EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms P Davis	**v**	West Suffolk NHS Foundation Trust

Heard at: Bury St Edmunds **On:** 4, 5, 6 and 7 December 2017

Before: Employment Judge Sigsworth (sitting alone)

Appearances
For the Claimant: Mr M Curtis of Counsel
For the Respondent: Ms M Murphy of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Respondent did not unfairly dismiss the Claimant.

2. The Respondent did not wrongfully dismiss the Claimant.

3. The Respondent has not established the employer's claim.

RESERVED REASONS

1. The Claimant's claims are for unfair dismissal and wrongful dismissal, and there is also an employer's claim for breach of contract relating to overpayment of wages to the Claimant from June 2016 to the date of her dismissal in January 2017. The Tribunal heard the case in respect of both liability and remedy.

2. The Respondent called four witnesses – Ms Alison Dalby, HR consultant; Dr Stephen Dunn, chief executive of the Respondent; Mr Craig Black, executive director of resources; and Ms Denise Needle, deputy director of workforce (development). The Claimant called one witness in addition to herself. This was Ms Susan Rush-Hall, senior midwife. The Tribunal also read and took into account as was appropriate the witness statement of Mr Rhysce Von Detton, ward clerk. There was a very substantial bundle of

documents of some 900 pages, due largely to the size and scope of the disciplinary investigation, and the lengthy and detailed disciplinary and appeal hearings. At the conclusion of the evidence, the Tribunal read written submissions and heard oral submissions from Counsel for both parties. The decision was reserved.

Findings of Fact

3. The Tribunal made the following relevant findings of fact:-

3.1 The Claimant was employed by the Respondent as head of midwifery from 2 October 2000 until her summary dismissal for alleged gross misconduct on 24 January 2017. At the time of her dismissal, the Claimant was responsible for managing the central delivery suite, inpatient and outpatient maternity services, gynaecology, paediatrics and neonates. Her duties included performance management of staff and service delivery, recruitment and selection, sickness absence management, managing governance and risk and dealing with complaints for the department. The Claimant had significant management training and experience. From October 2000 until August 2015, the Claimant worked for the Respondent without any complaint about her performance or character being brought to her attention, and she had a clean disciplinary record.

3.2 The Respondent received anonymous letters, dated 26 August 2015 and 9 September 2015, raising concerns about the Claimant's management style, management of the resources within the maternity service and the recruitment and selection processes in maternity. The Respondent arranged a meeting for all staff in the midwifery department on 17 September 2015 to discuss their concerns. Prior to the staff meeting on 17 September, the Claimant and the deputy director of workforce spoke regarding the anonymous letters. The Claimant was advised to arrange a meeting with her line manager to go through them. Ms Needle then emailed the Claimant, urging her to meet with her line manager to discuss the anonymous letters before the staff meeting. However, the Claimant did not arrange to meet with her line manager. The Claimant attended the meeting on 17 September with other employees from the department. No indication was given at this meeting that these allegations were to do with the Claimant specifically. The Claimant sat with her staff and challenged the concerns raised in the letters, rather than sitting with the COO and her line manager which had been the intention of the Respondent. The staff at the meeting made few comments.

3.3 On 9 October 2015, the Claimant was suspended from duty on full pay, the reason given being so that there could be an investigation of concerns raised with the CQC regarding poor clinical leadership, unsafe practices, and a bullying culture in the midwifery department.

The decision to suspend the Claimant was taken by Mr Jon Green, executive COO. Ms Needle gave evidence that her understanding of the purpose of the suspension was to protect witnesses from feeling intimidated, to protect the Claimant from any additional allegations against her, and because the nature of the Claimant's role would have made it impossible to move her to any other role in the organisation. A third anonymous letter complaining about the Claimant was received on 6 October via CQC. It raised issues of insufficient staffing, bullying from the Claimant and a climate of fear amongst the staff.

3.4 An independent investigator – Ms Dalby, an HR consultant – was appointed by the Respondent to conduct an investigation, based on terms of reference drawn up by Mr Green. The allegations to be investigated were whether there was a culture of managerial bullying within women's and children's services exhibited, encouraged or tolerated by the Claimant; whether there was evidence to suggest that the Claimant failed to provide reasonable management support to her team, and/or created a culture of fear, and/or whether she bullied members of the midwifery team. A further concern to be investigated was whether the Claimant had been responsible for unfair processes in making senior appointments in the midwifery team. The final matter for investigation was the Claimant's behaviour towards Ms Bernadine Bramble on 22 September 2015. The investigator was tasked with initial fact finding and then a broader investigation with further interviews as necessary, the location of any documentary evidence relating to the allegations, and the production of a report setting out the investigator's findings, and making recommendations as to whether the Claimant's conduct might constitute potential misconduct under the Trust's disciplinary procedure and, if so, the potential severity of that misconduct. Ms Dalby was provided with the Trust's disciplinary policy and procedure, and copies of the anonymous letters. The Respondent's disciplinary procedure states that the amount of time between identification of the alleged breach of discipline, the preliminary investigation and notification to the employee must be kept to a minimum. If possible, a member of the HR department will be appointed as the "case manager" and given responsibility for ensuring that there are no avoidable delays in the process. The procedure goes on to state that when an employee is suspended, that suspension should be for the shortest period possible. It appears to be the case that no-one was appointed to oversee the disciplinary process/suspension, either from HR or elsewhere.

3.5 Ms Dalby interviewed 29 employees and also the Claimant. These employees were at different levels of seniority and in different positions and areas of work within the Respondent organisation. Ms Dalby identified that six witnesses were "strongly critical" of the Claimant and, of these, five were directly line managed by her and a

sixth was the chief nurse of the Respondent who held professional accountability for all nurses and midwives employed by the Respondent. Ten witnesses were "mildly critical" of the Claimant, and these were people who worked alongside her and spoke in detail about her management style and the way in which she dealt with people. 13 witnesses were "broadly positive" towards the Claimant, but these witnesses worked mainly outside the labour ward/suite, which is the area where the problems had arisen. They were largely in neonates or paediatrics, where there were no such issues with the Claimant's management or management style.

3.6 The first of the six staff who were strongly critical of the Claimant was Ms Daisy Hamilton, labour ward manager from January 2015, a band 7 post. Concerning the staffing issues alleged, she confirmed that staff were discouraged from using Datix to report concerns about safe staffing levels. She said staff did not get proper breaks and worked extra hours in the labour suite. It was not uncommon to go 10 hours without anything to eat or drink. Morale was low. She felt that the Claimant wanted a glorified PA, not a labour ward manager. In the context of the alleged culture of fear, she said it was more anxiety than fear. She never knew quite what sort of mood the Claimant would be in. However, on a positive note, she said that the Claimant was very visible and accessible. She said there was covert bullying. The Claimant was not good at confrontation; she would feed concerns about somebody to others, and that person would then learn about it from other people. Ms Hamilton's view was that this was a deliberate tactic by the Claimant, and she was expecting that whatever she said would get back to that person. Ms Hamilton also criticised other band 7s who were not pulling their weight. She confirmed that there was favouritism in the appointments system by the Claimant and gave examples. The labour ward was the Claimant's "little fortress". Neonates and paediatrics were managed by her quite differently.

3.7 The second 'strongly critical' staff member was Ms Jo Sarah, band 7 midwife. She said that staffing was very tight and was constantly re-jigged. When there was a midwifery matron, that post provided some structural support. However, the matron post had not lasted because the Claimant did not want it. The Claimant had a poor working relationship with her and with Ms Greenwood. She did not like the fact that Ms Sarah and Ms Greenwood got on and did not like them to be together. Ms Sarah did not challenge the Claimant's behaviour. She said: "It's a bit like domestic violence in the workplace – you become very weakened by it." She said there was low morale in the department and people kept their heads down and knew their place. As far as inappropriate appointments were concerned, then there was a joke that the Claimant could reconfigure the department so that they were out of their jobs, and people were coached and told that the next band 7 post would be theirs. Ms Sarah gave two specific examples of inappropriate

appointments where there were better candidates. The Datix system was the best way to record staffing issues. The Claimant herself carried the 519 bleep through which staffing concerns could be raised, bypassing the labour ward manager.

