EMPLOYMENT TRIBUNALS

Claimant: Mrs P Nkomo

Respondent: Cygnet Health Care Limited

REASONS

1. These written reasons are provided upon the Claimant's request by email dated 18 May 2019.

2. The Claimant claims unfair dismissal, race and sex discrimination, victimisation and unpaid wages. The Respondent resists the claims.

3. The Tribunal heard evidence from the Respondent's witnesses: Michele Paley, Michelle Jones, Lyn Elliott, Simon Belfield and Peter Smith. The Claimant gave evidence on her own behalf. The Tribunal was provided with a bundle of documents contained within two lever arch files to which the parties variously referred. At the conclusion of the hearing the parties made oral submissions.

The issues

4. The claims and issues had been discussed at a preliminary hearing before Employment Judge Corrigan on 3 August 2018. The parties agreed that those issues remained the issues for determination at this hearing. They are as follows:

<u>Unfair Dismissal</u>

5. What was the date of dismissal? Was it 14 February 2018 or 27 February 2018 (when the Claimant says the dismissal was communicated to her)?

6. What was the reason for dismissal? Was it a potentially fair reason? Was it misconduct/ some other substantial reason (as the Respondent asserts) or capability (as the Claimant asserts)?

7. Did the Respondent have a genuine belief in misconduct, held on reasonable grounds after a reasonable investigation?

8. Was the Respondent's procedure fair?

9. Was it within the range of reasonable responses to dismiss?

10. The Claimant's case is that it should have been treated as a competency issue. She should have been given a chance to improve through a capability process with consideration of training. The process should have been over a period of performance management with a view to help her improve.

11. Would there have been a fair dismissal at some stage in any event?

12. Did the Claimant contribute to her dismissal?

13. What award should be made to the Claimant? In particular, has the Claimant failed to mitigate her loss by not accepting the role of registered nurse offered by the Respondent and/or by not obtaining alternative work elsewhere?

Sex Discrimination

14. Did the Respondent treat the Claimant less favourably than it treated Mr Padare by inviting Mr Padare to a reconvened hearing before he was dismissed but not extending the same opportunity to the Claimant?

15. Did the Respondent treat the Claimant less favourably than the hypothetical man in a similar position by being offered a demotion several positions down instead of dismissal rather than just being dismissed without demotion?

16. Was this done because of the Claimant's sex?

17. Are there facts from which the tribunal could decide in the absence of any other explanation that the Respondent treated the Claimant less favourably than Mr Padare and/or a hypothetical man because of her sex?

18. Has the Respondent shown a non-discriminatory reason? The Respondent says the reason for the difference in treatment between the Claimant and Mr Padare is that Mr Padare was in a more senior role and a reconvened hearing was not necessary in the Claimant's case. She was offered a demotion rather than dismissal because she committed an act of misconduct.

Race discrimination

19. Did the Respondent treat the Claimant less favourably than it would have treated a hypothetical White British manager in her position by:

    19.1. treating her actions as misconduct rather than a competency issue;

    19.2. predetermining the outcome of her disciplinary hearing;

    19.3. offering a demotion as an alternative to dismissal; and/or

    19.4. failing to uphold the Claimant's appeal?

    19.5. Was this done because of the Claimant's race (Black African)?

20. Are there facts from which the tribunal could decide in the absence of any other explanation that the Respondent treated the Claimant less favourably than it would have treated a White British manager because of her race?

21. Has the Respondent shown a non-discriminatory reason? The Respondent argues that the reason for the dismissal and not upholding the appeal is the misconduct which she admitted.

Victimisation

22. Did the Claimant do a protected act? In particular, did she raise allegations of race and/or sex discrimination in her appeal; the appeal statement; and in the appeal hearing? The Respondent disputes this.

23. Was the Claimant subjected to a detriment when the Respondent referred her to the Nursing and Midwifery Council (NMC)?

24. Was this done because the Claimant did a protected act? The Respondent's case is that it is obliged to make a referral to NMC in these circumstances. The Claimant says NMC Code gives discretion to the Respondent and it was a considered decision to do so.

Arrears of pay

25. Has the Claimant been paid in full up to the date of dismissal or are wages outstanding? The Claimant's case is she should have been paid up to 27 February when dismissal was communicated. She was actually paid until 14 February, which is the date the Respondent says she was dismissed.

