**EMPLOYMENT TRIBUNALS**

| Claimant | | Respondent |
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| **SARAH STANGOE** | v | **SOUTH WARWICKSHIRE NHS TRUST** |

**FINAL HEARING**

Heard at: **Birmingham** on: **22.10.18 & 23.10.18**
Before: **Employment Judge McCluggage**

*Appearance*:
For the Claimant: **Mr Wallace** (counsel)
For the Respondent: **Mr Sheppard** (counsel)

**JUDGMENT**

1) The claim for unfair dismissal is not well-founded and is dismissed.

2) The claim for wrongful dismissal is well founded and succeeds.

3) If the parties are not able to agree damages for the wrongful dismissal claim, they are to make joint request to the tribunal for listing of a Remedy hearing with an estimated length of hearing of 1 hour.

Empoyment Judge McCluggage

Date: 16 November 2018

## REASONS

### Introduction

1. By a claim form dated 6 April 2018 the Claimant Sarah Stangoe brings claims against her former employer the Respondent, South Warwickshire NHS Trust.

2. I was provided with an agreed bundle of documents, an agreed chronology, a list of issues, and each counsel provided me with a short skeleton argument. I received witness statements and heard oral evidence from the Claimant herself, and called by the Respondent: Kathy Wagstaff (a clinical lead nurse), Simon Illingworth (the decision-maker) and Helen Lancaster (the appeal decision-maker).

3. References below in square brackets are to pages in the agreed bundle of documents.

### Facts

4. After hearing evidence and submissions, I found the following facts.

5. The Claimant was employed by the Respondent from 2 August 2010 as a Care Support Worker, Band 2 at the Central England Rehabilitation Hospital at Leamington Spa.

6. The Claimant worked in neuro-rehabilitation wards. I was told and accept that the vast majority of patients are both physically and cognitively disabled by reason of acquired or constitutional brain injury and most would lack capacity for treatment purposes. Most of the patient base would be unable to speak up for themselves.

7. The Claimant's line manager was Kate Murphy, Campion Ward Manager.

8. The Claimant's appraisals were good though there was mention that she could be loud at times: see for example the 2015 appraisal.

9. There had been some issues raised with the Claimant's conduct prior to the immediate events that led to her dismissal in October 2018.

10. In 2014 there was an allegation that the Claimant had roughly treated a patient and been aggressive [138-140] but it was felt there was no evidence outside of the relatives' evidence and a witness denied ill treatment. The complaint was not pursued further.

11. In June 2017 a patient's family raised a written complaint of mistreatment of the patient [135]. There were a variety of issues raised in this letter, such as washing the patient too roughly and pushing the patient's wheelchair and hoisting the patient roughly.

12. This led to a meeting between Kathleen Wagstaff, the Clinical Lead Nurse - CERU, and the Claimant on 27 June 2017 at which the Claimant was assisted by a union

representative, Bash Rafiq. This meeting did not lead to a disciplinary sanction but rather Informal Action. The status of such an outcome is addressed in the Respondent's Disciplinary Policy which is a lengthy document appearing at [47-79]. The status of Informal action is described at para 13 [55]. It is said to refer "in most cases" to relate to issues of minor misconduct and it is apparent that it is designed to constitute informal advice to an employee. It is to my mind plainly designed to stand as a warning outside of formal sanction with the expectation that the employee will take heed and avoid problems in the future. The way in which this complaint was dealt with formed one strand of the Claimant's argument in relation to unfair dismissal.

13. A factual issue between the parties was whether the Claimant received the outcome letter dated 27 June 2017. The Respondent's position was that Ms Wagstaff handed the outcome letter to the Claimant personally. Ms Wagstaff was adamant in oral evidence that she had. The Claimant was adamant that she had not. The Claimant's point was that she was on holiday on 27 June 2017. Ms Wagstaff did not specify that was the date she handed the letter over and in oral evidence said that it may have been after C's holiday. I found it persuasive that the Claimant denied having received such a letter during the investigatory meeting on 12 September 2017 into the later disciplinary issue arising in August [130]. On balance, I preferred the Claimant's evidence on this point and believe Ms Wagstaff was mistaken and the letter was not given as said.

