EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Mackinnon**

Respondent: **Doncaster & Bassetlaw Hospitals NHS Foundation Trust**

Heard at: **Nottingham** **On:** **21- 22 May 2018**

Before: **Employment Judge Moore**

Representation
Claimant: In Person
Respondent: Mr N Caden, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal succeeds.
2. The Claimant's claim for wrongful dismissal fails as the Respondent was entitled to treat the Claimant as summarily dismissed and accordingly no notice pay is due.
3. The Respondent is ordered to pay the Claimant a basic award of £3707.27 and loss of statutory rights of £450.00.
4. There is no order for a compensatory award. This is reduced to nil on the basis that but for the procedural errors there was a 100% chance the Claimant would have been dismissed in any event.

REASONS

1. The issues before the Tribunal were as follows:-

2. Unfair Dismissal

a) Has the Respondent shown the reason for dismissal?

b) Was that reason a potentially fair reason?

c) Was a fair procedure followed under Section 98(4)? If not what was the percentage change of a fair dismissal?

d) Was the dismissal within the range of reasonable responses?

e) Was there a failure to comply with the ACAS code?

f) Did the Claimant contribute to her own dismissal?

3. Wrongful dismissal

a) Was the Claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment thereby entitling the Respondent to summarily terminate the contract?

4. Relevant Law

The relevant law in relation to the unfair dismissal claim is set out in Section 98 of the Employment Rights Act 1996. The relevant sections provide:

Section 98

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(b) relates to the conduct of the employee,
….
(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.

5. In a conduct dismissal case **British Home Stores v Burchell [1980] ICR 303**, the Court of Appeal set out the criteria to be applied by Tribunals in cases of dismissal by reason of misconduct. Firstly the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the dishonesty in question. Secondly the Tribunal has to consider whether the

employer had reasonable grounds upon which to sustain that belief. Thirdly at the stage at which the employer formed its belief, whether it has carried out as much as an investigation of the matter as was reasonable in all of the circumstances. Although this was not a case involving dishonesty it is well established that these guidelines apply equally in cases involving misconduct.

6. The relevant authorities in relation to reasonableness under Section 98 (4) were considered by the EAT (Browne-Wilkinson J presiding) in **Iceland Frozen Foods v Jones [1982] IRLR 439.** The test was formulated in the following terms:

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [ERA 1996 s 98(4)] is as follows.

(i) the starting point should always be the words of [s 98(4)] themselves;

(ii) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

(iii) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

(iv) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(v) the function of the Industrial Tribunal, as an industrial jury, 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'.

5. In assessing whether the claimant's conduct amounted to gross misconduct that conduct must be deliberate wrong doing or gross negligence. In the case of deliberate wrong doing it must amount for wilful repudiation of the expressed or implied term of the contract **(Sandwell and West Birmingham Hospitals NHS Trust v Westwood).**

6. If the dismissal is procedurally unfair I must assess the percentage chance of the Claimant being fairly dismissed **(Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987].**

7. I must also consider whether, under S207 (2) TULRCA 1992 there is any provision of the ACAS Code of Practice on disciplinary procedure which appears to be relevant.

8. Lastly whether the Claimant's basic and or compensatory award should be reduced under S122 (2) and S123 (6) ERA 1996. The wording of the two provisions are not identical and differing reductions can be made in principle.

S122 (2) provides that where the tribunal considers any conduct of the Claimant before the dismissal 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. S123 (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.

9. In **Steen v ASP Packaging Ltd [2014] ICR 56** (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Background

10. This is a claim for unfair dismissal and wrongful dismissal. The ET1 was presented on 30 November 2017. The claim was heard in Nottingham on 20-21 May 2018 with the decision being reserved. There was an agreed joint bundle totaling 803 pages. The Tribunal heard evidence from the Claimant and Ms C Beattie and Ms D Culkin for the Respondent.

Applications for Witness Orders

11. At the outset of the hearing the Claimant made an application under Rule 32 of the Employment Tribunal Rules of Procedure for an order that five individuals attend the hearing to give evidence. These were Debbie McKnight (Investigating Officer and Claimant's line manager), Amber Green (Student midwife and witness to the disciplinary hearing), Jenna Marsden (Student midwife and had provided a witness statement as part of the disciplinary proceedings), Alison Schofield, Deputy to Debbie McKnight) and Suzanne Miller (the Claimant's union representative from the Royal College of Nursing).

12. The Claimant's application was refused. Having regard to the two stage test in **Dada v Metal Box Co Ltd 1974 ICR 559** the reasons for the refusal were that having regard to the issues in this case none of the witnesses could give evidence on the issues in dispute as it is not the Tribunal's function to re hear the evidence. The Respondent had called the disciplining manager who had made the decision to dismiss who could deal with the Claimant's questions about the investigation. Furthermore the Tribunal had no evidence as to whether it was necessary to compel their attendance. The application was made very late and there was no information about whether they had been asked to attend.

Findings of Fact

13. I make the following findings of fact on the balance of probabilities.

14. The Claimant commenced employment with the Respondent on 2 February 2004 initially as a support worker subsequently qualifying as a midwife. At the time of her dismissal the Claimant's substantive role was Community based in the area where she lived, Worksop.

