EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Miss L George	**v**	Royal Berkshire NHS Foundation Trust

Heard at: Reading **On:** 28 September 2018

Before: Employment Judge Gumbiti-Zimuto (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Mr S Pender (Solicitor)

JUDGMENT having been sent to the parties on **26 October 2018** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant was employed by the Respondent as a maternity care assistant from 8 April 2002. Apart from a written warning that the Claimant received, about which there has been some controversy in this case, she has an otherwise good record. During the course of 2017, she was told by her line manager, Elizabeth Williams, that she was a valued member of the team. That is what Ms Williams thought at the time and it is no doubt an accurate reflection of the contribution that she made to her employers.

2. The Claimant has a son: the Claimant's son had a girlfriend. The Claimant's son also had an association with a patient, X, who fell pregnant with a child for the Claimant's son. In the course of her employment with the Respondent, without any authority to do so, the Claimant looked at the confidential medical records for patient X.

3. Patient X got to find out that the Claimant had looked at her medical records. Patient X told the community midwife that this had happened.

4. The Claimant accepts that she look at patient X's medical records but says she did so in March (not in February as patient X believed). The claimant has given different reasons for doing so; she did so in order to ascertain the gestation of the pregnancy; at another time, she said that it was also in order to ascertain that patient X was in fact was pregnant; and the Claimant said to her son that the reason that she had looked on the

records was in order to ascertain the address of patient X so that she would not in the course of her ordinary duties in employment with the Respondent be required to attend at her address.

5. It was not until June 2017 that a report was made of the Claimant's inspection of the medical records of patient X. As a result, a disciplinary investigation was instigated.

6. The Respondent's disciplinary procedure and policy has a number of annexes to it, one of which is Annexe 3 which contains a list which is non-exhaustive of examples of gross misconduct, one of which is deliberate misuse of information covered by the Data Protection Act and/or deliberate interference with computerised information.

7. On 22 August, the Claimant was interviewed by Mandy Maycock and Rebecca Blakeley. During the course of that interview, she admitted looking at the confidential medical records of patient X. The investigation report which was subsequently prepared recorded the following:

"On 27 June 2017, an email was sent to the Claimant's team lead by a community midwife reporting that in February 2017 a breach of confidentiality had been verbally reported to her by a patient that she visited. Patient X claimed that she was unhappy as her ex-partner's mother who worked for the Royal Berkshire Hospital within the maternity unit had looked at her details on the maternity system. Patient X was unsure which aspect of her details had been accessed and a subsequent meeting between the reporting community midwife and patient X on 29 March 2017 patient X reported that she had since informed her partner that she had discussed the issue with her midwife and he claimed that his mother had only accessed her records to find out her address to ensure that she was never seen there on a visit in a professional capacity. Patient X declined to register her complaint formally or put it in writing."

8. That appears to be an explanation of how the matter came before the Respondent employer as the subject of an investigation.

9. During the course of the interview, the Claimant said that she did not know patient X directly; she had been informed by her son that patient X was having his baby; the Claimant admitted that she had asked her son what the patient's full name was; and also admitted accessing the patient record. She said that it was for her personal benefit only and she had wanted to confirm that the patient was actually pregnant and what the gestation was. She claimed that she only looked at the initial page where it showed the gestation and she explained that she did not look at any other information on the system and it was put to her that there is evidence of an audit trail which suggested that other pages had been accessed and the Claimant said that she did not recall doing so. The Claimant said that she did not look at the address and she was confused as to why this would have been reported by the patient.

10. Following that interview, it was concluded that there was a case to answer and the Claimant was subsequently invited to attend a disciplinary hearing.

11. In a letter dated 21 September, Elizabeth Williams wrote to the Claimant and asked her to attend a hearing on 2 October. The letter to the Claimant included a comment that the allegation that *"On 17 March 2017, you accessed CMIS maternity system for a patient that you did not appear to require access to."* She stated that the investigation report had found that there was a case for the Claimant to answer and that this could amount to gross misconduct and that the procedure to be followed was that which was set out in the disciplinary procedure and policy. The Claimant was told that she was entitled to attend with a friend or colleague or a representative of a trade union or professional organisation.