14. However, I concluded that those attending the 22 June 2017 meeting knew that the result was Informal Action within the Disciplinary Policy. Ms Wagstaff was assisted by a HR representative and the Claimant by a union representative. Had the outcome not been clear I am sure that someone would have raised this afterwards. Unfortunately, no notes were available of the meeting, but I was confident the result would have been orally communicated.

15. The 22 June letter raised issues of training for the Claimant in terms of a CSW Away Day and customer service training. It was not in dispute that the Claimant did not receive this training. There was some disagreement between the parties as to whether it was the Claimant's responsibility to organise such or whether the Respondent should have taken active steps to facilitate such training. Kate Murphy did in fact seek to follow this up describing a communication course as an "excellent idea" in an email on 8.8.17 [107A]. It appears that the training was overtaken by events.

16. Matters bearing on the event that led to the actual dismissal began on 20 August 2017.

17. The Claimant had been working with another Care Worker, Kathy Taylor on that day, it being a Sunday afternoon.

18. Kathy Taylor was inexperienced on CERU, having only worked there for a few months, though she had longer experience of nursing. She had not worked with the Claimant before.

19. One of the patients within their care that night will be referred to as "Patient L".

20. At the end of her shift, Ms Taylor raised concerns about the Claiamnt's care of Patient L to Rosamma Idichandy, a Band 6 Nurse.

21. A couple of days later on 22 August 2017, Ms Taylor formally raised concern about the Claimant's handling of Patient L to Kate Murphy, who was the Campion Ward Manager and the Claimant's line manager. Ms Murphy asked Ms Taylor to write down a record of what she said happened, which she did, and that record appears at [115].

22. Ms Murphy in turn raised the issue with Ms Wagstaff who suspended the Claimant from duty, confirming that by a letter of the same date [118].

23. Ms Murphy was appointed an investigating officer to see whether the matter warranted disciplinary action. I noted that the Claimant has challenged as to whether it was appropriate to do so given Ms Taylor had raised the issue directly with Ms Murphy on 22 August.

24. Ms Murphy proceeded to interview Ms. Kelly (on 8 September 2017) [111] and the Claimant (on 12 August 2017) [112]. They had different accounts of what had happened with Patient L.

25. In effect Ms Taylor was alleging that the Claimant had been shouting at Patient L in an aggressive manner in seeking to get him to manoeuvre himself using a hoist and then roll on the bed. It was further alleged that the Claimant forcibly sought to bend Patient L's knee in what was described in an aggressive manner. It was noted in Ms Taylor's investigatory meeting that Patient L's limbs were contracted and stiff. It was confirmed in oral evidence and I accepted that Patient L would have contractures and it would have been uncomfortable for him to have his knee bent. The patient was described as being anxious. It was further alleged that the Claimant was complaining in front of the patient that he had soiled himself for the second time that day. Ms Taylor also reported that at a later stage of the day, the Claimant had taken his sheet off, the Claimant observed that he had soiled himself again and said that she was not "seeing to him every 5 minutes" and that she would leave the cleaning for the night staff.

26. Ms Murphy recommended in her Investigatory Report [108-114] that the case be referred for formal disciplinary action. Ms Murphy gave a further recommendation that the Claimant be transferred to an area where patients were much less vulnerable and are better able to express themselves [114].

27. The matter was progressed by the Respondent to a disciplinary hearing, initially set for 23 October 2017, then postponed to 10 November 2017. The allegation was stated concisely that, "on Sunday 20 August 2017 on Campion Ward you were seen to be verbally and physically aggressive towards a patient". This was said to have contravened the Trust Disciplinary Rules at paragraphs 2.1 and 3.1, including "Gross or Wilful Negligence" and "Abuse of Patients, visitors or members of staff". The letter warned that the allegations could amount to gross misconduct.