26. Ms Genn suggested at the commencement of the hearing that time issues might also fall for consideration although in the event it was not apparent that there were any time issues arising.

27. The hearing proceeded on the basis that the Tribunal would consider the question of liability and any issues relating to Polkey and contribution. If the Claimant were to succeed in any or all of her claims then a further hearing would be listed to consider remedy.

Findings of fact

28. The Claimant is an experienced qualified registered nurse. She describes herself as black with African ethnicity. She commenced employment with the Respondent on 3 August 2011 as Quality Assurance Administrator and was appointed interim Clinical Services Manager in 2015. In July 2016 she was appointed to the position of Clinical Services Manager at the Respondent's hospital at Godden Green. The evidence before the Tribunal strongly suggests that the Claimant was a dedicated hard-working professional.

29. In terms of seniority at the hospital, the Claimant's position was second only to that of the hospital manager, a position held by Mr Danmore Padare, who is also black with African ethnicity.

30. Godden Green hospital provides services to adults and children with mental health difficulties. The Claimant worked in a challenging environment. Incidents might arise day or night.

31. Managing risk was a key aspect of those employed by the Respondent at Godden Green. Unsurprisingly, the Respondent had in place a number of policies including: CPF 4.05 Risk Management Policy and Guidance; CPF 4.0 Policy for Patient Safety: Incident Reporting and Management; and CPF4.03 Safeguarding Children and Young People Policy.

32. Among other things, the Respondent is required to comply with the provisions of Regulation 18 of the Care Quality Commission (Registration) Regulations 2009. This Regulation requires providers to notify the Commission without delay of certain incidents that affect the health, safety and welfare of people who use the services. A failure to make timely notification can lead to a prosecution and other regulatory action.

33. It was agreed between the parties that the importance of "Reg 18" notification meant that in terms of priority it was second only to the requirement to deal with emergency situations.

34. The Claimant explained to the Tribunal the process for making a Reg 18 notification. A member of staff, which might include a member of agency staff, would make an initial incident report recorded in manuscript. The contents would then by typed onto the Respondent's electronic EPrime system by a ward manager, a ward team leader, ward administrator or by the Claimant herself. The Claimant or a ward manager would prepare in manuscript a Serious Incident ("SI") report or, towards the end of the Claimant's employment, prepare the SI report electronically. The SI report was then forwarded to the Respondent's Corporate Risk Manager who would review the SI report and determine whether or not a copy should be sent to NHS England and/or the CQC. If the Corporate Risk Manager considered the matter fell within the Reg 18 notification requirements, either Mr Padare or the Claimant would complete an electronic Reg 18 form to forward to the CQC. The Tribunal heard conflicting evidence as to how long it might take to complete a Reg 18 Form; the evidence suggested anything between about five and a minimum of thirty minutes, the Claimant saying that she might be required to verify information before she submitted the notification.

35. Given the environment at Godden Green, it was not uncommon for the requirement for Reg 18 notifications to be made.

36. It was agreed between the parties that although Mr Padare was the Registered Manager and thus the legally nominated person, the Claimant shared responsibility with Mr Padare to make Reg 18 notifications.

37. In about July or August 2017, the CQC issued the Respondent with both warning and improvement notices in relation to a number of its sites including Godden Green. The Respondent set up a quality improvement team which included the Claimant.

38. Towards the end of October 2017, the CQC Inspector raised concerns regarding the lack of Reg 18 notifications since 5 September 2017. Shortly thereafter, no doubt prompted by the CQC concerns, Mr Padare retrospectively submitted twenty-four notifications going back as far as early September 2017.

39. On 2 November 2017, acting upon instructions issued by Nicky McLeod, the Respondent's Chief Operating Officer, Michele Paley suspended both the Claimant and Mr Padare. The Respondent confirmed the reason for suspension in writing as:

    - Lack of trust and confidence to meet clinical standards
    - The fact that Godden Green had been highlighted as not providing adequate service
    - Service quality issues
    - Breach of CQC regulations alleged breach of CQC rules

40. An urgent inspection undertaken by the Respondent found a further 19 unreported incidents.

41. The CQC subsequently imposed a substantial financial penalty upon the Respondent by reason of the failures.

42. The Respondent commenced an investigation into the involvement of the Claimant and Mr Padare in the reporting failures. This investigation was initially led by Shaun Ramsey but was subsequently led by Lyn Elliott.