3.8 Ms Lynda Brignall was the next 'strongly critical' witness, a former band 7 midwife and now on the bank at band 6. Re staffing, she said there were inadequate breaks for food and drink, and although there was adequate staffing across maternity as a whole, it was not deployed appropriately. Four midwives on the labour suite at any one time would be beneficial, with a co-ordinator or supernumerary in addition to the normal three, and the safety of care was sometimes compromised. It seemed to be a deliberate policy of the Claimant to have the labour ward manager at band 7, the same as the other senior midwives. Six labour ward managers had come and gone in Ms Brignall's time because of problems with the Claimant and they all ended up at loggerheads with her. She said that she had seen Ms Sarah in tears because of her relationship with the Claimant. Ms Hamilton was not getting the support she needed from the band 7s or from the Claimant. Ms Brignall also commented on the inappropriate appointments issue, saying that in 2013 there were two questionable band 7 appointments by the Claimant – one did not have the clinical skills, experience or the professional qualifications to be promoted. Of the current six band 7s, there were problems with three of them. The Claimant had not addressed the issues on the unit because of a lack of staffing in the labour suite and a dysfunctional team of band 7s. She felt that people were scared of the Claimant and that she was negative about people behind their backs. The Claimant discouraged the use of Datix for staffing issues.

3.9 Ms Colleen Greenwood, former band 7 midwife, made a witness statement to the investigation. She talked about delay by the Claimant in recruiting which was not brought about by any vacancy freeze. There was a constant need to find staff all the time, and she gave an example of 21 shifts a week not being covered. The bank was quite small and they did not use agency staff. Ms Greenwood did not feel that safe care was compromised, however. But it did mean that staff were not able to take their breaks appropriately and worked beyond their shifts/hours. She recalled a midwife being reprimanded for putting in a Datix because she felt unsafe with the staffing levels. She referred to the cliquey culture of the band 7s and said that some of them did not have managerial skills. After a resignation, the VAF form for replacement recruitment was not done quickly and the department could lose a month or two before the advert went out. She gave examples of unpopular decisions made about appointments. She said that staff did not feel valued, empowered or listened to; the Claimant was difficult to work with – she wanted to be in control. Ms Greenwood felt bullied and she gave examples. The Claimant and Ms Alison Littler (deputy head of

midwifery) were not good at managing performance issues. Rather than deal with them properly, they moved the person to another post, and again she gave examples. She said that some appointments were based on favouritism and personal specifications were changed to suit preferred applicants. The Claimant had told two band 7s that they lacked leadership, but put in place no development programme to address this, saying that if necessary she would restructure.

3.10 Ms Karen Denman, senior community midwife, said that the Claimant did not like to be challenged and she wanted to be in control. She made promises to people about promotion which was not fair, because it meant the right person did not get the job. Ms Denman said that she wanted to take out a grievance against the Claimant and the way that the department was run, but she was fearful of the consequences. She supported other witnesses who said that a midwife was reprimanded for using Datix for staffing issues, and called into the Claimant's office and told not to do it.

3.11 Ms Nicole Day, executive chief nurse, gave evidence to the investigation. She was the Claimant's line manager, from an operational point of view. Ms Day was required to report nursing staffing levels to the board each month, but she struggled to persuade the Claimant to provide them. She was told everything was fine by the Claimant, but when the data was presented she could see that it was not. The Claimant held back vacancies in order to achieve a cost improvement to her budgets. Ms Day had concerns latterly that the next tier down in the women and children's department was not supported or supervised. Certain staff – Ms Sarah, Ms Littler, Ms Stone and Ms Denman - had come to see Ms Day in confidence. However, they refused to put their concerns about the Claimant in writing. They felt suppressed by the Claimant and not able to put initiatives in place and were undermined by the Claimant. Ms Day had been keen for the Claimant to establish a matron role in midwifery to be in line with the rest of the Trust. The role was to focus on quality and initiatives. When Ms Greenwood was given the role, it was a token gesture because the Claimant combined it with the ward manager role. Ms Day had told the Claimant this dual role would not work, but the Claimant had said there was no justification for a full time matron. The upshot was that Ms Greenwood was not able to fulfil the matron role to the full potential, and struggled to balance the two roles that she had. Ms Day said that the Claimant did not support Ms Greenwood and did not understand Ms Greenwood's quality function. They did not know why Ms Greenwood had left the Trust quickly. Ms Day pointed out some positive things. The data for KPIs at the RCA meetings was more open and transparent when the Claimant attended. However, it was clinical incidents that were discussed, rather than staffing issues. The Claimant was reluctant to attend one-to-one meetings with Ms Day. Ms Day said that she had tried to help the Claimant in

her new role, when Ms Bernadine Bramble was brought into the budgetary function, leaving the Claimant to focus on the quality agenda.

3.12 Ms Dalby recorded the evidence of the ten witnesses who were mildly critical of the Claimant. In the context of the alleged culture of managerial bullying, Dr Peter Powell, consultant paediatrician, said that it was an uncomfortable culture and it was not particularly healthy. He talked of the capricious decision making of Ms Davis. The Trust's response to manage this difficult situation was to split the role of head of service from that of general manager. When Mr Steve Myers, general manager, came in it was like a breath of fresh air and things were suddenly moving again. Dr Powell felt it had been foolish to invest the structure with so much power in one place. Another witness, Ms Karen Green, a senior midwife on the labour suite, said Ms Davis and the senior team had the ability to really destroy people and destroy people's confidence. She did not feel that Ms Davis had bullied her. Another witness said that the Claimant was quite autocratic but she had not been bullied by her.

3.13 On the question of reasonable management support to the team, Dr Powell felt there was not sufficient staffing or managerial resource to allow for sensible autonomy and responsibility to develop at a lower level. He never felt completely comfortable that he knew what the staffing levels in midwifery were meant to be. If someone did something that was not acceptable to Ms Davis, they would somehow be undermined, or moved, or de-graded or demoted to a job that they did not want to do. He said that Ms Davis was hardworking, on top of things and a continual presence in the unit. He felt that some may see this as supportive and others as oppressive. Ms Gail Nolleth, another senior midwife on the labour suite, said that the unit had high levels of sickness and staff were not replaced quickly when they left. It was a regular pattern on the unit of staff not being able to take their breaks and working over their hours. Band 7s did not really feel supported. The meetings they used to have with management had been stopped. Mr Myers, general manager, told Ms Dalby that there was a closed shop approach to midwifery compared to other services such as surgery. It was difficult to get hold of what was happening in the department. Ms Davis did not like the fact that a general manager had been put into the structure above her. He had experienced resistance from Ms Davis when he tried to get involved. A further senior midwife on the labour suite, Ms Karen Green, felt that Ms Davis had difficulty managing some of the strong characters on the unit. There was a divide and conquer ethos and Ms Davis had enabled staff on the unit to undermine the new manager, Ms Daisy Hamilton. Since Ms Lynne Saunders had taken over, it was a different place. She was professional and did not engage in tittle tattle. Ms Davis used a restructure as a threat if band 7s did not perform. Another senior midwife on the labour suite, Ms Sharon Baragry, said that the team

did not get their breaks on many occasions and staff routinely worked over their hours. The staffing problems issue was also referred to by others in the 'mildly critical' group.