15. The Claimant was subject to the Nursing and Midwifery Council ("NMC") Professional Standards of Practice and Behaviour for Nurses and Midwives ("The Code"). In addition, prior to 1 April 2017 there was a process in place called the 'Statutory Supervision of Midwives'. The Tribunal did not have any documentary evidence on this process but accepted Ms Beattie's evidence explaining the set up. As a result of this requirement there used to be a Local Supervising Authority ("LSA") and the Respondent was required employ a Supervisor of Midwives who was an employee of the Trust but would have a separate external role for which they were responsible to the LSA. If an incident was raised about a midwife the Trust would investigate the issue in accordance with their internal disciplinary or capability policy and also ask the Supervisor of Midwives to undertake a second investigation. The Supervisor of Midwives report was confidential and should not have any input from the Trust and be sent to the LSA for their consideration.

16. In the Claimant's case, the LSA recommended that the Claimant be referred to the NMC. Ms Beattie did not have sight of the LSA report.

17. Also relevant to these proceedings was the Respondent's Disciplinary Procedure.

18. On 20 February 2015 the Claimant's line manager, Debby McKnight, met with the Claimant to discuss two issues that were of concern to Ms McKnight. The Claimant was sent an outcome of the meeting in a letter of the same date which was titled "Outcome of Counselling Meeting". The relevant matters for this Tribunal were (in summary) that the Claimant was instructed to stop inviting or accepting friend requests on Facebook from women who were pregnant and whom the Claimant had met through work and that if she had an additional job it should be declared in writing and kept out of working hours. The Claimant was advised if there were further instances it may result in disciplinary action.

19. On 30 March 2015 the Claimant emailed Ms McKnight to inform her that she had become a distributor for Forever Living. Forever Living are Aloe Vera based skin and supplement type products. No reply was sent to that email. The Claimant sent another email on 11 August 2015 to another manager, Alison Schofield advising she was donating some Forever Living products and helping at a fund raising event in a function during her own time. Ms Schofield replied the same date advising as this was in her own time this was no problem.

20. On 4 February 2016 a patient of the Claimant telephoned the Respondent and requested to change midwife. I shall refer to this patient as "Patient 1" as referenced in the various documents in the bundle. Alison Schofield telephoned the patient back but did not make a contemporaneous note of the call nor was there any attempt to ask Patient A to confirm the note of the conversation or obtain a signed statement. At the Claimant's disciplinary hearing on 22 June 2017 Alison Schofield gave evidence that she wrote notes of the conversation in

a notebook then at a later time typed them up into the record of the conversation which was produced as part of the investigation (page 336 of the bundle – "Patient 1 statement").

21. Ms Schofield's note of her conversation with Patient 1 was in summary:

- She had been offered an Aloe Vera health product by the Claimant and specifically referred to a 7 or 9 day diet product.
- Patient 1 was aware of the product and had previously looked into becoming a distributor
- She knew of at least three or four other people who had been approached in their pregnancy by the Claimant but they had not taken it further as they had had their babies and would not be seeing her again
- That the Claimant informed her she could be earning more selling the product than from being a midwife

22. Ms Schofield informed Ms McKnight who met with the Claimant on 5 February 2016 to inform her of the complaint. The Claimant was temporarily moved to the Labour Ward. There was no note of this meeting. Ms McKnight did not follow up or confirm the meeting with the Claimant until on or around 10 March 2016. This letter was dated 1 February 2016 but I find it was not sent until 9 March 2016 as it would have pre dated the meeting on 5 February 2016 and the Claimant did not receive it until 10 March 2016. Upon receipt the Claimant request further time to respond (she had been given until 14 March 2016).

23. In the meantime on 9 February 2016 a further patient complaint was received this time during a conversation between Alison Schofield and another patient who I shall refer to as "Patient 2". This time the complaint came about during contact Ms Schofield had with the patient to rearrange an antenatal appointment. Alison Schofield's evidence to the disciplinary hearing about the record of this conversation (at page 337 of the bundle) was inconsistent and confusing. She gave evidence that she wrote notes of the conversation in a notebook then at a later time typed them up into the record of the conversation which was produced as part of the investigation as with Patient 1 statement. However it transpired at the disciplinary hearing that Alison Schofield had visited Patient 2 at her home as the first line resolution to a potential complaint. There were no notes of the home visit or records of the conversation. Ms Schofield's note of her conversation with Patient 2 was in summary:

- the Claimant had been given information about other things not related to pregnancy namely she had been offered a herbal product, 'something to do with living'
- the Claimant had said she could earn more selling this than she could as a midwife
- she had been offered an Aloe Vera product (after prompted by Ms Schofield) and at each appointment other than the last one when a student midwife had been present

24. On 18 February 2016 Alison Schofield was covering an antenatal clinic at Langold Children's Centre. In her subsequent witness statement dated 27 May 2016, Ms Schofield stated that the staff at the centre were fully aware of the

events that had taken place and the manager Sharon Christianson asked Ms Schofield to speak to one of the workers in relation to this. It is not clear how the staff at this centre were fully aware of the events given that the investigation was supposed to be confidential. Ms Schofield made notes of the discussion with the staff member in a separate record although it is not clear when the notes were made. The identity of this employee was never disclosed to the Claimant during the later investigation. I shall refer to this employee as "Employee 1". Employee 1 informed Ms Schofield in summary that the Claimant had approached her during work to ask if she would be interested in selling Aloe Vera products and subsequently sent her a message on Facebook. Further that the Claimant added her and a colleague to a selling group on Facebook without their consent and that two parents at the Centre informed Employee 1 that they were asked to purchase products during their pregnancy.

