EMPLOYMENT TRIBUNALS

Claimant: **Mr S Brudzinski**

Respondent: **Nottinghamshire Healthcare NHS Foundation Trust**

Heard at: **Nottingham**

On: **25 February 2019 to 1 March 2019 inclusive**

Before: **Employment Judge P Britton (sitting alone)**

Representation

Claimant: **Mr D Bunting of Counsel**
Respondent: **Mr J Crow of Counsel**

JUDGMENT having been sent to the parties on 4 March 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

JUDGMENT

This claim, namely of unfair dismissal, is dismissed.

REASONS

Introduction

1. My function here is to determine whether the Claimant's dismissal with notice by the employer on 30 August 2017 was unfair pursuant to the provisions to be found at Section 98 of the Employment Rights Act 1996 (the ERA). I remind myself that what I have to do is to decide is whether within the range of reasonable responses of an organisation of the type, size and administrative resources the Respondent acted fairly having regard to equity and the substantial merits of the case.

2. There is a core point in this case which I will refer to as the START issue. It really is as to whether the Michelle Bateman (MB) Panel which dismissed the Claimant consequent upon a disciplinary hearing on 23 August 2017 wrongfully admitted and considered the contents of a report by Mr M Start (START).

Findings of fact including observations

3. The Claimant was at the material time a highly experienced, fully qualified mental health nurse. He was registered with the NMC. He had been working for some years at Millbrook Mental Health Hospital within the compass of a very large mental health trust which is the Respondent (the Trust).

4. In circa December 2014 a very serious issue came to light. It involved a Healthcare Assistant highly trained in mental health issues who I shall refer to as RR. He had been transferred across from Rampton where he had been for many years. Post the transfer he worked on Orchid Ward at Millbrook alongside when they were on the same shifts the Claimant. What had transpired through a complaint originally raised by a mental health patient (Patient A) was that RR had raped her. Taking things short, on 28 October 2016 having pleaded guilty to "offences of a sensitive nature x 8", including against Patient A, he was sentenced to 4 years and 4 months imprisonment. RR had resigned the employment shortly after the allegations came to light.

5. Consequent upon the rape allegation coming to light and other concerns having been raised about the Claimant's conduct on Orchid he was transferred to Bracken Ward[1]. But once on that ward further concerns were raised in particular relating to two female patients on Bracken and the allowing of a sectioned patient (Patient B) to be allowed out for a visit having tested positive for prohibited substances. This was on the 6 June 2015. Those concerns were raised by a band 5 nurse, GS, and it started with her raising contemporaneous concerns to her line manager backed by what I will describe as nursing records known as ROI's[2].

6. So in the context the Claimant was suspended on 19 June 2015 (Bp438) and there was an investigation Bp98-445[3] undertaken by Mr Start. His investigation concluded on 19 December 2015 at which stage he obviously passed it back to the Commissioning Manager of the Respondent, Joanne Horsley (JH). But the Claimant continued to be suspended on that matter at least until 14 June 2016 (Bp451) because JH sent him letters on a monthly basis confirming that his suspension was continuing because the investigation "had not been deemed as completed for the allegations as confirmed in my previous letters."

7. If I stop there and summarise the issues that came out of START, I factor in that I have been extensively taken to an agreed bundle which runs to approximately 843 pages and which contains chapter and verse to start with of the START investigation and all the appendixes to it including that the Claimant was interviewed prior to the commission of the investigation by Mick O'Driscoll[4] (MoD) and Annie Clarke as part of an investigation panel viz Patient A, on 7 April 2015 and 4 June 2015[5]. These were taped and transcribed (Bp156A-213).

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[1] Initially he had been suspended but post the police confirming they were closing down their investigation against him the suspension was lifted on 14 April 2015 and he was transferred to Bracken. The investigation would still take place in terms of the concerns about his practice including viz RR (see Bp436-5).

[2] See START Bp346;365-6 and 571.

[3] Bp = bundle page. The joint bundle before me ran to over 840 pages.

[4] MoD is the lead Safeguarding investigator for the Trust.

[5] A concern which forms part of the terms of reference/allegations for Mr Smart to investigate was that what the claimant said in that very lengthy interview inter alia showed that he "1) …*you have not shown*

The Claimant signed the transcript as correct on 30 June 2015.Reading the same as to which it is Appendix B (II) to the SMART report, and cross referencing the supporting evidence comprehensively contained in that report and its appendices, I can conclude as follows.

8. The Claimant was grossly negligent in his dealings with RR. In particular on an issue which causes me profound concern and which even if he was unfairly dismissed cannot but hugely impact on the measure of loss because of contribution, he allowed RR to assist unaccompanied a female patient to bathe, namely patient A, on two occasions. RR had to make an entry in the ROI that he had assisted her. The Claimant never queried it. This is despite being the nurse in charge. He seemed to think that he was not authorising it but only "validating" and therefore did not have any responsibility because all he was doing was endorsing the entry in the ROI. MoD and Ms Clarke in difficult interviews but which I see as fair, understandably quizzed the Claimant about all of this.