3.14 The issue of unfair processes in making senior appointments in the midwifery team was also addressed by other witnesses who were mildly critical of the Claimant. Dr Powell believed that the allegation was unfortunately true. Ms Nolleth gave a specific example of an appointment in the band 7s through the "back door", as she described it, despite her misgivings that that particular person would not be a good member of the team. She felt that Ms Davis had favourites and some of those appointed to more senior roles were not good role models for the students and more junior staff coming through. She was absolutely shocked when one particular midwife was appointed substantively, because she had been involved in an incident which should have prevented that appointment. Ms Baragry, the midwife who acted up into the senior role for 18 months had done a cracking job. However, when the post was advertised, she did not get the job and did not know why. Ms Abigail Buhagiar, a band 6 midwife on the labour suite, said that she had acted up for a period of time and when she was interviewed for the substantive post she had been told she had not been doing well and was not "warm enough" for the post. This was the first time she had been told there had been problems with her during her acting up. She said that others on the unit had not worked enough to get a senior role.

3.15 Ms Dalby then interviewed the Claimant on 27 January 2016. Ms Davis had a companion with her from the Royal College of Midwives. Ms Dalby found that, throughout the interview, the Claimant was not prepared to take on board any of the criticisms made or demonstrate an ability to see anyone else's point of view. Ms Dalby asked the Claimant if she felt her style could be misinterpreted but she instantly rejected this, describing herself as very open and honest. She denied that she was scary. Ms Dalby noted some unusual comments during the interview. For example, the Claimant seemed proud to tell Ms Dalby that her staff know about it if she is cross: *"If a midwife has done something and I have asked to see her, I will tell her I am cross. I will say I am very cross. I don't hide that I am cross. I don't have to use my body language but I will just say that I am very cross with you today because you have done X… I don't know if that is right or wrong."* Ms Dalby felt that the Claimant showed a general lack of concern about the allegations which had been made and an inability to accept that her management style has been misinterpreted which may have led to the various allegations against her. The Claimant described her management style as "relaxed, inclusive and easy", despite the concerns of many employees about it. Seven additional individuals were identified by the Claimant as potential witnesses and who she wanted Ms Dalby to interview. Those witnesses were interviewed by

Ms Dalby, which resulted in the investigation taking longer than it would otherwise have done. The initial witnesses had been interviewed in November and December 2015. The new witnesses were interviewed in February 2016. However, it was not until 25 May 2016 that Ms Dalby completed her report. She had interviewed 30 employees and the report ran to 574 pages. She found it difficult to schedule time to interview them around their busy working day, and she had been hampered by the fact that she did not have a note-taker appointed by the Trust to assist her. She also had other work to do apart from the work for the investigation that she was doing for the Trust. The Claimant remained suspended throughout all this period. It is not apparent that that suspension was reviewed on any or any regular basis.

3.16 Ms Dalby concluded that the allegation of bullying members of the midwifery team and the culture of managerial bullying was proven, through both direct behaviour exhibited by the Claimant and the failure to ensure that staff who were more junior than her behaved in an appropriate manner towards their subordinates. Approximately 20% of the staff she interviewed said the Claimant's behaviour was inappropriate and could be categorised as bullying as defined in the Trust's bullying and harassment policy, which states:

'*Bullying may be characterised as offensive, intimidating malicious or insulting behaviour, an abuse of power through means intended to undermine, humiliate, denigrate or injure the recipient.*
This takes many forms and is not just physical menace or violence. It is stress and/or anguish caused by: attitudes, innuendoes, derogatory comments, ridicule, undermining authority, repeated rudeness/pressurising behaviour and deliberate isolation of an individual. This can include demeaning communications using written, electronic or telephonic methods.'

Ms Dalby told the Tribunal that she did not specifically investigate band 7s. This was a culture created by the head of department; it came from the top. The more senior and more experienced you are, the greater responsibility you have, and you have a greater understanding of how to behave – according to Ms Dalby. Ms Dalby explained that what she meant by the allegation being proved was that there was sufficient evidence for it to go to a disciplinary hearing.

3.17 Many of the witnesses interviewed described a culture of poor staffing, long hours and an inability to take breaks. The Claimant was described as actively dissuading staff from reporting poor staffing on the Respondent's reporting system (Datix). Staff on the labour suite felt that they were consistently understaffed and processes to replace staff who had left were slow to be initiated. Ms Dalby noted there was a high turnover rate of staff, notably at senior level. For example, there was a rapid turnover of labour ward managers. In conclusion, Ms Dalby felt there was sufficient

evidence to suggest that the Claimant was failing to provide reasonable management support to her team. Concerning the allegation of a culture of fear, Ms Dalby concluded that this allegation was proven, as she put it in her report. Many of the staff interviewed expressed the view that staff felt unable to speak up at the meeting of 17 September 2015 due to the Claimant's presence, indicating an oppressive culture fostered by the Claimant. So far as unfair processes in making the senior appointments in the midwifery team was concerned then, in summary Ms Dalby did not consider that this allegation was proven. Despite anecdotal evidence from some witnesses, Ms Dalby found that those witnesses who were involved in recruitment episodes stated that the Claimant adhered to robust processes and there was no evidence of candidates being "shoe'd in". Ms Dalby found that the Claimant had behaved in a condescending and strident manner towards Ms Bramble on 22 September 2015. Ms Dalby concluded that the allegation of the creation of a culture of fear was proven. Ms Dalby's recommendation was that the matters that she considered to be proven, or where there was sufficient evidence, should go forward to a disciplinary hearing. She also recommended that the Claimant's suspension be maintained until the hearing was convened, although she gave no reason for that recommendation.

3.18 Following Ms Dalby's report, the Respondent decided to instigate a formal disciplinary procedure in accordance with their disciplinary policy. The Claimant was invited to attend a disciplinary hearing on 17 June 2016. She was notified of the disciplinary panel members, the management team who would be attending and their witnesses. The allegations that she faced were five in number. First, that there was a culture of bullying within women's and children's services. Second, that she failed to provide reasonable management support to her team. Third, that she created a culture of fear, causing concerns to be suppressed in maternity services. Fourth, that her behaviour before and at the meeting held on 17 September 2016 was not appropriate. Fifth, that a number of midwives felt they were directly bullied by her. It said in the letter that some of the behaviour or conduct was considered by the Trust to be very serious and may lead to dismissal. An extract from the bullying and harassment policy was drawn to the claimant's attention. Clause 3.12: "Staff are expected to treat each other with respect and dignity and any form of bullying, harassment, victimisation or unlawful discrimination will be dealt with as a serious matter and may be deemed as gross misconduct." The Claimant was told that she was entitled to be represented by her union or a work colleague and she could call witnesses. All documents connected with the case that would be presented were sent to her along with a copy of the disciplinary policy and procedure and disciplinary rules. However, the Claimant went off sick on 14 June 2016, citing the lengthy investigation process as responsible for impacting her health. Thereafter, she provided regular sick certificates. The Claimant was fit to return to

work on 2 December 2016, and she was re-suspended. She was invited by letter to attend a disciplinary hearing on 17 January 2017. The charges she now faced were slightly different to those set out in the original letter. They were four in number. First, that she had exhibited, encouraged or tolerated a culture of managerial bullying within women's and children's services. Second, that she had failed to provide reasonable management support to her team. Third, that she had created a culture of fear causing concerns to be suppressed in maternity services. Fourth, that she behaved in an inappropriate manner towards Bernadine Bramble in a meeting held on 22 September 2015. The panel personnel was also changed, and she was notified of the members of the panel. Otherwise, the information in the letter was essentially the same as before.