28. In advance of the disciplinary hearing, the Claimant prepared a statement for the panel [151] and obtained various references [159-166].

29. One document in the bundle [167B] showed that Ms Murphy had shown her Investigatory Report to Ms Wagstaff to check that it was sufficient. It was Ms Murphy's first investigation report. Ms Wagstaff responded on 22 October 2017, "…case looks good, well done".

30. The HR Advisor assisting management in bringing the disciplinary proceedings, Heather Ward, had emailed Ms Murphy on 18 October 2017 [167B] to say: "Finally, just thinking we should have a quick meeting with Kathy prior to the hearing to make sure she is up-to-date on what we want to her to say as our witness" (sic). I concluded that this was a reference to Kathy Wagstaff rather than Kathy Taylor as it was not initially the Respondent's intention to call Kathy Taylor as a witness.

31. The disciplinary hearing proceeded on 10 November 2017 with Mr Simon Illingworth, the Associate Director of Operations as decision-maker. The notes of this meeting appear at [168-175] and were expressly agreed by the Claimant in her oral evidence. I accepted them as accurate with the recognition that they would not be a word for word account. Mr Illingworth was assisted by Ms Kate Hughes, another HR Manager. The Claimant was assisted by Mr Anselme Uwihanganye, a Unison representative.

32. Ms Brown stated in the meeting that management considered Joanne Kelly's written statement was sufficient so it was not proposed to call her as a witness. Ms Wagstaff was however called as she was required to give details of the previous investigation into the June incident and the informal action. Ms Wagstaff confirmed within her account to the disciplinary hearing that the patients in both incidents could not communicate for themselves.

33. A point raised in the hearing by Mr Uwihanganye was that the allegations were not credible because Kathy Taylor and the Claimant had been engaging in texts that evening and the next day which were inconsistent with her showing any upset.

34. The Claimant gave her account to the disciplinary hearing as to events and what she would have done differently. She denied Kathy Taylor's account. She answered questions. She admitted [174, para 57] that she could have raised her voice though not shouted and that she may have put her hand on the patient's knee to stop spasms.

35. The disciplinary panel felt that they needed to hear from Kathy Taylor and so adjourned the hearing. Mr Illingworth told me in oral evidence that the main reason for this was that he found the nature of the texts sent between the two women to be difficult to reconcile with Ms Taylor's account that she had been shocked by what she had seen and did not want to work with the Claimant anymore. The relevant texts were included in the bundle [147-150] and contain a substantial number of communications between them about a man who was a romantic interest over the social media application called

Whatsapp. These communications started at 19:15 and went into the next day with various communications on 21 and 22 August. They read as warm and friendly communications which one would expect between good friends rather than 2 workmates who barely knew each other (one of whom had made a complaint about the other) which was in fact the case.

36. The reconvened hearing took place on 15 November 2017 and Joanne Kelly attended and was questioned. Mr Illingworth predominantly questioned Ms Kelly as to the texts and the relationship between the two ladies. He did not ask anything about the incident involving the patient itself. Ms Kelly was questioned by Mr Uwihanganye about why the incident was not reported earlier and why she had not intervened. Some further questions were asked by those present about the messaging. Ms Kelly did confirm [179, para 25] that she understood the consequences of the allegations, that she was there for the patient and did not consider that the Claimant had shown respect or dignity.

37. Following this hearing, Mr Illingworth made a decision to dismiss the Claimant, which was confirmed in a letter dated 15 November 2017. In short, Mr Illingworth found the allegation proven and that the Claimant did not have sufficient insight into her actions to reassure him that such conduct would not happen again. The Claimant was dismissed without notice. Having heard from Mr Illingworth, I found that he was a reliable witness and what he said in contemporaneous documents reflected his views at that time.