43. As part of the investigation, the Claimant attended an investigation meeting which took place on 21 November 2017. Among other things, the Claimant said her responsibilities included care, quality and serious incident reporting. The Claimant said that because administration support had been patchy, and because of a high number of challenging incidents, it had been difficult to keep on top of the notifications. The Claimant's understanding was that it was a requirement to notify Reg 18 incidents within 24 hours. An extract from the investigation notes records the Claimant as saying:

    I know I should have reported these incidents, I cannot deny that. I should have reported them and notified CQC but it was really busy at the hospital, patients swallowing stuff, hitting each other, it was a really challenging time

    We just got caught up in the busy schedule of the site. We had action plans, hardly had time to do anything. We missed the notification system.

44. There was also discussion about three outstanding Root Cause Analyses (RCAs) and concerns about safeguarding reporting.

45. Mr Padare was also interviewed as part of the investigation process.

46. Lyn Elliott completed her investigation report on 1 December 2017. In addition to the Reg 18 reporting failures, Neil King, the Respondent's Professional Lead for Safeguarding informed the investigation that a number of processes and systems were not in place at Godden Green in relation to safeguarding young people.

47. By letter dated 8 January 2018 the Claimant was invited to attend a disciplinary hearing to take place on 12 January. The allegations were described as follows:

- *Failure to comply with CQC regulation/s and expectations regarding Regulation 18 and the appropriate notification of incidents and safeguarding events, as well as failure to ensure robust processes and systems are in place, to include root cause analyses, in order for the patients at Godden Green to be safeguarded appropriately;*

- *A breach of the company's policies on Safeguarding (CPF 4.03), Incident Reporting and Management (CPF 4.0) and Risk Management (CPF 4.05 in relation to the above;*

- *A breach of the Company's trust and confidence in relation to the above*

48. The Claimant requested access to her laptop and work telephone so she could obtain information to present at the disciplinary hearing. The Respondent permitted the Claimant to do so. As a result, the Claimant presented in the region of 200 pages of documents which were added to the pack of documents to be considered at the disciplinary hearing which was, in the meantime, postponed.

49. Mr Belfield held a disciplinary hearing with Mr Padare on 12 January 2018. Mr Belfield adjourned the hearing and it was reconvened on 26 January 2018. After a brief adjournment, Mr Belfield informed Mr Padare that he was to be dismissed by reason of his failures.

50. The Claimant's disciplinary hearing took place on 22 January 2018 chaired by Mr Belfield. At the hearing, she presented a 10 page statement to Mr Belfield setting out her response to the allegations. Among other things, the Claimant admitted in her written statement, with regard to the failure to make Reg 18 referrals:

> *As stated above, I accept the responsibility for this allegation. I am accountable for my failures in this regard. I cannot pass the buck to anyone else.*
>
> *I accept that there were two people who were responsible for raising incidents with the CQC…*
>
> *… I would like to take this opportunity to apologise to my colleagues, the CQC, the company and everyone involved for the impact of my actions or omissions*

51. The Claimant made an honest and open admission as to her responsibility for the failure and went on to set out the difficult circumstances in which she had been working.

52. Mr Belfield heard what the Claimant had to say and adjourned the hearing to consider the wealth of material before him. The Claimant had covertly recorded the disciplinary hearing. The transcript she provided to the Tribunal clearly shows that Mr Belfield asked the Claimant if there was anything else she wanted him to know, that she replied that there was not, and that if there was she would contact the Respondent's HR Business Partner.

53. By letter dated 7 February 2018, Mr Belfield informed the Claimant of his decision that she should be dismissed by reason of gross misconduct. Alternatively, she could accept demotion to a nurse position at one of the Respondent's other hospitals. The letter makes clear that "failure to return the copy of this letter or declining the alternative offered by 12 February 2018 will result in your dismissal". The Claimant did not accept the alternative employment.

54. The Tribunal finds that the Claimant's employment in fact ended on 14 February 2018, the date up to which she continued to be paid.