25. On 22 February 2016 Alison Schofield had a telephone discussion with another employee at Langold hereafter referred to as "Employee 2". The identity of this employee was not disclosed to the Claimant. Again Ms Schofield made notes of the discussion in a separate record. It was later clarified at the disciplinary hearing that the notes were not contemporaneous but made shortly after the calls, although it is not clear when the notes were made. In summary Employee 2 informed Ms Schofield that she knew the Claimant was selling Aloe Vera products, had purchased some from her but did not state this was during work time. Employee 2 stated she felt pressured to sign up to be a seller. Employee 2 also stated that whilst working at the children's centre she felt that this was always a big topic of conversation and that her experience of the product was that anyone who sold it turned it into "a bit of a cult" where the products would become part of any conversation.

26. On 9 April 2016 the Claimant sent an email requesting that the supporting HR Officer Kerstie Hodgkinson be replaced as she was a friend of the Claimant's Forever Living Manager. The Claimant also raised concerns that she may not get a fair investigation due to work related history between her and Ms McKnight. The HR officer was subsequently changed to Samantha Francis but Ms McKnight remained as the investigating officer.

27. According to Ms McKnight's Investigation Report at some point before 5 May 2016 Ms McKnight was approached by another midwife called Jane Stephenson who advised that a student midwife (Student Midwife 1") had witnessed the selling of Aloe Vera products by the Claimant to women in the Claimant's care. Student Midwife 1 was later identified as Amber Green who had been mentored by the Claimant.

28. On 21 April 2016 Catherine Burke, who is a Senior Midwife Lecturer at Sheffield University emailed Ms McKnight to advise she had met with Amber Green to commence statement development regarding the professional behaviour of the Claimant. Ms Burke had also been approached by Amber Green who voiced concerns that the Claimant (who was her mentor) was selling products to women whilst providing antenatal and postnatal care. Ms Burke reported that most of the students that have worked in Bassetlaw knew about the issue as well as all the community midwives. Further that Ms Green was not the only student who had witnessed discussion and sale of products to women in their own homes and other students had been sold products and named on the Claimant's Facebook group and that the Claimant had invited "all the students" to

be members of the Facebook page without their consent. Ms Burke proposed that they meet with all the students as a group and investigate further.

29. Ms McKnight replied to the email asking if Ms Burke could assist with accessing the Claimant's Facebook site. Ms Burke responded attaching a JPG of the Claimant's Facebook post which contained a post about a second year student who was said by the Claimant to have lost weight. Ms Burke informed Ms McKnight that "there are more than LMCK [the Claimant] selling this that work in the unit…". It is not clear what unit Ms Burke was referring to.

30. The Claimant's Forever Living Facebook page made no mention of her status as a midwife.

31. An investigation meeting with the Claimant eventually took place on 5 May 2016. The Claimant had provided a statement ahead of the meeting in which she denied endorsing products or knowingly selling to anyone in her care (stating she had "100% not"). She accepted Aloe Vera based products may have come into conversation and that some women in her care were also involved in selling the products. The Claimant informed Ms McKnight that Ms Schofield had contacted a friend on her mobile (a Ms G Randall) who used to work at the Children's Centre). Ms McKnight committed to take this up with Ms Schofield.

32. A meeting took place at Sheffield University on 25 May 2016 between the Bassetlaw students and Ms Burke and other lecturers. A summary of the discussion was provided in an email from Ms Burke to Ms McKnight that same day. Ms Burke reported that all except one student had been present and all agreed to the statement which was attached in the form of a summary of minutes from the meeting. In summary this stated that students and their Facebook friends had been added to the Claimant's Facebook group without being asked and information then came through promoting products. They had also been asked to join the business and sell the products whilst in the work – student midwife setting. The Claimant was witnessed in work time selling products to clients, more than one and on more than one occasion. Students had reported that women had swapped midwifes as they were uncomfortable with the Claimant. Students had felt under pressure as they were being assessed on their placement and felt compromised to say anything as a result. Students were uncomfortable with working with the Claimant on the labour ward (where she had been moved at the outset of the investigation from the community). It was reiterated to the students that the NMC Code stated that midwives should not endorse products and they were effectively informed the Claimant had breached the Code. I set out in particular this part of the note:

"Reiterated the Code (NMC 2015) that midwives should not endorse products – so this is both endorsing and then promoting her products to sell – students understood that this breaches the Code."

33. I find from the tone and covering email that Ms Burke had led the discussion and this had taken place in a group context. The covering email from Ms Burke was clear that students had been instructed not to provide any other statement and that the statement stood as the response for all of them. The student midwives had been given a form of words to say to the Claimant if she asked them for a statement.

34. As a result the Claimant was moved again to work at Doncaster Royal Infirmary.

35. A number of witness statements were then obtained from the community midwifes in June and July 2016. Of relevance, Jane Stephenson reported that Amber Green had informed her the Claimant was promoting Aloe Vera products to women in care of maternity services but had not witnessed this directly. Lynn Cowgill stated she was not aware of any women being invited to buy Aloe Vera products but was aware of a patient who had been approached by the Claimant to sell the products. Kerry Wainwright reported that none of the women on the caseload had discussed issues surrounding Aloe Vera products with her but that a student midwife had found an Aloe Vera product trial questionnaire in the Claimant's old caseload paperwork. The Claimant accepted in evidence that this was her handwriting and questionnaire but could not explain how it came to be present within a patient's notes.