3.19 Ahead of the hearing, the disciplinary panel read the investigator's report and witness statements, and relevant documents such as the disciplinary policy and the bullying and harassment policy. The disciplinary hearing took place at the Respondent's education centre at 10.00 am on Tuesday 17 January 2017. The panel consisted of Dr Stephen Dunn as the chair, and indeed the decision maker. He was assisted by Ms Denise Needle, deputy director of workforce, and Ms Lynne Cook, independent midwifery advisor. Ms Needle took the panel through the disciplinary process. The panel members were encouraged by Mr Dunn to ask questions throughout the hearing. The Claimant attended, accompanied by a colleague, Dr Malini Prasad, consultant obstetrician. Mr Green and Ms Dalby attended to present the management case and question the three witnesses for the management side. These were Ms Lynda Bignall, Ms Colleen Greenwood and Ms Jo Sarah, three of the witnesses who were highly critical of the Claimant in the report. The Claimant called two witnesses to the hearing, Ms Michelle Judd and Ms Dawn Dorrington. There was a note-taker present. The management case was presented by Mr Green. Then the three witnesses were called and were questioned by the Claimant. The Claimant read out a pre-prepared statement and then called her witnesses. Questions were asked of all witnesses by the other side and by the panel members.

3.20 Dr Dunn wrote to the Claimant on 24 January 2017 with the disciplinary hearing outcome. In the letter, it was said that the panel had given the case careful consideration and reviewed all the evidence presented and found that allegations 1, 2 and 3 against the Claimant should be upheld. Her behaviour was extremely serious, breaching both the disciplinary rule against bullying and harassment and the Trust's "Patients First" standards, and constituted gross misconduct. It was said that there was no adequate mitigation for this behaviour. Although the Claimant had not had previous disciplinary warnings, she had more than enough training and experience to be reasonably expected to understand the severity of her behaviour. Despite this, she showed little or no insight or remorse at the hearing. The nature of the behaviour, the

severity and the impact it had had on other Trust staff had fundamentally undermined the trust and confidence in her to continue in her role. The panel did not believe there were viable alternatives to continue to employ her at the Trust. Therefore, the panel's decision was that the Claimant should be summarily dismissed with effect from 24 January 2017. She would not be paid notice but was entitled to accrued but untaken annual leave. The 13-page letter went into some detail as to the reasons why the first three allegations were found to have been made out. The evidence relied on by the panel was set out in some detail. The panel did not uphold allegation number 4. The letter also summarised the evidence of the Claimant and her witnesses. It was noted that the three witnesses who gave evidence for the Respondent were experienced and senior midwives, who had left the service voluntarily and there was no obligation for them to come forward as witnesses. Since the Trust's launch of the Freedom to Speak Out campaign in December 2015, the Trust had actively encouraged staff to speak out if they had issues of concern. The panel felt that this led to a number of witnesses in this case having the confidence to share their experiences. It was noted that, in response to the numerous specific allegations of bullying or inappropriate behaviour put forward by witnesses in the investigation or at the hearing, the Claimant largely did not provide specific responses or engage with individual allegations. It was noted that the Claimant told the panel that she was sorry that witnesses felt that they had been bullied by her and that she was unaware of her management style. Nobody had brought these issues to her attention and she believed that senior managers should have addressed these concerns with her. The panel considered that point and found that whilst some staff had raised concerns in the past regarding bullying, they requested complete confidentiality and were not prepared to come forward and give evidence. This was on the basis that they feared reprisals from the Claimant once their identity was known. The panel also noted that the Claimant had undertaken various leadership and management development training programmes since joining the Trust which have focused on the behaviour and standards expected of senior managers, and which have offered techniques to use to obtain the best possible outcomes when discussing difficult matters with colleagues. On staffing issues, the panel said they particularly noted Ms Day's evidence of the Claimant's verbal reports that staffing levels were satisfactory, but this turned out not to be the case once the data was made available. They were also impressed by the evidence of Ms Greenwood, that she repeatedly offered to complete a vacancy approval form for a vacant post but the Claimant declined this offer, meaning that recruitment to the post subsequently did not commence until after the person had left. In order for staff to feel they can escalate concerns, it is essential that they feel supported to do so. The panel did not find that this support was in place in the midwifery department. The panel found the following bullying behaviours (as defined): derogatory comments,

deliberate exclusion, undermining staff who had been placed in a managerial position; all of which caused a number of staff to suffer stress and anxiety. Further, the panel found that the management of staffing levels caused unnecessary and unacceptable risks to both staff and patient safety, and the Claimant's active discouragement regarding the use of Datix reports for staffing issues meant that the Trust was not able to identify those risks through its normal governance procedures. The Claimant had been extensively trained; therefore, further training could not be identified that would address the Claimant's behaviour. The health and wellbeing of the Trust's staff and patients were paramount and the Trust would take steps to eliminate risks to them. The Trust would not tolerate bullying and intimidating behaviour. The panel considered potential alternatives to dismissal. Supervision was thought to be completely inappropriate for a post at the Claimant's level. It would not be able to provide the necessary assurance that she would not repeat such behaviour. Demotion to a less responsible role would not reduce the risk of inappropriate behaviour reoccurring, as there was no evidence that the requirements of the Claimant's current role were the cause of her inappropriate behaviour. As the Claimant had not demonstrated insight into the effect of her behaviour on others and made no reference to the obvious distress experienced by the witnesses, it was not felt that a performance assessment would be successful in addressing her behaviour. The Claimant was notified of her right of appeal.

3.21 In cross-examination, Dr Dunn told the Tribunal that ultimately the decision to dismiss was his decision. Nevertheless, the way he leads his organisation is by drawing on the experience of colleagues in senior positions, and he took into account what Ms Cooke and Ms Needle had said to him. There was no vote on the decision. The Claimant had not raised any matters of process or procedure prior to the disciplinary hearing. It was noted that there was a lack of documentation, such as contemporaneous emails, or even VAF forms to support the delayed recruitment point. Dr Dunn said that he had the testimony of many witnesses, and that they had noted the significantly lower Datix reference compared to other parts of the hospital. This was surprisingly low, given that labour was a risky area. They encouraged staff to report incidents specifically around staffing. From the Trust's viewpoint, there were enough staff to mean the unit was safe. However, people were working long hours and could not take breaks, and there were a number of vacancies. These concerns were actively suppressed. Dr Dunn said he accepted dismissal should be a last resort. However, he had to balance the interests of the Claimant against those of the patients and staff. He was clear that the decision he made was the right decision. He said that this was the first time he had ever conducted a disciplinary hearing. He said that had raised questions as to whether he should have dealt with the appeal rather than the disciplinary hearing.

3.22 The Claimant appealed the decision to dismiss her on 12 February 2017. Mr Craig Black, executive director of resources, was appointed to chair the appeal hearing. Mr Black has conducted 12 or so appeal hearings. He had no prior involvement in the Claimant's disciplinary process. The Claimant objected to Mr Black as chair because she said that she had raised a complaint against him with the previous CEO of the Respondent. However, Mr Black had no knowledge of this complaint and the former CEO had not raised any such issue with the HR director. The Respondent nevertheless decided to appoint Mr Steve Turpie, non-executive director, as the chair in place of Mr Black, but Mr Black remained a member of the panel. The Claimant had not raised concerns about Mr Black being part of the first or original disciplinary panel and raised no further objections to his being on the appeal panel. Ms Jan Broomfield, executive director of workforce and communications, was the third member of the appeal sub-committee. A panel advisor from HR was also present as was a secretary and minute-taker. The Claimant was accompanied by the same work colleague as at the disciplinary hearing. Dr Dunn, Ms Dalby and Ms Needle also attended.

3.23 The format of the appeal hearing was to consider the Claimant's grounds of appeal, examine the process which had been followed and judge whether the sanction of dismissal was proportionate or not. I refer to the relevant parts of the disciplinary procedure:

> "The hearing of the appeal by the disciplinary appeal subcommittee shall take place within eight weeks of the receipt of the appeal by the respondent. In exceptional circumstances, the Trust will be entitled to extend this period. The member of staff will be kept informed."