12. On 2 October, the Claimant attended the disciplinary hearing. The notes record that at the disciplinary hearing present were the Claimant, Elizabeth Matthews (aka Williams) as hearing manager, Rebecca Blakely the investigating officer and Mandy Smith (aka Maycock) Employee relations advisor.

13. The notes of the disciplinary hearing are fairly laconic. Reading from the notes as they appear in the trial bundle, it records that the introductions; that the purpose of the meeting was explained; that the claimant happy to proceed alone. The question was asked whether the claimant had all the papers she was required to have. This appears have lasted a little bit of time, there was a question whether the Claimant had in fact received all the papers that she ought to have. There was a question about whether the Claimant had been sent the investigation report. However, it is clear that the Claimant did agree to proceed, and she was provided with a further copy of the investigation report. The Claimant had been sent a copy of the investigation report, but she did not had bring a copy of it with her when she arrived at the disciplinary hearing

14. The notes then go on to record as follows:

EM: Do you admit the allegations?
LG: Yes

Shortcut the hearing - No need for RB to present. LG asked if wanted to present anything.

LG: Sorry that I did it. I did look. Did it to satisfy my mind that there was a pregnancy. Had a conversation with her son to say that she would look.

MS: Did you know that it was wrong?
LG: I did know, but I didn't think about it. I looked and then forgot.

No questions
Asked if wanted to wait

Decision: Already on a warning- Know that shouldn't have accessed info. No need to. Decision to dismiss. Considered whether could be moved. Decided not to. Right of appeal.

LG: (Distressed) Explained that the baby was her grandchild and she

needed to help support them. LG won't appeal as can't take any more.

MS: Letter will and explain will be paid any A/L

EW: asked to return equipment. How will she get home. Does she want us to call.

LG: No

15. The decision outcome was notified to the Claimant in a letter dated 9 October and I will refer to just one short passage from the letter and that reads:

"Upholding the allegations confirms a misuse of information covered by the Data Protection Act and gross negligence in the performance of your duties. Your information governance training was in date so you have been aware that you should not access this information. This means that in the light of the first written warning already on your file and an example of gross misconduct being upheld, it is my decision to dismiss you from your position within the Trust with immediate effect."

16. The Claimant appealed the decision. Her appeal letter is dated 11 October 2017, she set out some lengthy grounds of appeal. She began by saying that she only looked at the first page of the data and only looked at it for about a minute. She said that she did not misuse any information which is covered by the Data Protection Act. She wanted to challenge the fact that she was taken through this process when the patient X had refused to take the matter further. She said that the decision was harsh. She wanted to challenge the fact that she had been given a written warning and she said that she did not have a final warning which appears to be something that she thought that the Respondent was taking into account. She wanted to challenge the fact that consideration was not given to her knowing *"how well I did my job over the past 15 years"*. She stated that her credibility was questioned, and she did not believe that all the facts had been fully established. She said that she was now a grandmother of the complainant's daughter and she now faced having her livelihood taken away and not being able to pay her mortgage or offer financial help to her granddaughter.

17. The Claimant's appeal was considered by Ms Sangha and she upheld the decision to dismiss the Claimant.

18. At the beginning of these proceedings, I explained to the Claimant the role of an employment tribunal in a complaint of unfair dismissal such as this.

19. An employee has the right not to be unfairly dismissed. Whether or not an employee has been unfairly dismissed requires first of all for the Tribunal to require the employer to show what the reason for the dismissal was. The reason for the dismissal must be a potentially fair reason as is set out in section 98(1) and (2).

20. If the employer shows that there is a potentially fair reason, it has to be determined whether or not the dismissal was fair or unfair having regard to

all the circumstances including the size and administrative resources of the employer and it has to be determined whether the employer acted reasonably or unreasonably in treating the reason as sufficient reason for dismissing the employee. All this has to be done having regard to equity and the substantial merits of the case.