9. Given the weight of the professional evidence both from the documentation and the evidence before me of the respondent witnesses on this who I found impressive,[6] I am wholly persuaded that it is an absolutely unacceptable practice for a male nurse to be alone with a female patient in a bathroom. It matters not that the Claimant extensively tried to persuade Michelle Bateman (MB) and her panel colleagues at the hearing on 23 August 2017(Bp612-30), or indeed before me in his evidence, that there was no risk because the lady in question albeit wheelchair bound only needed to be assisted into and out of the bath and that she would let the staff know when she was ready to leave so to speak and would have robed herself, that does not detract from the obvious risks of a male nurse being alone with a female, vulnerable patient in the intimacy of a bathroom. At the very least there is the issue of dignity; and that the nurse should not be putting himself at risk of a complaint even if he himself poses no risk to the patient; finally as in this case there can unfortunately mean that a sexual offence or other abuse could happen. The evidence is overwhelming that the practice should be that a female nurse should undertake this role for obvious reasons unless there was some exceptional circumstance why not, for instance no female staff available and the patient inter alia being in deep distress such as having had a fit. None of that applies here. In fact it was established that at the relevant times there were two female members of staff on duty.

10.It follows that I am wholly with the Respondent whether it goes to the fairness of the dismissal or to turn it round another way and taking the submissions of Mr Crow, contribution, that this was a gross dereliction of duty.

11. As to what happened on Bracken first I accept the evidence of the totality of the Respondent witnesses and particularly MB and Mr White (PW) that to cast aspersions in relation to talking openly about a file on a patient, cross referencing back to RR, to the effect of these things can be unfair accusations and "he's my mate" coupled with that the Claimant had around about this stage accompanied

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an understanding or willingness to follow required procedures or standards of care related to safeguarding privacy and dignity required in your practice.
2) you have demonstrated in recent interviews related to the SUI investigation on Orchid Ward, that you will not follow the safeguarding procedure that keeps patients safe in terms of risk of financial exploitation or violation of professional boundaries…"

[6] Julie Gardner, associate director for safeguarding and social care for the Respondent and with years of experience; Lisa Dinsdale, a Service Director and a qualified registered nurse since 1989; Michelle Bateman a qualified nurse since 1988 and an Associate Director of Nursing ; finally Peter Wright, Executive Director for forensic services and previously a prison governor for over 20 years. In all cases evidence in chief by written statement as was the Claimant.

RR for his interview at the Police station, shows even then an inability to stand back professionally and appreciate the enormity of what was being alleged.

12. The second issue goes to safeguarding and it relates to two female patients. Suffice it to say that Patient B was not to be left alone with Patient C[7] unobserved because she was sexually attracted to her and was prone to making unwanted advances including physically. GS was profoundly concerned having (a) looked at the ROI note and (b) thence in the context of a discussion with Patient C, that there had indeed been unwanted contact which had caused Patient C distress and which the Claimant had done nothing to stop. It was only much later that the Claimant was to provide an explanation to the effect that it was not like what was reported and that it was banter. More important that it was only about Patient B having bought a dress, come back with it and in the little courtyard placed it in front of her at which Patient C had said something to the effect of "you look pretty and I would like to get you naked". Even if that was the extent of it, the Claimant's attitude and professional indifference troubled the MB panel and thereafter PW and his panel at the appeal hearing on 14 December 2017 (Bp6360-656).

13. The third matter is even more concerning. A Section 17 patient is under a regime whereby they can be allowed to go out. However the practice in this respect, and I repeat that I found the Respondent witnesses all consistent and overwhelmingly persuasive, is that if the patient is a suspected user of illegal drugs, he will be tested and if he does not pass as negative he will not be allowed out. That the patient (Patient D)) was allowed to go out despite having failed the drug test is not in dispute. The concern was that the Claimant in effect poo-pooed the policy to GS, hence justifying his decision to let him go out. I have no doubt from the evidence before me that this was a clear breach of policy. I can add from my extensive judicial experience of hearing other NHS and associated mental health organisation employment cases, that to allow out either having not administered a drugs test or when the patient has tested positive is a serious disciplinary offence. There is an obvious risk of potential harm to the patient or others when out and about and under the influence of drugs with such as a history of schizophrenia as per patient D who is described as "psychotic". I would add that albeit Mr Smart had evidence that GS and the Claimant did not get on it was irrelevant as there was the documentary corroboration including the raising of the matter by GS to her line manager contemporaneously.