36. Following the Claimant's transfer to Doncaster she became unwell and was signed off sick from work. Occupational Health subsequently confirmed that she was not well enough to attend an investigation meeting. The Claimant remained off sick until the end of December 2016 when she returned on a phased return.

37. Ms McKnight fractured her ankle in August 2016 and was off sick until November 2016.

38. On 8 December 2016 the Claimant raised a grievance against Ms McKnight of bullying and harassment. This was dealt with by Sharon Dickinson who held a meeting with the Claimant on 11 January 2017 and provided a detailed outcome on 9 February 2017. The Claimant's grievance was not upheld. She did not appeal this decision and Ms McKnight continued in her role as investigating officer.

39. In December 2016 a number of student midwives gave formal written statements that the Tribunal had sight of. Of relevance was one provided by Jade Hicks who the Claimant had requested be interviewed in support of her. Ms Hicks stated that she was aware the Claimant had sold Aloe Vera products to staff but had no experience of her selling to women in her care, also that the Claimant had informed Ms Hicks that she had sold products to women she had been caring for but many of these were known to her personally in any event due to children attending the same school.

40. Part of the Claimant's case is that there was a breach of confidentiality by the Respondent and that the allegations were public knowledge and gossip which could have influenced statements taken months after the allegations first arose.

41. There was some evidence to substantiate the Claimant's position. Jade Hick's witness statement refers to a Rebecca Smyth, Clinical Risk Midwife, telephoning her at home asking to talk to her about the Claimant. It was unclear why Ms Smyth was involved or her role on the investigation. Alison Schofield's witness statement stated that when she visited the Children's Centre at Langold on 18 February 2016 staff were "fully aware of the events that had taken place" but gave no details as to how this had come about or that she made enquiries as to how or why the staff had become fully aware.

42. Another student midwife, Rebecca Brown made a statement that the Claimant had encouraged her to become a seller of the products; this took place towards the end of a student midwife meeting where the conversation had turned to living on the bursary. The Claimant later added this student onto a Facebook page for selling the products.

43. The most significant statement was from Amber Green who reported that on a community visit the Claimant asked a postnatal patient to become a seller of the product and on another occasion she observed the Claimant collect a box of products from a postnatal patient she had asked to try and sell the products but the patient had declined.

44. On 12 February 2017 a Joanne Hadley emailed Ms McKnight in response to a request from Ms McKnight. Ms Hadley led the LSA investigation into the Claimant. Contrary to the evidence we heard from Ms Beattie that the LSA investigation was to be kept confidential and distinct from the Trust investigation, Ms Hadley sent Ms McKnight a copy of a redacted statement ("the LSA statement") from a Patient described as Patient A and advised this patient had agreed for her redacted copy to be shared. The other patient had declined to share their statement with Ms McKnight. The Respondent was unable to confirm if Patient A was the same patient and Patient 1 however I find that they were the same patient. The reason I make this finding is the similarity between the statements the LSA statement and there was no evidence that there were more than 2 patient complaints. The Patient A statement was clearly not Patient 2 statement so it falls it must have been Patient 1. The LSA Patient A statement was very similar to background detail in Patient 1's statement in that they both contained allegations that the Claimant "could not be bothered".

45. There were also inconsistencies between the accounts in Patient 1 and Patient A's statement to the LSA. In the LSA statement there was no reference to the Claimant offering a 7 or 9 day diet product although it did refer to a lavender product and that the Claimant was making recommendations. In the LSA statement the patient stated that "I wouldn't say she was trying to sell it to me but definitely recommending this range." She went onto say that perhaps 10 minutes of her appointment was taken up discussing Forever Living. The LSA statement alleged that the Claimant had sent her a friend request on Facebook from her Forever Living Page but this was not mentioned in the Patient 1 statement.

46. The LSA statement only came to light at the Tribunal hearing as it had been disclosed in the course of the proceedings and included in the bundle. Ms McKnight had not disclosed the statement as part of the investigation despite it being in her possession at the time. Ms Beattie was unaware that Ms McKnight had been in possession of this statement until she was asked about it in cross examination. In re examination Ms Beattie gave evidence that if she had seen the LSA statement and Patient 1 statement she would still have reached the same decision to dismiss the Claimant as the LSA statement still confirmed Ms Beattie's concerns that the Claimant was talking to pregnant women about Aloe Vera products and this was not on the list of recommended products that midwives can prescribe.

47. On 14 February 2017 a further investigatory meeting took place with the Claimant. The Claimant repeated her 100% denial that she had not tried to sell

products to clients and also denied that she had tried to recruit students to sell Aloe Vera but stated she might have discussed in general about Aloe Vera products.

48. During March 2017 both HR and later Ms Dickinson chased Ms McKnight for her final investigation report. Ms Dickinson was clearly concerned at the delay and eventually instructed Ms McKnight to complete the investigation by 16 April 2017. Four members of the Respondent's HR team were involved in amending or commenting on the draft investigation report namely Samantha Francis, Jayne Lang, Louise Spencer and Diane Culkin. The drafts were not available to the Tribunal in evidence. The Investigation Report was dated "April 2017". It was not clear the date of the final report was completed but there were emails at the end of April 2017 indicating that Ms McKnight was still adding statements to the appendices as of 26 April 2017.