38. The Respondent referred the conduct issue to the Disclosure and Barring Service. This service took no action.

39. The Claimant appealed the decision on 20 December 2017 and an appeal hearing took place on 6 February 2018, conducted by Helen Lancaster. The appeal was essentially a challenge to Mr Illingworth's conclusion that the allegation raised by Joanne Kelly was made out.

40. The Claimant accepted the accuracy of the appeal minutes. At the appeal hearing evidence was presented showing that the Claimant was on holiday as at the date of the 27 June 2017 letter so showing that it was unlikely Ms Wagstaff had handed the letter to the Claimant on that date.

41. One point raised in the appeal, which was emphasised by Claimant's counsel in the current proceedings, was that Mr Illingworth accepted that while "the relatives had not been informed under the duty of candour and that he had not believed there was a serious and reportable harm, in hindsight this was something to consider" [210]. I heard evidence from Ms Lancaster about the duty of candour and accepted that it would not have been Mr Illingworth's decision, and further, whether such an incident is reported is often dependent upon potential impact on relatives.

42. The appeal was dismissed. The appeal letter date 8 February 2018 dealt in a reasoned manner with each of the grounds of appeal raised by the Claimant. The Claimant agreed in oral evidence that all points were dealt with.

**Law**

Unfair Dismissal

43. Section 98(1) of the *Employment Rights Act 1996* requires an employer to establish a potentially fair reason for a dismissal. In considering the fairness of the dismissal the tribunal is required to apply the considerations set out in section 98(4) of the Employment Rights Act. This entails consideration of whether the dismissal was fair or unfair having regard to the reason shown by the employer whereby the tribunal takes into account the circumstances of the case, size of the employer and equity.

44. Although the statutory test is of course overlaid with much case law where conduct is concerned, the considerations within Section 98(4) ultimately is the starting point and indeed the end point for any judgment applied to the facts found by the tribunal.

45. As this is said to be a conduct dismissal, the well-known questions from British Home Stores Ltd -v- Burchell [1978] IRLR 378, endorsed by the Court of Appeal in Foley v Post Office [2000] ICR 1283 are apposite:

    (i) whether the employer genuinely believed that the employee was guilty of the alleged conduct;
    (ii) that the employer had reasonable grounds to sustain its belief;
    (iii) whether the employer had carried out a reasonable amount of investigation into the matter.

46. Turner v East Midlands Trains Ltd [2012] EWCA Civ 1470, [2013] ICR 525 re-affirmed that the band of reasonable responses test did not simply apply to the question of whether the sanction of dismissal was permissible: it applied to all aspects of the dismissal process, including whether the procedures adopted by the employer were adequate

47. As recently observed by Lord Wilson in Relly v. Sandwell Metropolitan Borough Council [2018] UKSC 16 at para 22:

> "In effect it has been considered only to require the tribunal to inquire whether the dismissal was within a range of reasonable responses to the reason shown for it and whether it had been preceded by a reasonable amount of investigation."

48. I reminded myself that the law obliges a tribunal to be careful not to substitute its own subjective judgment for that of the employer. The tribunal's role is not to engage in a re-hearing function.

Breach of contract/Wrongful Dismissal

49. In contrast, in considering whether the Respondent was entitled to dismiss the Claimant without notice, I had to consider the underlying truth of the disciplinary allegations to determine whether the Claimant was in repudiatory breach of contract. If the Claimant had repudiated the contract by her actions, the Respondent would be entitled to accept the breach and terminate summarily.

50. Whether there has been a repudiatory breach of contract will depend on whether the employee's conduct so undermines the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to maintain the employee in his employment.

51. The tribunal is entitled to take into account what the contract of employment says about what types of behaviour might constitute gross misconduct.