3.24 The appeal hearing was held on 22 May 2017, well outside that eight-week window. The reason for this was it took time to organise the members of the appeal panel to get them together, along with the management and staff side. Finding a suitable date for such a large number of senior people was challenging. The procedure provides that the employee and their representative will be notified of the subcommittee's decision within seven working days of the appeal hearing. A report will be prepared for the next board of directors' meeting where the decision of the subcommittee will be ratified. The copy of the appeal report will be available for the employee or their representative at the time it is issued to the board of directors, normally seven days in advance of the meeting. Those timeframes were complied with here. Finally, in appendix A of the disciplinary procedure, it is said that appeal against a final written warning, downgrading and dismissal shall be to the board of directors (disciplinary subcommittee). This is what occurred here.

3.25 The case was presented by Dr Dunn, addressing each of the Claimant's twelve grounds of appeal with the Claimant's further

information. The Claimant then listed her grounds of appeal and read from a chronological event chart the events leading to the disciplinary process and dismissal. Finally, both parties summed up. Dr Dunn said that the procedures had been followed rigorously, independently and that the outcome had not been pre-judged, and the panel had considered potential alternatives to dismissal. The Claimant stated that she felt she had been unfairly dismissed and not been given the opportunity to make amends to her management style as the allegations had not been previously highlighted to her. The panel reserved their decision.

3.26 The Claimant complained about the change in the allegations between the two letters inviting her to a disciplinary hearing then the panel revisiting one of the allegations that had already been dismissed. The appeal panel noted that allegations 1 to 3 were identical to the terms of reference 1 to 3 of the investigation and were heard by a disciplinary panel, and allegation 4 was found not to be proven. Thus, any error was rectified in the second letter and the Claimant was not prejudiced by this. The second ground of appeal was that the disciplinary hearing was poorly managed and there was insufficient time for the Claimant to consider the evidence presented by the witnesses. The appeal panel found that this ground was not made out. The Claimant had over six months from June 2016 to consider the evidence obtained by Ms Dalby although chose not to do so. She also had every opportunity to question Mr Green and each of the three management witnesses, and also the opportunity to call her own witnesses to the hearing. The sub-complaint here was that witnesses were allowed to state their feelings without time limit or structure. This is a rather specific question based on their written witness statements. Their feelings are important as this was a case about bullying. To the allegation that evidence was based on hearsay, the appeal panel found that witnesses gave direct, personal accounts of their experience of the Claimant and that the allegations of hearsay were unfounded. Ground of appeal number three concerned the context in which the comments had been made. The appeal panel found that it was not practicable for all 16 staff members who had made negative comments to attend the disciplinary hearing. The Claimant could not produce any evidence to support an allegation that there had been covert meetings with members of her team. The ground of appeal (four) that matters of no direct relevance were raised by the Respondent's management side was discounted by the appeal panel, as the Claimant had been able to discuss any issues that she wanted to. Appeal ground five was that one of the Trust witnesses refused to answer questions put forward by the Claimant. However, the Claimant had agreed to drop the question when challenged about its relevance. It did not result in Ms Sarah's evidence being unreliable or inadmissible. As to ground six, the Claimant had a full opportunity to respond to allegations both in advance of the hearing and also at the hearing. As to ground seven, the appeal panel found

that witnesses provided personal accounts of behaviour that they had directly experienced, which were not vague and there was some supporting evidence. The evidence was not questionable, as alleged by the Claimant, in the light of a very thorough investigation of a wide cross-section of staff. The appeal panel found there was a great deal of consistency among witnesses' criticism of the Claimant and gave a specific example. It was not the case, as alleged in ground eight, that the evidence was cherry picked and positive quotes made by the Claimant's staff were totally ignored. As to ground nine, the fact that the Claimant dealt with incidents of bullying concerning allegations against other staff did not necessarily preclude her from behaving in a bullying manner herself. There was no evidence to demonstrate that the Claimant's evidence was ignored or regarded as irrelevant by the disciplinary panel. The fact that the disciplinary panel reached a decision which the Claimant did not agree with did not mean that her evidence was ignored. Ground ten was that the Claimant was not made aware of concerns raised by midwives and so was denied the opportunity of an informal resolution. The appeal panel found that senior management were significantly limited in investigating allegations because staff did not want their concerns raised with the Claimant for fear of consequences. Appeal ground eleven was that the decision to summarily dismiss the Claimant did not take into consideration whether the perceived behaviour was deliberate or accidental, and did not take account of the Claimant's disciplinary and employment record, her list of considerable achievements and awards, and excellent divisional performance. Further, it was inconsistent with how other HOMs have been treated by Trusts across the east of England. The panel's response was that the evidence suggested consistent behaviour towards a number of people over several years. If gross misconduct is established, summary dismissal for a first offence is reasonable. What other Trusts do is of no relevance, as each case should be considered on its own merits. The Claimant's achievements were not ignored but were not considered pertinent to the allegations investigated regarding the Claimant's behaviour and actions towards staff. As to ground twelve, the appeal panel found no evidence to support the Claimant's allegations that Mr Green had a personal vendetta against her. Mr Green's personal opinion that the Claimant was not fit to be head of midwifery was not binding on the appeal panel.

3.27 The appeal panel considered the additional comments that the Claimant brought to the appeal hearing and found that they did not affect the validity or reasonableness of the disciplinary panel's findings of summary dismissal in respect of the Claimant. The disciplinary process had been conducted in accordance with the Respondent's policy. The appeal panel was not satisfied that the Claimant accepted responsibility for her actions and she demonstrated an overall lack of insight into her behaviour. The appeal panel also agreed that the Claimant's behaviour was outside

the Respondent's Patients First Standard. The Claimant clearly acknowledged that she understood what bullying and harassment meant as she had disciplined members of her team. The appeal panel concluded that she should therefore have been able to recognise her own inappropriate behaviour. Thus, the appeal panel concluded that the disciplinary panel had reached the correct conclusion and deemed the sanction of summary dismissal for gross misconduct appropriate. Mr Turpie wrote to the Claimant on 26 May 2017, confirming that the decision of the panel was to dismiss her appeal. He told the Claimant that their report would be sent to her following its ratification at the next board of directors' meeting.

3.28 In her oral evidence to the Tribunal, Ms Needle said as a panel they considered there was a sufficient correlation between the experiences identified in the management report, as well as the personal testimony of the witnesses at the hearing, to believe that a culture of managerial bullying by the Claimant was in place, and that management support by the Claimant was lacking in respect of some of the staff, and that a culture of fear therefore existed in maternity services. All panel members felt that this was unacceptable behaviour on the part of the Claimant and should not be tolerated by the Respondent, particularly in an environment in which the patients' safety is paramount and staff must feel confident to speak out if there are issues. The panel also felt that the Claimant had shown no self-knowledge or insight into her behaviour throughout the process. This was very concerning, said Ms Needle, especially considering her experience and level of seniority. The decision to dismiss the Claimant for gross misconduct was unanimous amongst the panel members. The disciplinary panel considered whether the Claimant had a development need. Ms Needle told us that she was responsible within the Respondent for the education and training of the non-clinical staff, so training needs for staff were something she took very seriously. However, in Ms Needle's experience, people management training is only successful if an individual recognises that they are struggling with dealing with people effectively. The panel felt that the Claimant's bullying behaviour towards many individuals over a period of several years had gone far beyond a training and development need. Further, she did not recognise that her behaviour was a problem. The Claimant had been upset at the disciplinary hearing but had shown incredulity about the allegations regarding her behaviour. The Claimant had attended a number of training programmes, including a "Vital Conversations" course which gave practical advice and hands on experience of dealing with difficult conversations in a sensitive and constructive way. Ms Needle also said that the reason why Ms Stone and Ms Hamilton, both senior managers in maternity, were not investigated or disciplined in respect of the complaints set out in the anonymous letter of 26 August 2015 was that they were not named. Further, the

independent investigator in her findings had not identified them as exhibiting bullying behaviour towards staff. Ms Stone in any event had left the organisation the year before and therefore could not be investigated. The case involving complaints about Ms Stone's bullying behaviour in September 2012 were very different as Ms Stone was an inexperienced manager who had not received much in the way of management training. Further, Ms Stone readily acknowledged and accepted the concerns about her behaviour and was willing to be placed on a development plan to redress those areas.