49. Ms McKnight indicated to HR that she had lost and found a statement taken in 2016 (Rebecca Brown). On 26 April 2017 Ms McKnight sent an email to HR advising she had found a statement from a Gemma Davis and asking if they had any interview notes. No statement from Gemma Davis was included in the investigation report. Ms McKnight indicated that Gemma Davis had stated a patient on her caseload had been approached by the Claimant. Of more concern was the last sentence in that email which read:

"Also
I can't find the statement that Ali changed yesterday anywhere so I've asked her to sign another one."

50. It was not possible to conclude what statement had been changed or how.

51. On 23 May 2017, almost five months after the Claimant had returned from sickness absence and 15 months after the initial complaint from the two patients, the Claimant was informed the allegations were proceeding to a disciplinary hearing. There were two allegations. These were in summary;

- Promotion and selling Forever Living products to women on her caseload which was a breach of NMC Code only to supply and administer authorised medicinal products
- Attempting to recruit women on her caseload to sell Aloe Vera products on her behalf as well as recruiting student midwives and others to work as Forever Living representatives in breach of the Trusts Policy prohibiting secondary employment being undertaken during work time

52. Christine Beattie, Head of Paediatric Nursing was appointed to hear the disciplinary hearing. I found Ms Beattie to be a highly credible and reliable witness who took the role extremely seriously. Ms Beattie raised concerns with HR and Ms McKnight about the lack of signed witness statements in the Investigation pack and gave a clear instruction this should be remedied ahead of the hearing. The disciplinary hearing was set for 22 June 2017.

53. During this time further allegations were raised against the Claimant that she had been discussing the case and she was subsequently suspended. This was subsequently added to the allegations to be heard at the disciplinary hearing on 22 June 2017.

54. The Claimant was supported at the hearing by Suzanne Miller from the Royal College of Midwifery. Ms McKnight had arranged to call Alison Schofield and Amber Green as witnesses to the hearing.

55. The Claimant was permitted to explain her actions and challenge the Respondent's evidence. Ms Beattie considered all of the Claimant's documents submitted prior to the hearing. The Claimant had submitted a copy of a text message exchange between the Claimant and Gemma Randall who the Claimant suggested was Employee 2. This exchange significantly conflicted with the note Alison Schofield had made of her conversation with Employee 2. Ms Randall stated she had defended the Claimant to the high hills or words to that effect and that she had been asked about whether the Claimant had sold Forever Living at work. As Employee 2's identity was never disclosed it was not clear whether Gemma Randall was Employee 2 or whether Alison Scofield spoke to a third employee and did not disclose this or prepare a statement. Therefore Alison Schofield's record of Employee 2 conversation was either potentially at odd with Ms Randall's later account to the Claimant of what was discussed or there was a third statement taken from Gemma Randall and Ms Schofield did not disclose this.

56. Ms Beattie also raised concern directly with the Claimant that whilst she had challenged the investigation procedure she had not directly responded to the allegations. The Claimant maintained, as she had done throughout the investigation that she had not sold Forever Living products to patients or recruited patients to sell the products. Ms Beattie sought an explanation as to why a number of patients and a student midwife had said she had but the Claimant was not able to explain this other than to say she did not know the identity of the patients. When Ms Beattie asked therefore why the Claimant needed to know the identity if she had 100% never sold to patients the Claimant was unable to answer.

57. After an adjournment the Claimant read out a short statement which stated she may have "blurred the lines" as she was passionate about the products she was selling. It was agreed that the hearing would be adjourned and the Claimant could submit a statement of case, which she subsequently did via Ms Miller a few days after the first hearing.

58. On 30 June 2017 a further hearing was held. Ms Beattie upheld all of the allegations against the Claimant except for interfering with the investigation which was not upheld and informed the Claimant she was dismissed the Claimant for gross misconduct. This was communicated in a letter dated 3 July 2017. The effective date of termination was 30 June 2017.

59. Ms Beattie subsequently wrote to Sharon Dickinson to raise concerns about the quality of the investigation conducted by Ms McKnight and recommend management training. These were around unsigned witness statements and notes, inconsistent redactions, wrong dates on letters, defensive conduct at the disciplinary hearing, failing to pursue Jane Stephenson who had been advised by Amber Green of her concerns some time earlier and having knowledge of the Supervisor of Midwives report and whether this was a breach of confidentiality. I accepted that Ms Beattie was not aware that Ms McKnight had had sight of

Patient A witness statement to the Supervisory Board until the employment tribunal proceedings.

60. The Claimant appealed the decision in a letter dated 20 July 2017. There then followed a significant and in my finding, unreasonable delay in arranging the appeal. The Tribunal heard evidence from Ms Diane Culkin, HR Case Manager about the appeal arrangements. Initially it was arranged (in a letter dated 31 July) for 4 September 2017 but this was cancelled by Louise Spencer in an email dated 1 August 2017. I find that the letter dated 31 July 2017 was never sent to the Claimant. As of 18 August 2017 the Claimant sent an email advising she would be out of the country until 5 September and was awaiting to hear about her appeal. Ms Culkin acknowledged this email to say they were still seeking a date.

61. The tribunal saw a letter dated 21 August 2017 from Ms Culkin advising the appeal had been arranged for 27 September 2017. This was inexplicable as on 18 August 2017 Ms Culkin had emailed Ms Miller to advise that they had provisionally arranged 27 September 2017 but it had to be rearranged as Ms Beattie was unable to attend.

62. On 21 August 2017 the Claimant's RCN union representative advised Ms Culkin of dates she was able to make an appeal offering 6 dates in September and October.