55. As to the reasons for Mr Belfield's decision, he took account of the fact that Godden Green was busy and that the Claimant had focussed on seeking to lift the warning and improvement notices issued by the CQC. But Mr Belfield felt that did not detract for the Claimant's responsibility to ensure the regulations and expectations were met. With regard to the allegation that the Claimant had failed to ensure robust processes and systems were in place at Godden Green, Mr Belfield partially upheld the allegation.

56. The Claimant subsequently appealed by letter dated 14 February 2018. Among other things she complained that she had been treated less favourably to the way in which others had been treated or would have been treated.

57. By letter dated 5 March 2018, the Claimant was invited to attend an appeal hearing. The appeal hearing took place on 9 March 2018 chaired by Peter Smith. The Claimant read her pre-prepared statement running to nine pages.

58. At the conclusion of the appeal hearing, the Claimant said she "I feel I have been discriminated against. Probably double discriminated in the whole process".

59. By letter dated 3 April 2018, Mr Smith informed the Claimant that the decision to dismiss was upheld. In a long letter, Mr Smith set out his response to each and every point of appeal the Claimant had raised.

60. In April 2018, Michelle Jones referred both the Claimant and Mr Padare to the NMC.

Applicable law

Direct discrimination

61. Race and sex are protected characteristics under the Equality Act 2010.

62. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

63. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (sex in this case), A treats B less favourably than A treats or would treat others.

64. The House of Lords has considered the test to be applied when determining whether a person discriminated "because of" a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see James v Eastleigh Borough Council [1990] IRLR 572. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884.

65. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual.

66. Whether there is a factual difference between the position of a claimant and a comparator is in truth a material difference is an issue which cannot be resolved without determining why the claimant was treated as he or she was; see: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

67. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

68. Thus, it has been said that the Tribunal must consider a two-stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

69. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

70. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent,

save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

71. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see Madarassy v Nomura International [2007] IRLR 246. As stated in Madarassy, "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

72. If the Claimant does not prove such facts, his or her claim will fail.

73. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with the protected characteristic in question: see Glasgow City Council v Zafar [1998] ICR 120 and Bahl v The Law Society [2004] IRLR 799."

74. In Laing v Manchester City Council [2006] ICR 1519, the EAT stated, among other things, that:

> *No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with [the protected characteristic]*

Victimisation

75. Section 27 of the Equality Act 2010 provides that a person (A) victimises another person (B) by subjecting (B) to a detriment because (B) has done a protected act or because (A) believes that (B) has done or may do a protected act. A protected act includes circumstances in which a person makes an allegation (whether or not express) that the Act has been contravened.

Unfair dismissal

76. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

77. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

78. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

79. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:

    - The employer must show that he believed the employee was guilty of misconduct;

    - The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and

    - The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

80. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases.

81. In A v B [2003] IRLR 405, the Employment Appeal Tribunal said that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. See also: Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402. However, it is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

82. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.

83. It was said in London Ambulance Service NHS Trust v Small [2009] IRLR 563:

> *It is all too easy, even for an experienced Employment Tribunal, to slip into the substitution mindset. In conduct cases the claimant often comes to the Employment Tribunal with more evidence and with an understandable determination to clear his name and to prove to the Employment Tribunal that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the Employment Tribunal so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal.*

84. In Taylor v OCS Group Ltd [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

Unpaid Wages

85. Section 13 of the Employment Rights Act 1996 provides that an employer must not make a deduction from a worker's wages employed by him unless the deduction is required by statute, under a relevant provision in a worker's contract, or the worker has previously signified her written agreement or consent to the making of the deduction. A deficiency in the payment of wages properly payable is a deduction for the purposes of this section.

86. In Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood [2018] UKSC 22, the Supreme Court reiterated the principle that notice of termination is effective when it comes to the employee's attention and they have had a reasonable opportunity to read it.

Conclusion

Sex and Race Discrimination

87. Dealing firstly with the allegation of less favourable treatment of the Claimant compared to Mr Padare, the Tribunal has been unable to identify any credible evidence that the Claimant has shown anything more than a difference in protected characteristic, namely sex, and a difference in the treatment of Mr Padare to the extent that he was invited to a reconvened disciplinary hearing. In accordance with Madarassy the Tribunal concludes that the Claimant has not shown a prima facie case of direct sex discrimination and her claim must accordingly fail.