52. Given this was a case where I heard evidence on the substance of the allegations, I was careful to keep any factual issues relevant to unfair dismissal distinct from the issue of breach of contract. The specific findings of fact I made relevant to the wrongful dismissal claim are included within my conclusions on the latter issue.

**Analysis and Conclusions**

Wrongful Dismissal

53. The Respondent contended that the evidence showed the Claimant had acted as alleged; the Claimant denied this and said she had acted properly and responsibly to Patient L.

54. I had in evidence what the Claimant said about the incident in her witness statement and I heard her cross-examined about it.

55. As requested by the Respondent I took into account the hearsay documentation within the hearing bundle as to what Joanne Kelly had said about the incident; however, Joanne Kelly was not challenged within that material on the facts of the incident concerning Patient L.

56. In contrast, I did hear the Claimant cross-examined on her account. She impressed me as a witness and gave appropriate concessions and responses when pressed. For example, she accepted immediately that if she had acted as alleged then it would amount to gross misconduct.

57. I also took into account that while there was a complaint made by Joanne Kelly at the end of her shift, her interactions with the Claimant in the texts on the evening of the alleged incident and the following day gave me sufficient cause for concern as to Ms Kelly's state of mind that I would have wished to hear from her.

58. The fact that there had been some complaints in the past, none of which had led to confirmed disciplinary action was something I gave some small weight to, but it did not illuminate the detail of the contested truth of the single incident I had to deal with.

59. Ms Kelly was still employed by the Respondent and I was given no reason as to why she could not give evidence, other than that Respondent's counsel considered it common not to call a witness in such circumstances. That is not a reason why Ms Kelly could not have given her account to me if the Respondent sought to call her. It was quite apparent that this was an incident involving one person's word against another. I drew no inferences from the Respondent's failure to call their key witness; I merely weighed up the evidence I had.

60. Overall, I concluded on the evidence before me that the incident occurred broadly as the Claimant outlined between paragraphs 17 to 24 of her witness statement.

61. Such conduct could not in my judgment amount to repudiatory breach.

62. Therefore, the decision to dismiss without notice was in breach of contract.

63. I was told that the parties had evidence of the Claimant's wages, but these were not provided to me. I expect that the parties will be able to calculate the Claimant's notice pay easily. If they cannot, they should apply back to the tribunal for a remedy hearing.

Unfair Dismissal.

64. I approach my conclusions broadly on the basis of the Claimant's List of Issues:

*Did the Respondent have a genuine believe that the Claimant was guilty of misconduct?*

65. I concluded that Mr Illingworth as decision-maker came to a genuinely held view. I found him to be a credible witness. I found no evidence or facts that would undermine his bona fides as the dismissing officer.

*Did the Respondent carry out as much investigation as was reasonable in all the circumstances?*

66. A number of discrete criticisms were raised. The first went to who was being interviewed. In my judgement on the basis of Patient L's medical condition, he could not reasonably have been interviewed. While Patient L's wife could in theory be interviewed, she was not in the room. I accepted that it would likely cause her distress in a case with no evidence of injury and the Respondent's decision was reasonable.

67. The second was whether it was reasonable for Ms Murphy to rely upon a previous informal warning when referring the case to a disciplinary hearing. Given I have concluded that the Claimant knew there was 'informal action' taken even though she did not receive the letter, I could not conclude it was unfair of Ms Murphy to take this into account. Given the nature of the allegation made which would likely amount to gross misconduct if true, it would be surprising if the allegation was not referred to a disciplinary hearing.

68. Ms. Murphy's independent was questioned. I did not conclude that the email interaction with Ms Wagstaff, though perhaps unwise, undermined her independence as an investigator. This would not in any event undermine my view of the overall fairness or otherwise of the dismissal process, given Ms Wagstaff was not the decision-maker.