63. Ms Miller then chased Ms Culkin again on 28 September 2017 about the appeal arrangements. She raised concern about the delay and that a 4 month delay was totally unacceptable. On 2 October 2017 Ms Culkin sent a letter to say the appeal hearing had been arranged for on 3 November 2017 however this was a date on which the Claimant's union representative was unavailable and no attempt had been made to check the date with the Claimant's union representative.

64. Eventually the appeal hearing managed to be arranged for 24 October 2017. The Respondent's disciplinary procedure provides that appeals should normally take place within five weeks of receipt of the appeal although it acknowledges there may be circumstances when this period may need to be extended.

65. In evidence Ms Culkin apologised for the delay but said the delay was primarily due to the union representative's unavailability. I do not accept this was the case. Ms Miller had offered available dates on a number of occasions. The Claimant's appeal was dated 20 July 2017. There was no contact from the Respondent until Ms Culkin emailed in response to an email from the Claimant on 18 August 2017. Whilst arrangements had gone on in the background to try and set a date for the appeal there were long periods where nothing happened to progress matters, namely between 21 August 2017 and 28 September 2017. I find the delay in arranging the appeal was wholly attributable to the Respondent and the delay was unreasonable.

66. The appeal did not take place as the Claimant withdrew her appeal on 23 October 2017. There was a dispute between the parties as to the reason. In the Claimant's letter to the appeal panel the Claimant stated:

"The significant delay in scheduling this hearing, which followed an extremely lengthy investigation process has had a considerable impact on my mental health. Unfortunately, this is such that I do not feel able to cope with the inevitable interrogation and hostile environment which awaits me at the hearing."

67. Ms Culkin emailed Ms Miller to enquire if the Claimant wanted to reschedule the hearing, Ms Miller clarified she did not and was withdrawing her appeal. Ms Culkin gave evidence that she telephoned and spoke to Ms Miller on 23 October 2017 as she was concerned withdrawing the appeal was the right decision. Ms Culkin gave evidence that Ms Miller informed her that the reason the Claimant had withdrawn her appeal was she was concerned she may say something at the appeal hearing that would jeopordise her NMC registration.

68. On 26 October 2017 the Claimant received confirmation from the NMC that there was no case to answer but that the NMC had given her advice. The letter from the NMC was dated 24 October 2017. The outcome records the Claimant acknowledged she had discussed and promoted Aloe Vera products with colleagues occasionally during working hours and that patients could have bought products from her online shop although she would not have known who had accessed the shop. In relation to selling to patients in the Claimant's care the NMC concluded there was insufficient evidence as the patients had declined to take the matter further.

69. That same date the Claimant, via her union representative sought to reinstate her appeal against her dismissal. Ms Culkin agreed to review the request but subsequently drafted a letter dated 2 November 2017 advising that the appeal would not be permitted to be reinstated. The reasons given were that when the Claimant made her decision to withdraw her appeal she had fully considered her reasons for doing so and fully understood the consequences of her decision. This letter was emailed to Suzanne Miller who did not pick up the email until 8 November 2017. Ms Culkin informed Ms Miller the Claimant would be sent the letter that day but for reasons unexplained it was not sent until 20 November 2017.

Conclusions

Reason for dismissal – has the Respondent shown a potentially fair reason?

70. The Respondent relied upon the reason for dismissal being misconduct which is a potentially fair reason under Section 98 (2) ERA 1996. There was no serious or meaningful challenge to this being the actual reason relied upon by Ms Beattie in reaching her decision to dismiss the Claimant. I find the Respondent has shown the reason for dismissal to be misconduct. Promotion and selling products to women on a maternity caseload by a midwife, where the said products were not authorised medicinal products could amount to serious misconduct. Furthermore, attempting to recruit women on a caseload to sell unauthorised products as well as recruiting student midwives and others to work as representatives was also potentially in breach of the Respondent's Policy prohibiting secondary employment being undertaken during work time.

71. Midwives are held within the highest position of trust by women in their care and it is of the utmost importance that they take care to only recommend authorised products.

72. This leads me onto S98 (4) and whether the Respondent has acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant

Discussion

The Investigation

73. The Respondent, having received two separate patient complaints within a few days that the Claimant had promoted Aloe Vera products and had allegedly told both patients that she could earn more selling this product than being a midwife, was wholly reasonable in commencing an investigation especially given the counselling that had been given to the Claimant in February 2015.

74. There was a lack of clarity and transparency surrounding who was leading and involved with the investigation. Ms McKnight was appointed but it was clear that a number of other individuals were involved including Ms Schofield and Ms Burke. Ms Schofield's visit to Patient 2 in her home was not disclosed as part of the investigation and no notes were ever available of the discussion. It only transpired at the disciplinary hearing that the visit had taken place. The Respondent's witnesses did not deal with the involvement of Rebecca Smyth who was involved in telephoning a student midwife.

75. The role of an investigating officer is to gather all of the facts, for and against proving an allegation and present these to the disciplinary officer so they can make an impartial decision. I find that Ms McKnight did not follow up investigations that Ms Schofield had contacted a friend of the Claimant (Gemma Randall) who the Claimant had put forward as supporting the Claimant at investigation hearing after being told of this at the investigation meeting in may 2016. There was reasonable evidence in the form of a text message exchange between the Claimant and Ms Randall that Ms Randall had not made the suggested statement to Ms Schofield as was presented in Employee 2 statement in the investigation pack. I found that Employee 2's statement was either inaccurate or there was a third supporting statement taken by Ms Schofield that was never included as part of the investigation.