3.29 The Claimant's witness, Ms Rush Hall, who was one of the senior midwives at the relevant time, gave positive evidence in support of the Claimant. The Claimant had changed the ethos of the unit and encouraged new developments and gained valuable resources. The Claimant was conscientious in her work and aware of meeting deadlines to the extent of taking work home or working late. So far as the vacancy approval forms were concerned, the Claimant would inform Ms Rush Hall (who was responsible for completing these forms) that they were required, and often well before the date on which the person was due to leave. If there were any delays in the recruiting process, it was usually due to the finance department withholding the VAF forms. The Claimant conveyed a standard she expected of staff and, if somebody made a mistake, she would reprimand them. Ms Rush Hall noticed a change when Mr Green became chief operating officer. There was some reconfiguration of the department and a `significant change for the Claimant, who lost her role as general manager in June 2014. From then on, she was solely head of midwifery. When Ms Bramble took over as general manager from Mr Myers, she automatically assumed a role of being overall in charge and treated the Claimant as if she was a manager beneath her. Ms Bramble would send requests direct to the senior midwives without involving the Claimant, which caused confusion and undermined the Claimant's authority. Mr Rhysce Von Detton did not attend the Tribunal so I was not able properly to assess his evidence. As a ward clerk, he had made complaints about Ms Sarah's treatment of him. It was clear to Mr Von Detton that Ms Sarah did not like the Claimant and apparently tried to influence other midwives to complain about her.

3.30 Following a management restructuring in June 2014, the Claimant was downgraded from band 8D to band 8C. She was given two years' pay protection which expired on 2 June 2016 when her pay should have gone down to the band 8C level: from £82,434 per annum to £68,484 per annum. However, the Claimant continued to be paid at band 8D in error. The Respondent has calculated that the Claimant has been overpaid by £9,037 gross for the period 2 June 2016 to 24 January 2017. She was aware that her pay protection ended in June 2016 but she did not bring this to anyone's attention. Clause 8 of the Claimant's contract of employment provides that all

outstanding sums properly owed by the Claimant to the Respondent at the time the claimant left its employment would be deducted from her final salary. No such deduction was in fact made. The Respondent now seeks to counterclaim for this sum against the Claimant or set it off against her contract claim (for pay in lieu of notice).

The Law

4. The law relating to unfair dismissal is well established.

By section 94(1) of the Employment Rights Act 1996:

> "An employee has the right not be unfairly dismissed by his employer."

By section 95(1)(a):

> "For the purposes of the unfair dismissal provisions, an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice)."

By section 98(1) and (2):
It is for the employer to show the reason (or principal reason) for the dismissal and, in the context of this case, that it related to the conduct of the employee. Conduct is the reason relied upon by the Respondent.

In Abernethy Mott, Hay v Anderson [1974] IRLR 213, CA, it was held that the reason for a dismissal is a set of facts known to the employer or beliefs held by him that cause him to dismiss the employee.

By section 98(4):

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

The law to be applied to the reasonable band of responses test is well known. The tribunal's task is to assess whether the dismissal falls within the band of reasonable responses of an employer. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair. I refer generally to the well-known case law in this area, namely Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, EAT; and Foley v Post Office; HSBC Bank PLC v Madden [2000] IRLR 827, CA.

The band of reasonable responses test applies equally to the procedural aspects of the dismissal, such as the investigation, as it does to the substantive decision to dismiss – see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA. As far as the investigation is concerned, and the formation of the reasonable belief of the employer about the behaviour, conduct or actions of the employee concerned, then I have in mind, of course, the well-known case of British Homes Stores Ltd v Burchell [1978] ICR 303, EAT. Did the Respondent have a reasonable belief in the Claimant's conduct formed on reasonable grounds after such investigation as was reasonable and appropriate in the circumstances?

In Taylor v OCS Group Ltd [2006] ICR 1602, CA, it was held that if an early stage of a disciplinary process is defective and unfair in some way, then it does not matter whether or not an internal appeal is technically a re-hearing or a review, only whether the disciplinary process as a whole is fair. After identifying a defect, the Tribunal will want to examine any subsequent proceeding with particular care. Their purpose in so doing would be to determine whether, due to the fairness or unfairness of the procedure adopted, the thoroughness or lack of it in the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at an earlier stage.

In Brito Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854, EAT, it was held that a finding of gross misconduct does not necessarily make a dismissal fair. Even in cases of gross misconduct, regard must be had to possible mitigating circumstances such as, in this case, the Claimant's length of unblemished service and that dismissal would lead to her deportation and destroy her opportunity of building a career in the UK.

In Strouthos v London Underground [2004] IRLR 636, CA, it was held that length of service and a clean disciplinary record are factors which can properly be considered in deciding whether the reaction of an employer to an employee's conduct is an appropriate one.

5. In the context of the Claimant's suspension, as referred to the case of Agoreyo v London Borough of Lambeth [2017] EWHC 2019 (QB), such suspension must be justified on the facts of the case. It is not to be considered a routine response to the need for an investigation.

The commentary in Harvey on Employment Relations and Employment Law says that one particular problem here has been arguably the over-readiness of certain employers (particularly in the public sector, including the medical area and the education area) to resort to suspension as soon as allegations have been made against an employee, and then to allow that suspension to continue for a long period. See Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402, CA.

I was referred to the case of ILEA v Gravett [1988] IRLR 497, EAT. There is no hard and fast rule as to the level of inquiry that the employer should conduct into the employee's (suspected) misconduct in order to satisfy the

Burchell test. It will very much depend on the particular circumstances, including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. At one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.

6. The compensation provisions relating to the basic and compensatory awards appear at section 118 – 124 of the Employment Rights Act 1996. Here, the Claimant does not seek reinstatement or re-engagement with the Respondent. I heard submissions on the so-called Polkey issue and on contributory fault.

Section 122(2) provides that:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

Section 123(1) provides that:

> "…..the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."

Section 123(6) provides that:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

In Polkey v AE Dayton Services Ltd [1987] IRLR 503, HL, it was held that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

In Nelson v BBC (No 2) [1979] IRLR 346, CA, it was held that in determining whether to reduce an employee's unfair dismissal compensation on the grounds of his contributory fault, an employment tribunal must make three findings. First, there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. Second, there must be a

finding that the matters to which the complaint relates were caused or contributed to, to some extent, by action that was culpable and blameworthy. Third, there must be a finding that it is just and equitable to reduce the assessment of the complainant's loss to a specified extent.

7. The Claimant brings a claim of wrongful dismissal, in respect of her notice pay. An action for wrongful dismissal is a common law action based on breach of contract. It is very different from a complaint of unfair dismissal. The reasonableness or otherwise of an employer's actions is irrelevant. All the Tribunal has to consider is whether the employment contract has been breached. The actual question is: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?

8. The employer's claim. The starting point is the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994, article 4, which provides that proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (…excluding personal injury…) if (among other things) the claim arises or is outstanding on the termination of the employee against whom it is made, and the employee has brought a contract claim to the Tribunal. It is not in dispute that the Respondent has a valid employer's claim here, if it can establish a breach of contract or contractual claim within the jurisdiction of the Tribunal.