69. The fourth issue was whether Ms Murphy's referral to a disciplinary hearing was "pre-determined". I concluded that the fact Ms Murphy received Joanne Kelly's complaint did not undermine her independence. Receiving a complaint is different from determining its validity. Merely receiving a complaint does not make one a 'witness' and it was not disputed that the complaint was made. It did not undermine Ms Murphy's independence as an investigatory officer. It might be of more concern that Ms Murphy made a recommendation as to whether the Claimant and Ms Kelly could work together in the conclusions of her report which implied her view of the Claimant, but upon hearing from Mr. Illingworth I was satisfied that he made up his own mind. He agreed that it was inappropriate for Ms Murphy to have stated a view.

70. Though not on the List of Issues I would make clear that the tone of Ms Ward's email dated 18.10.17 speaking of saying what "they wanted" Ms Wagstaff to say is to be deprecated. I did not hear from Ms Ward to be able to explore further. Little was made of it by the Claimant during the hearing. Having heard from Ms Wagstaff I concluded that whatever Ms Ward's actions it did not impugn Ms Wagstaff's account to the disciplinary hearing or the overall procedure. Had there been evidence that the meeting was actually held with Kathy Taylor to tell her "what we want her to say" (this was not explored in evidence) I would have been very concerned as to the fairness of the procedure.

71. Further, I did not consider that the Respondent's lack of progression of the further training recommended after the informal action added to any potential fairness either procedurally or substantively. The Claimant, an experienced care support worker, did not need to be told or trained not to shout or mishandle patients.

*The reasonableness of the decision to dismiss*

72. I took into account that the Respondent is a large public-sector organisation with both (pressed) significant resources and access to human resources expertise and that the Claimant had long service as an employee.

73. Both Mr Illingworth and the Claimant separately agreed in oral evidence that if the conduct alleged had happened, the conduct was so serious as to justify dismissal. I agreed with this view. Mishandling and shouting at Patient L would be inherently and obviously serious given his general condition. It would give rise to a lack of trust as to how a nurse guilty of such behaviour might act with other patients, who of course could not largely speak up for themselves on the unit.

74. In my judgment, Mr Illingworth was reasonably entitled to come to his view that the Claimant had behaved as alleged to Patient L. In submission, Mr Wallace based his case for the Claimant on a lack of precise evidence as to "volume" (in terms of shouting) and "pressure" in terms of mishandling. However, it seemed to me that if Ms Taylor's basic account was accepted, there was adequate evidence of both in the handwritten account on the day and in the investigatory meeting. Further, Mr Illingworth had the benefit of hearing from both the Claimant and Ms Taylor in the context of the written documentation. Whilst Ms Taylor was not questioned about the detail of the incident, she said enough for Mr Illingworth to be able to form a view about her character and the context of the texts and decide whether she was credible. He had that important advantage which I did not. In any event, Mr Illingworth would be entitled to come to a different view from my own, providing it was rational and based on adequate material. I concluded that he did have such material, his reasoning was adequate, and so his decision was within the band of reasonable responses open to an employer.

75. I did not consider that the fact Mr Illingworth also made express mention of whether the Claimant had insight into her behaviour was inconsistent with a finding of gross misconduct.

76. Id did not consider that the limited reference made to the informal action and previous complaints shy of disciplinary action impugned the fairness of the dismissal. Firstly, the material incident was serious enough to justify dismissal. Secondly, I assessed that the material was used, for example at [199], as a yardstick as to whether the conduct alleged was wholly out of character or not.

77. Though some time was spent in cross-examination on the point of whether either the June or index incidents amounted to events reportable under the Respondent's "duty of candour", I did not find this advanced the issues. It was an incidental concern in my judgment.

78. Overall, I found the procedure to be fair, including the appeal.

79. In all the circumstances, I concluded that the Respondent acted reasonably in treating the reason given as a sufficient one for dismissal of the Claimant.

Employment Judge McCluggage

Date: 16 November 2018

REASONS SENT TO THE PARTIES ON

19 November 2018