76. Ms McKnight also did not disclose to the Disciplinary Manager or include in her report that she was in possession of a statement a patient had made to the LSA even though the LSA investigating manager informed Ms McKnight that the patient had consented for the statement to be shared. I found that that Patient A in the LSA statement was also Patient 1 and the statement contained some inconsistencies. These at the very least should have been disclosed to the Claimant to enable her to have explored these inconsistencies and make representations at the disciplinary hearing.

77. Some of the witness statements had been taken in 2016 but the witnesses had not been asked to sign them and there were only draft notes. These had to be re visited many months later. In some cases notes of statements were lost

and not pursued. Some witness statements appear to have been changed with earlier versions not being disclosed to the Claimant.

78. There was evidence that the confidentiality of the investigation was not afforded the proper respect it deserved particularly given the close connections the Claimant had with her local community. No attempt was made to investigate the Claimant's concerns when this was raised. Ms Schofield stated that the allegations were being widely discussed when she visited Langold Children's Center a few days after the initial complaints from Patients 1 and 2. There was no enquiry as to how staff were aware of the allegations and how this may have affected the witness statements taken from staff at the centre.

79. The way in which the investigations were conducted by the university were in my view open to a lack of impartiality and freedom for statements to be given in an open and confidential manner. The university gathered all of the student midwives together at a group meeting and there are grounds to conclude this could have led to pressure on the students to toe a particular line especially as the Claimant was described as having breached the NMC Code by Ms Burke at that meeting. At this point the Claimant was still under investigation Further, Ms Burke herself confirmed that others who worked in the unit were involved with selling the Aloe Vera products. If others (unknown) were selling the products and had been told this breached the NMC Code then this should have been followed up by Ms McKnight. The student midwives may have found it difficult to say anything other than what they said in the "group" statement they gave. The student midwives were clearly instructed not to deviate from the group statement and were even told a form of words to tell the Claimant or her union representative if they were approached for a statement. This was not conducive to gathering facts and evidence in an open and fair investigation.

Delay

80. The ACAS Code of Practice provides that it is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case (paragraph 5). Further the meeting to discuss the problem (the disciplinary hearing) should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case (paragraph 10). At paragraph 26 it provides that appeals should be heard without unreasonable delay.

81. The Respondent submitted that the delay did not cause any real prejudice to the Claimant as she continued to work and any quicker investigation would have meant she would only have been dismissed sooner.

82. I do not accept these contentions.

83. The delay in conducting the investigation into what were relatively straightforward allegations was significant. The allegations were first made in February 2016. The Claimant was off sick and too unwell too engage in the investigation from June to December 2016 and Ms McKnight unfortunately fractured her ankle and was absent from August to November 2016. The Claimant had given a statement and attended an investigation meeting on 5 May 2016. There was no reason why the investigation could not have progressed some way during her absence. There was a delay until December 2016 to take

statements from individual student midwives by which point, following the group meeting in May 2016 could have resulted in inconsistent recollections. The investigation report was not concluded until the end of April 2017 at the earliest and not communicated to the Claimant until 23 May 2017 which is 15 months after the allegations were first raised.

84. Ms McKnight lost statements and notes of meetings which then had to be re taken months later. This could have affected the witnesses recollection of events.

85. The disciplinary hearing did not take place until 22 June 2017. The Respondent was clearly concerned at the delay in completing the investigation as can be seen from the email instruction from Ms Dickinson to Ms McKnight that she complete the report without further delay.

86. I also find that the delay in hearing the appeal was unreasonable. Whilst senior managers authorised to hear the appeal may have busy diaries it is unreasonable and unfair for a healthcare professional who has a career dependent appeal pending to have to wait over four months to have an appeal hearing arranged. It was not a reasonable position to blame the Claimant's union representative unavailability for the delay in the appeal. Ms Miller was proactive and whilst may have had some unavailability took steps to inform the Respondent of these yet still there were long periods when nothing was done to progress the appeal arrangements. Ms Culkin was entitled to accept Ms Miller's explanation as to why the Claimant decided to withdraw her appeal however having made the Claimant wait four months for an appeal hearing and then deny her change of mind communicated in only two days from the decision to withdraw was not in my judgment a very balanced position to have taken.

Anonymity of witness statements

87. If a patient makes a complaint about a healthcare professional it may in certain circumstances be appropriate for the complaint / statement to be anonymised. However this must be balanced with ensuring that an adequate investigation is undertaken to ensure what the patient is alleging can be substantiated or verified and an employee know the case they are facing. No checks were undertaken by Ms Schofield or Ms McKnight about the complaints made by either patient or even if the Claimant was actually their midwife. This was particularly important as Ms McKnight was later in possession of an LSA statement that was Patient 1 and was potentially contradictory. Ms McKnight failed to declare or share this statement with Ms Beattie or follow up on the inconsistencies.

88. There was no explanation as to why Employee 1 and Employee 2 statements were anonymised. They were not patients but employees of a children's center nor were they within the Respondent's employment. The Claimant presented evidence that one of the Employee's statement may have been inconsistent with what Ms Schofield had presented (Gemma Randall and her text message). This was not investigated or followed up.