88. Even if she had shown a prima facie case and the Tribunal were to consider the reason why Mr Belfield invited Mr Padare to a reconvened meeting and did not invite the Claimant to a reconvened meeting, the Respondent gives a rational and non-discriminatory explanation for the treatment.

89. The Tribunal accepts Mr Belfield's evidence, clearly set out in his witness statement and supported by the evidence he gave to the Tribunal, that he delivered his decision to Mr Padare at the conclusion of a reconvened disciplinary hearing because he was the Registered Manager and the likely outcome would be dismissal whereas, in the Claimant's case, the outcome had not been determined. It is clear that in the case of Mr Padare, Mr Belfield did not complete the disciplinary hearing on 12 February 2018 and it was necessary to reconvene for further consideration. This was in contrast to the Claimant's case in which she had produced a lengthy written statement, provided in the region of 200 pages of documents, and said she would provide further information if she felt she had any to provide. The Tribunal is satisfied this was a genuine reason and does not disclose either conscious or unconscious sex discrimination.

90. Similarly, the Tribunal concludes that the Claimant has failed to show a prima facie case that the Respondent treated her less favourably than a hypothetical man in a similar position by being offered a demotion several positions down instead of dismissal rather than just being dismissed without demotion because of her sex. Again, other than an alleged difference in treatment and a difference in protected characteristic, there was no credible evidence to suggest the Respondent would have treated a white male any differently in the same or similar circumstances.

91. In any event, the Respondent has shown a non-discriminatory explanation for offering demotion to the Claimant, namely the Claimant's acceptance of responsibility for the failure to made Reg 18 notifications. Further, she was an experienced registered nurse; in a demoted position she would not have managerial responsibilities and in particular would not have to make Reg 18 notifications.

92. There was simply no evidence before the Tribunal to show that the Respondent would have treated a white British manager any differently than the Claimant in treating her actions as misconduct rather than a competency issue, allegedly predetermining the outcome of her disciplinary hearing (which the Tribunal addresses below), offering a demotion as an alternative to dismissal; and/or failing to uphold the Claimant's appeal.

93. For these reasons the Claimant's claims of direct sex and race discrimination are dismissed.

Victimisation

94. As to the victimisation claim, the first question for the Tribunal is whether the Claimant did a protected act. She relies on her allegations of "less favourable treatment" raised in her appeal letter, her statement at the appeal hearing, and what she said at her appeal hearing. However, as she admitted, at no time did she suggest that she was complaining of less favourable treatment by reason of holding, or related to, a protected characteristic. The Tribunal concludes that the Claimant did not do a protected act and at no time could the Respondent have believed that the Claimant had done or may do a protected act. The Claimant's complaints of less favourable treatment during the appeal process, in the absence of any explanation relating to a protected characteristic as to why she felt she had been less favourably treated must lead to this conclusion.

95. Even if the Claimant had done a protected act, there was no credible evidence to show that Michelle Jones reported the Claimant to the NMC, or that she was instructed to make the report to the NMC, because of any such protected act. The Respondent's disciplinary policy makes it clear that a relevant professional registration body may be informed of disciplinary matters. This reflects the NMC advice on referring a nurse or midwife which states: *"You must always report a case to us if you believe the conduct, competence, health or character of a nurse or midwife presents a risk to patient safety"*. As the Claimant admitted in evidence, failure to make Reg 18 notifications presents such a risk.

96. For these reasons, the Claimant's victimisation claim is dismissed.

Unfair dismissal

97. The Claimant's case was that the reason for her dismissal related to her capability, not conduct. However, as she candidly admitted when giving evidence, she knew how to make Reg 18 referrals but failed to do so. In reply to questions by the Tribunal, the Claimant agreed that the matter related to conduct – misconduct – but that there were extenuating circumstances.

98. Regardless of what the Claimant had to say, the Tribunal has properly placed the burden upon the Respondent to show the reason for the dismissal and that it was for the potentially fair reason relating to conduct. The Tribunal is perfectly satisfied that both Mr Belfield and Mr Smith held a genuine belief in the Claimant's misconduct. It was clear that the Claimant was capable of making Reg 18 referrals but failed to do so, as she honestly stated throughout. The Respondent has shown the reason for the Claimant's

dismissal, as stated in Mr Belfield's letter of 7 February 2018, and that it related to the Claimant's conduct.