   The Claimant argues that there should be no claim in this case because there is no contractual right on the part of the Respondent to recover monies overpaid to the Claimant, save under clause 8, which provides that the Respondent is entitled to deduct the overpayment from the final wages paid to the Claimant on the termination of employment. However, in this case, that did not happen. The Claimant says, therefore, that the Tribunal would have to imply a contractual right into the contract to allow the Respondent to recover the overpayment. An implied term can arise in four ways. First, because it is necessary to give the contract business efficacy. Second, where it is the normal custom and practice to include such a term in contracts of that particular kind. Third, where an intention to include the term is demonstrated by the way in which the contract has been performed. Fourth, where the term is so obvious that the parties must have intended to include it (the 'officious bystander' test). There is no implied duty on an employee to disclose any misconduct, so that the Claimant's failure to disclose to the Respondent the overpayment of salary to her is not a breach of contract by her. See Bell v Lever Brothers Ltd [1932] AC 161, HL.

   The law of restitution may provide a remedy to a claimant who has paid money to a defendant under a mistake of fact, under the concept of unjust enrichment. Although there might be a cause of action in the civil courts here, the statutory jurisdiction of the employment tribunal in contract claims would not seem to include it.

The Respondent argues that, should the Claimant succeed in her contractual claim, they should be entitled to set off against her damages for unpaid notice pay their contractual claim for overpaid wages. The doctrine of set off can be used as a defence to a contractual claim in the employment tribunal. See Ridge v HM Land Registry UKEAT/0485/12 (19 June 2014, unreported). There, the Employment Appeal Tribunal took the view that Parliament intended the law of contract to operate in the same way before an employment tribunal as it does before the civil courts. For the doctrine to apply, both the sum claimed and the sum counter-claimed must be due at the time the claim is started and it must be possible to ascertain both amounts with certainty. It is common ground that the doctrine of set off does not operate in the context of an unauthorised deductions claim, which is clearly a statutory rather than a contractual claim – see Asif v Key People Ltd EAT/0264/7 (7 March 2008, unreported).

Conclusions

9. Having regard to my findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties' representatives, I have reached the following conclusions:-

9.1 In the agreed list of issues, the Claimant accepts that the reason for dismissal was conduct. Therefore, this is not an issue to be determined by the Tribunal. The Respondent has established that conduct was the reason and conduct is a legitimate reason recognised by the Employment Rights Act for dismissal. However, on the basis of the allegations made against the Claimant and found to be made out by the Respondent, I would conclude anyway that the Respondent has established conduct as the reason for dismissal – a potentially fair reason. That was the reason in the collective mind of the Respondent when it decided to dismiss the Claimant. The three allegations made out were as follows. First, that the Claimant had exhibited, encouraged or tolerated a culture of managerial bullying within women and children's services. Second, that the Claimant had failed to provide reasonable management support to her team. Third, that the Claimant had created a culture of fear causing concerns to be suppressed in maternity services. As the Respondent's counsel says; put simply, the allegation was that the Claimant bullied her staff (in terms of the Respondent's bullying and harassment policy), and failed to support them.

9.2 I turn to look at the investigation and the Burchell test in that respect. As submitted by the Respondent, it has not been suggested that the Respondent's managers and witnesses did not have a genuine belief in this conduct of the Claimant. The question for the Tribunal, therefore, is whether that belief was reasonable, and based on such investigation as was reasonable in the circumstances. The Claimant makes a number of allegations here. She says that there was reliance on subjective hearsay, no

reference to documents to support oral testimony, such as VAF forms; a lack of specificity about dates and instances; ignoring of evidence such as that of Ms Rush Hall; the positive support for the Claimant, among many witnesses to the investigation and in the fourth anonymous letter. However, the Claimant had the opportunity to question three of her severest critics at the disciplinary hearing. She did not engage with individual allegations or provide specific responses. She appeared to the disciplinary panel to accept what was said, therefore, and sought to apologise for the way her management style came across and said she was not aware of it, and no-one had brought it to her attention. Thus, although there was some positivity about the Claimant, there was also a large body of evidence – from many different and relevant witnesses – about the Claimant's bullying and divisive management style. No reason was given to the disciplinary panel as to why they should not accept that evidence. Witnesses to the disciplinary panel said that they personally felt bullied.

9.3 Although the VAF forms were not looked at by the panel or the investigator, they had Ms Greenwood's evidence. She told the panel and investigation that she repeatedly offered to complete a vacancy approval form for a vacant post, but the Claimant declined that offer, meaning that recruitment to that post subsequently did not commence until after the person had left. There was also unchallenged evidence that the vacancy level was high, that the Claimant had not filled budgeted, established positions and was entitled to do so, and from the many witnesses saying how stretched staff were with lack of breaks and so on. There was thus plenty of evidence on this point – a lack of management support for the labour ward staff - for the panel to take into account. Further, the Claimant did not herself call Ms Rush Hall to the disciplinary hearing, as she could have done, to give evidence to the contrary. The panel did not have the evidence that the Tribunal hearing had from this witness.

9.4 A lack of managerial support was also shown by the Claimant's labour ward manager policy. The appointment of a band 7, with insufficient authority over other band 7s, leads to the inference that the reason for the high turnover of those managers was because of this unsatisfactory structure and/or the Claimant's behaviour towards them and towards the post. It could also lead to an inference that the Claimant did not like a challenge to her individual "fiefdom". There was further evidence of this point by the Claimant's reluctance to have a matron, and her resentment of a general manager being appointed. Mr Myers' evidence was that he could not get a handle on what was happening in midwifery, presumably because the Claimant kept such matters under her personal control. There were the threats to the staff by the Claimant that she could restructure them out of position. This evidence led to the disciplinary panel's conclusion that there was undermining of staff in managerial

positions. There was also evidence from several witnesses about the discouragement of the use of the Datix system for reporting staffing concerns. If it was hearsay (concerning a particular midwife, Sarah Paxman), it was a situation widely known in the department and reasonably accepted as true by the disciplinary panel. By discouraging the use of Datix in this way, the Claimant put the safety of staff and patients at unnecessary and unacceptable risk (even if in fact no specific incident occurred). Dr Dunn specifically noted that there was a significantly lower Datix reference compared with other parts of the hospital, which was surprising given that the labour ward is regarded as a risky area. This was further evidence, so far as the panel was concerned, in support of the Claimant actively discouraging its use (the third allegation).

9.5 The Respondent appreciated that a full and thorough investigation was required – hence the large number and wide range of witnesses and the detailed questions of them. An experienced external investigator was appointed, and the Claimant was encouraged to suggest her own witnesses. The witnesses interviewed were drawn from all areas of the Claimant's responsibility and at all levels. I conclude that, having regard to all of the above, the Respondent satisfied the Burchell tests as to reasonable belief in the misconduct and the reasonableness of the investigation.

9.6 I turn to procedural matters. Criticisms can be made here. I accept Ms Needle's evidence that suspension was required, and for the reasons that she gave. Namely, to protect witnesses from feeling intimidated, to protect the Claimant from any additional allegations against her, and because the nature of the Claimant's role would have made it impossible to move her to any other job in the organisation. However, although Dr Dunn said that the suspension was kept under review on a monthly basis, no minutes of board meetings to that effect were evident. Because the investigation took so long, suspension continued for a lengthy period also, and certainly beyond a reasonable time as contemplated by the Respondent's disciplinary procedure. However, even if the suspension had been reviewed, it is almost inevitable that the Claimant would not have returned to the workplace, on the basis of Ms Needle's reasons, until the investigation had been concluded. Therefore, I do not conclude that suspension was a knee jerk reaction in the circumstances.