89. For these reasons I have concluded that the investigation was not reasonable and there was not a fair procedure in accordance with Section 98 (4). Whilst Ms Beattie sought to remedy some of the defects such as ensuring as

many statements were signed this was so far after the events it did not in my view cure the defective investigation. Ms Beattie was faced with an investigation that was incomplete and not balanced. I therefore find the dismissal was unfair procedurally.

90. Notwithstanding the failings of the investigation I find that Ms Beattie had a reasonable belief that the Claimant was guilty of the alleged misconduct based on the evidence before her. The Respondent had received two unsolicited complaints from patients that they had been offered Aloe Vera products by the Claimant. Both independently contained the statement the Claimant was attributed as making that she could earn more selling the product than as a midwife. Employee 1 was approached by the Claimant and asked if she would be interested in selling Aloe Vera products and reported two parents were asked to purchase products. A student midwife gave a statement that she had personally observed the Claimant trying to persuade patients to sell the product and that the Claimant had left a box of products with a patient to sell. There was no reason to doubt the validity of these statements which to an extent corroborated each other. Although there were inconsistences between the statements Patient 1 gave to Alison Schofield and the LSA there remained some important consistencies. Further, a number of the student midwives confirmed that the Claimant had added them to her Facebook page without their permission.

91. I also conclude that the dismissal was within the range of reasonable responses based on the allegations against the Claimant. The Claimant had been told to keep her extra business activity outside of working hours yet there was clear evidence she had not done so. In addition, for reasons outlined above having concluded there was a reasonable belief the Claimant had promoted non authorised products to patients in her case this in my judgment amounted to gross misconduct. The Claimant also had been undertaking business activities at work namely promoting Aloe Vera products to patients, colleagues and students which was in contravention of the Respondent's Policy prohibiting secondary employment being undertaken during work time.

Polkey

92. I must go on to assess that had all of procedural irregularities identified above not taken place would the Claimant have still been dismissed. In other words if Ms Beattie had been presented with the investigation cured of the defects outlined above, would she still have arrived at the same decision. After very careful consideration of all of the procedural flaws identified above it is my conclusion that there was a 100% chance the Claimant would still have been dismissed. None of the procedural defects changed the evidence from the two patients and the student midwife. Ms Beattie was very clear about this in her evidence and I entirely accept her reasons given namely:

- Two unconnected patients had both reported the Claimant had talked to them about Aloe Vera products
- A student midwife (Amber Green) reported she had observed that Claimant promoting the Aloe Vera products to women in her care

93. In addition I have concluded:

- Even though Ms Beattie had not seen the LSA statement, having now seen it as part of these proceedings it still confirmed Ms Beattie's concerns that the Claimant was talking to pregnant women about Aloe Vera products and these were not on the list of recommended products that midwives can prescribe;
- The Claimant herself accepted she had talked to colleagues about Aloe Vera products during work time and had "blurred the lines";
- It was not is dispute that the Claimant had added colleagues and student midwives to social media page despite having been warned not to do so by Ms McKnight in 2015;
- As a mentor the Claimant was in a position of trust and the student midwives could have easily been influenced and led by her promotion of these products.

94. For these reasons the Claimant's compensatory award will be reduced by 100% as I have concluded this is the percentage chance she still would have been dismissed but for the procedural flaws in the investigation.

Contributory fault

95. Having made a 100% Polkey reduction it is not necessary to go on to consider contributory fault in relation to the compensatory award under S123 (6) ERA 1996 as there is no compensatory award to reduce. This leaves the question as to whether a reduction should be made to the basic award under S122 (2) ERA 1996. The Respondent submitted that this should be assessed as very high and even at 100% for both the basic and compensatory award.

96. The Claimant had been given a clear instruction by Ms McKnight in 2015 to keep her job out of working hours. There was a wealth of evidence to suggest the Claimant had not heeded that warning; the Aloe Vera questionnaire found amongst patient notes, the corroboration from students and patients that the Claimant had discussed the products and the Claimant's own admission that she may have "blurred the lines". There was no evidence of calculated and deliberate targeting of women in her care but there was evidence to conclude the Claimant was careless and did not fully appreciate the boundaries between her role as a midwife and her position as a Forever Living Distributor. The Claimant's own position was that everyone in her community knew her well. In turn many must have known she was a midwife. In these circumstances extra care should have been taken by the Claimant to ensure she was not associated directly with endorsing products that were not authorised for pregnant women by the appropriate NHS guidelines but instead the Claimant actively promoted products on social media and in the work environment.

97. I have considered whether to reduce the basic award for contributory fault especially in light if the 100% Polkey reduction to the compensatory award. I do not accept that a 100% reduction is appropriate in light of the Respondent's failing in respect of the investigation. In light of the evidence two unconnected patients and a student midwife that the Claimant had promoted products to women in her care I conclude that it is just and equitable to reduce her basic award by 50%.

Wrongful dismissal

98. Having found that the Claimant was guilty of misconduct that would have allowed the respondent to treat her as summarily dismissed I dismiss the wrongful dismissal claim.

Remedy

Reinstatement

99. I decline to award reinstatement given my findings on Polkey and contributory fault.

100. I therefore make an order that the Claimant be awarded a basic award of £7414.55 to be reduced by 50% to the sum of £3720.07 but no compensatory award due to a 100% Polkey reduction. I further award the sum of £450 for loss of statutory rights.

_____

Employment Judge Moore

_____

Date: - 26 July 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

30 July 2018

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FOR EMPLOYMENT TRIBUNALS