99. The Tribunal has considered very carefully the adequacy of the investigation by the higher standard described in A v B. The main allegation against the Claimant for which she was dismissed was the failure to make Reg 18 notifications. The Claimant admitted, as described in the Tribunal's findings of fact and as further set out in the documents presented to the Tribunal, that she failed to make the Reg 18 notifications. No further investigation was necessary to establish whether or not the Claimant had failed to make the notifications.

100. The Tribunal has been concerned as to the apparent lack of investigation into the circumstances in which the failure took place. The Claimant was engaged in the Quality Improvement Plan and having to deal with urgent issues which arose on a daily basis at the hospital. However, the Respondent accepted throughout that the Claimant was extremely busy and working in a difficult environment. Given that acceptance, the Tribunal concludes that it was reasonable for no further investigation into those matters to take place. The investigation fell into the band of reasonableness. On this point, the Tribunal notes that the Claimant was offered support from the corporate team as evidenced by an email from Neil King on 7 September 2017.

101. The Tribunal finds that the genuine belief in the Claimant's misconduct held by Mr Belfield and Mr Smith was held on reasonable grounds, not least because of the Claimant's own admission that she had failed to make the notifications as alleged.

102. The Claimant was made aware of the potential outcome of the disciplinary process, she was provided with the relevant documentation, she was granted a postponement of the disciplinary hearing, granted access to her laptop and work telephone, permitted to put forward a great number of documents and a written statement. She was informed of her right to be accompanied and she was granted an appeal. The Tribunal has been unable to find any failing in the procedure adopted by the Respondent which might render the dismissal unfair. Although the Claimant complains that her disciplinary hearing took less time than Mr Padare's disciplinary hearing, that does not lead to a finding of unfairness; the Tribunal is satisfied that the Claimant had full opportunity to put forward any points she wished. There was no credible evidence to suggest that the Respondent pre-judged the outcome of the disciplinary process.

103. The next question for the Tribunal is whether the Respondent treated the Claimant's conduct, with the obvious mitigation she put forward, as a sufficient reason for dismissing her. As the case law makes clear, the question for the Tribunal is whether the decision to dismiss was within the range of reasonable responses.

104. In many ways, this is the crux of the Claimant's unfair dismissal claim. It has been submitted on the Claimant's behalf that perhaps a written warning, or even a final written warning, would have been appropriate, in light of the mitigating circumstances – or extenuating circumstances as it has been put on behalf of the Claimant. The Tribunal has a considerable degree of

sympathy for the Claimant who was clearly doing her best to deal with the quality and compliance issues which had been raised by the CQC and failed to make the Reg 18 notifications. The Tribunal accepts her evidence that she worked long hours beyond those she was required to work. As accepted by the Respondent, she worked in a difficult and busy environment. But it comes down to this: the Claimant accepted the importance of making Reg 18 notifications as secondary only to dealing the emergencies. She told the Tribunal that although it was chaos at Godden Green she could not say that she was required to deal with emergencies all day and every day. What the Claimant failed to do was properly prioritise the necessity to make Reg 18 notifications. She had both the capability and the opportunity to do so. Despite the Tribunal's sympathy, the Tribunal is unable to conclude that the decision to dismiss the Claimant fell outside the band of reasonable responses.

105. For these reasons the Claimant's unfair dismissal claim is dismissed.

Unpaid wages

106. Dealing finally with the date of dismissal, the Tribunal finds it was 14 February 2018. Mr Belfield's letter of 7 February 2018 states that unless the Claimant notified her willingness to accept alternative employment by 12 February 2018, it would result in her dismissal. The Tribunal concludes that objectively considered Mr Belfield's letter clearly implies that failure to accept the alternative offer would result in termination on 12 February 2018. Mr Belfield's letter was communicated to the Claimant who had the opportunity to read it before 12 February 2019.

107. In the event, as communicated by the Respondent to the Claimant by email on 27 February 2018, the Respondent actually terminated the Claimant's employment on 14 February 2018.

108. The Tribunal concludes that the Respondent has not failed to pay wages due to the Claimant. There are no wages outstanding. The Claimant's claim for unpaid wages accordingly fails.

109. In light of the Tribunal's conclusion, any remaining issues do not fall for consideration.

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Employment Judge Pritchard

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Date: 18 June 2019