9.7 The investigation was too protracted, even allowing for its size and complexity and the diary commitments of witnesses and the investigation and so on. If a case manager had been appointed, and a note-taker to assist Ms Dalby, it might have been speeded up. I accept that it was not part of Ms Dalby's remit to investigate other band 7s – they had not been named in the anonymous letters, and the Claimant was the ultimate authority in the department, not them.

The Claimant's dealing with the allegations of bullying against band 7s was noted and accepted by the disciplinary panel, but reasonably found not to excuse her own behaviour and, accordingly, that it meant that the Claimant should have known what bullying behaviour was. Although Ms Dalby's report would appear to conclude that certain allegations "were proven", she explained that this meant no more than that she believed that there was a disciplinary case to answer. There was no evidence that the disciplinary or the appeal panel were influenced by her beliefs in any event. They took their own independent view of the case against the Claimant. Although the disciplinary allegations changed as between the first and second investigation letter, the second group of allegations properly reflected the terms of reference of the investigation, and therefore the Claimant was not prejudiced by this. She knew what charges she faced and had a full opportunity to respond to them. Dr Dunn was arguably at an unnecessarily senior level to conduct the disciplinary process, but clearly he was an appropriate person to do so. Although he lacked experience of chairing disciplinary panels, he was supported and guided through the process by Ms Needle and HR. Perhaps of more concern was the presence of Mr Black on the appeal panel, given the Claimant's objection to him as chair. However, in the event he was not the chair and the appeal panel's decision was unanimous. There was no evidence that he was improperly hostile towards the Claimant. It is of course the appeal findings that are important, not what Mr Black said to the Tribunal. There was a long delay in hearing the appeal – outside the Respondent's procedure. However, I also accept that it was difficult to get such a large number of senior people together at one time.

9.8 There was evidence of the Respondent's own failings. For too long, too much power was concentrated in one person's hands in midwifery – the Claimant's. Later on a general manager was appointed to spread the decision making, but by then the damage had been done. This was a failing of the Respondent's senior management. Further, it is not a good reason to say that senior midwives complained about the Claimant but wanted to remain anonymous - therefore, we need do nothing. Either, the Respondent should have made changes in the midwifery management structure so that midwives did not have anything to complain about, or Ms Day should have spoken informally to the Claimant, to make her aware that there were concerns, and give her an opportunity to put things right, so that the allegations against her did not come out of the blue. On the other hand, I accept the Respondent's case that someone at the Claimant's level, with her substantial training and experience, should have known how to behave and properly manage her staff. The disciplinary panel particularly noted the Claimant's training on how to conduct 'difficult conversations' with staff. I conclude that they had in mind that the Claimant should have utilised this training to resolve staff issues without bullying them.

9.9 However, none of this takes responsibility away from the Claimant for what she did. I look at the procedure adopted overall by the Respondent, when assessing fairness. By and large, I conclude that, although there were the difficulties I have identified, there was a procedure that was fair to the Claimant. There was an independent and thorough investigation. A fair disciplinary hearing was held with the Claimant given every opportunity to challenge the Respondent's witnesses and have her say, and the hearing was conducted by an appropriate manager who gave the case full consideration. The appeal was also properly conducted, and all the Claimant's grounds of appeal were carefully considered, and there was a proper assessment of the sanction. Therefore, I conclude that the procedural glitches identified do not render the dismissal unfair. If I am wrong about this, and there was a procedurally unfair dismissal, then I would conclude that if a fair procedure had been followed the Claimant would have been fairly dismissed in any event.

9.10 So far as sanction is concerned, the Claimant makes specific challenges, as set out in the agreed list of issues. First, the allegations do not amount to gross misconduct. Regardless of how they are categorised, I look at whether the Claimant's misconduct was such as to bring the sanction of dismissal within the band of reasonable responses. On the evidence, the disciplinary panel found that bullying of labour ward staff had taken place and that managers and staff were not supported. The issues were longstanding, deep-rooted and persistent. There was evidence that the labour ward did not function properly or safely, because of the impact of the Claimant's control or conduct on staffing levels and morale. Further, the Claimant showed little insight or remorse, so there was a risk in keeping her in employment. I conclude that the conduct was sufficiently serious on that basis to make dismissal a fair sanction. Second, mitigating factors such as length of service and a clean disciplinary record were not taken sufficiently into account, says the Claimant. However, I conclude that they were taken into account, but also that to some extent the Claimant's long service counted against her – because her experience and training as a manager should have meant that she would recognise her own behaviours and put them right. Further, the Claimant's long service was a reason why alternatives to dismissal were seriously considered, but ultimately decided against (see below). The third matter raised by the Claimant is that there was inconsistency with others who were referred to in the anonymous complaints, albeit not by name. Particular reference was made to the band 7 midwives and managers. As was clarified by Claimant's counsel, this was not a full inconsistency case, because the Claimant was not saying others were in truly parallel circumstances. It was more of an evidential matter. There was a failure to investigate and deal with others, which weakens the case for dismissal against the Claimant,

it is argued. One of the two managers identified, however, had left, and the Respondent dealt with band 7s by putting them on a management development programme, because they had not had such training. In fact, one of the senior midwives was disciplined for an incident in June 2016 and given a final written warning. So, it is not the case that the behaviour of the band 7s was ignored by the Respondent. Fourth, it was said that dismissal was too severe a sanction. Alternatives were considered, such as supervision, demotion and training. However, the seriousness of the findings, the lack of insight or remorse displayed by the Claimant at the disciplinary hearing, in line with her seniority and management experience, led both the disciplinary and appeal panels to consider that these alternatives to dismissal were not appropriate and would not prove successful. The Respondent had lost trust and confidence in the Claimant.

9.11 I am not entitled, of course, to substitute my view of the appropriate sanction for that of the Respondent's. Further, I cannot say that – for these findings of serious misconduct – the sanction of dismissal was outside the band of reasonable responses of an employer. The Respondent took the reasonable view that the interests of staff and patients, in terms of safety, were paramount. On that basis, they decided that they could not take the risk of continuing to employ the Claimant. I conclude that that was a decision that was within the band of reasonable responses.

9.12 I turn to consider the case for wrongful dismissal. Here, the test is different. The question is whether the Claimant by her conduct was in repudiatory breach of contract, entitling the employer to summarily terminate that contract. It is not necessary for me to go through the evidence again. As far as it is relevant, it forms the basis of the findings of fact. I accept that evidence. I conclude that the Claimant was guilty of serious misconduct, such conduct amounting to a repudiatory breach of her contract of employment, and entitling the Respondent to dismiss her summarily.

9.13 The Respondent cannot make out their employer's claim. There is no express term in the Claimant's contract of employment on which they can rely. In the circumstances, I cannot imply a term into the contract, giving the Respondent a right to recover overpaid salary. Such a term is not necessary to give the contract business efficacy. Custom and practice does not arise in the circumstances. The term is not and was not necessary to the performance of the contract. Finally, such term does not pass the officious bystander test. It is not obvious, particularly in the light of the express clause 8, which really covers the territory here. The Respondent really have only themselves to blame for not noticing this overpayment and for their failure to deduct it from the final salary payments to the Claimant.

9.14 However, if I am wrong about the wrongful dismissal and the Respondent was not entitled to summarily dismiss the Claimant as

there was no repudiatory breach of contract by her, then I am entitled to and would set off the overpayment against the notice pay due to the Claimant. The doctrine of set-off operates in the employment tribunal as it does in the civil courts in the context of contractual claims/counter-claims such as we have here – see Ridge, above. The Claimant was overpaid wages she was not entitled to under her contract of employment. The figures for the overpayment and for the Claimant's notice pay can readily be calculated. Both claims were outstanding on the termination of the Claimant's employment, and when the Claimant made her claim to the Tribunal. The Respondent's set-off is not made against a statutory claim for unpaid wages.

Employment Judge Sigsworth

Date: 9/2/2018

Sent to the parties on: .....

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For the Tribunals Office