21. It is for the Respondent to show that it believed that the Claimant was guilty of misconduct, which is the relevant potentially fair reason in this case, that it had reasonable grounds upon which to sustain that belief, and at the stage at which it formed that belief on those grounds it carried out as much investigation into the matter as was reasonable. It is not necessary for the Tribunal itself to have shared the same view of those circumstances.

22. After considering the investigatory and disciplinary processes, what the Tribunal has to do is consider the reasonableness of the employer's decision to dismiss and not substituting its own decision as to what right course to adopt for that of the employer must decide whether the Claimant's dismissal fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if it falls outside the band, the dismissal is unfair and at that stage the burden is neutral and the Tribunal has to make its decision based upon the evidence of the Claimant and the Respondent with neither having the burden of proving reasonableness at that stage.

23. The gravamen of the Claimant's case here has been that it was too harsh to dismiss her. She had been an employee of the Trust for a period of 15 years and apart from a written warning, which although she was told she had been given the warning in fact was not placed on her personnel file in accordance with the Respondent's policies and procedures, she had a good working record. This has been confirmed by her line manager as recently as a year or so before the disciplinary hearing and a few months before the matters giving rise to the dismissal.

24. The difficulty that the Claimant faces in this case is that if she admits the misconduct at the time of the disciplinary hearing. At the time of the investigation meeting she recognised that she had done something which is wrong. It is clear from the Respondent's procedures that accessing improperly patient medical records is an act of misconduct. Anyone who works as a professional in the health service should be well aware of the need to maintain patient confidentiality. The Claimant was given training which would have emphasised to her the importance of maintaining patient confidentiality. The dismissal of the Claimant for breach of that is in my view something that is clearly within the range of responses of a reasonable employer.

25. Are there any circumstances that arise in this particular case that take it out of that? Should there for instance have been greater regard paid to the Claimant's disciplinary record or the fact that she admitted her misconduct relatively early on.

26. I am satisfied that whilst it may well have been possible for Mrs Williams to come to a different conclusion in relation to the Claimant's case, she was

entitled to conclude as she did and she decided that this was a case where dismissal was appropriate. She formed the view that the Claimant had not been forthright in the way that she had disclosed events relating to the investigation. She actually formed the view that the Claimant had not been telling the truth about matters until quite late on. It is this which appears to have been the straw that broke the camel's back in her decision to dismiss the Claimant. She felt that this was something that meant that she could not trust the Claimant to continue in the Respondent's employment.

27. Those are conclusions that she was entitled to come to on the information that she had gathered and on the admissions that had been made by the Claimant. It is said by Ms Williams that she did take into account the Claimant's good record which she recognised but she did not consider that that was sufficient to save the Claimant's employment. In those circumstances, I am unable to identify an error of approach which makes this dismissal unfair.

28. I can agree with the Claimant that the decision to dismiss her was harsh and whilst her behaviour in looking at the medical information related to patient X was a clear and blatant act of misconduct, one can perhaps have an understanding of why she was tempted to do so but it is not for me to extend sympathy to the Claimant; it is my role to assess the actions of the Respondent and determine whether or not they acted within the range of responses of a reasonable employer and I am afraid that I am unable to say that what Ms Williams decided to do in this case is outside the range of responses of a reasonable employer.

29. I also take into account that Ms Sangha conducted the Claimant's appeal and the Claimant has not expressed any challenge to the way that was conducted. Taking into account that Ms Sangha is a matron in the Trust's maternity unit and was able to form a view of the circumstances of this case and concluded that the decision was within the scope of reasonable outcomes. It seems that that is another reason why I should not interfere with the decision which was made by Ms Williams so I am afraid that I have to conclude that the Claimant's claim is unsuccessful and the claim is dismissed.

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Employment Judge Gumbiti-Zimuto
Date: 27 February 2019

Reasons sent to the parties on
.....11.03.19.....

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For the Tribunal office