14. So that brings me on to the next theme so to speak. Sometime in early 2016 the Claimant when enquiring of a Ms Dolan as to whether he was still suspended and having been told he was, was told by her that he had best be aware that there were further serious allegations. By now Mr Smart had completed his investigation on 19 December 2015.The first in time of these new allegations is as follows. A highly vulnerable female patent, (Patient E), began to make allegations about a sexual relationship with the Claimant. This came to light starting 12 November 2015.The history thereafter is encapsulated at para 4.21-4.29 in the chronology of events set out in the investigation conducted by Mark Sherburn (MS), another case investigator with the Trust, date of issue 2 September 2016 (Bp455-525). In the context of the MoD interviews, discussions had heavily centred upon RR's contact with Patient A via mobile phone (see Bp156H). It was discussed that the Claimant had on one occasion himself had similar contact with a patient (Bp164). The Claimant agreed with Mr O'Driscoll that it was an absolute "no no" in my words to undertake such communications and in particular give a patient his mobile phone number.

[7] I have used these initials.

15. But he did not stop Patient E thereafter engaging in text exchanges with him. And to put in context what has happened by then is that in November 2015, so it is overlapping with the START enquiry, this unfortunate lady had told a mental health nurse or social worker whilst in the Bassetlaw Mental Health Unit that she had had this long standing sexual relationship and she named the Claimant (Bp461). When she was seen again on 20th November by a senior social worker and police officers her evidence remained the same. Subsequently following a relapse and her admission to the Priory clinic in Cheadle, on 8 March 2016, she said that "did not wish to provide any further information …as she did not "wish to ruin anyone's life". She did not retract what she had previously said. She never said it did not happen. I wish to make plain that there is no suggestion before me that the Claimant had engaged in a sexual relationship with her. She is clearly mentally unwell. But the point is that in the context and the Claimant having detailed knowledge of her mental fragility, he should not have encouraged or participated in any contact such as text messages by personal mobile phone. He should have just simply told her I cannot talk to you. But he did not and indeed Mr Crow both in his cross examination and his submissions has made eloquent points about that.

16. But it is much more serious than that. In his interview with MS he admitted engaging in what are clearly extensive text exchanges with Patient E. He disclosed some and MS discovered the rest when looking into the content on the mobile phone during the interview. What is deeply concerning is the contact the Claimant had with patient E on 25 February 2016. He obviously had got wind that she had alleged something because he asks her at 9.36 am: "

> *SB "I am ok just need to ask you something have you put in a complaint about me"*

And the conversation did not stop there when she said in answer "no".

17. This highly vulnerable patient clearly had a crush on the Claimant: see entry at 5:58pm:

> Patient E *" ..ur a lovely man wish I cud find a man like you xx".*

18. And these exchanges are on several days and he is back on the complaint issue on 1 April:

> *SB…Im not sure I should be in contact with you cos they are investigating what you told them last November*
>
> Patient E *They came to seem me in Manchester. I told them nothing went off. They asked me if I had seen you I said not for 7 years*
>
> *SB I'm sorry they've involved you in all of this they are trying to get rid of me and are desperate to find a reason I hope it didn't set you back you are doing so well"*

19. And again as merely illustrative of these texts, on 4 April when Patient E was in A& E "*have manic problems and heart to*" he engages in what the MB panel was entitled to see as sexual innuendo thus:

12.11pm Patient E *" Come to Cheadle go private lovely place u would work wonders*

12.15pm SB "May have to think about doing something else

3.18pm Patient E " ur talents are endless u cud do sexual favours for me I'll pay lol"[8]

20. Despite this proposal from, I repeat, a highly vulnerable patient in relapse, he continued to engage in text exchanges with her over the next two days and then on the 23 May. He reported none of this to his line manager.

21. Also established was that the Claimant had visited her home on an occasion. Take the totality of the evidence and when the Claimant actually went there to look at a motorcar she wished to sell he had got her address from her medical notes. He said, when he was quizzed about it by the Ward disciplinary panel [9] that when he went he did not know if anybody else would be there but it would not matter because he had only gone on the driveway. As it is when he went there, there is no evidence to contradict him when he says that her brother came round. She was there as well. He looked at the car and they went in the garden and he had a cup of tea. The point however flagged up by the Respondent is that he should not have gone there in the first place because again it is overstepping the professional boundaries. The same applies to that he went along to an abseiling event she was doing for charity because she had asked him to, and to give her encouragement as otherwise she would have no one to support her. He went on his own.

22. That brings me to the second new set of allegations. Patient F is a very vulnerable female patient. She had for some years had an obsession about the Claimant. She would regularly say that she thought he was a Mr Topham. He was somebody she said she was having an internet dating relationship with. She however thought that he was a New Zealander. Suffice it to say that on Bracken Ward on an occasion when yet again she was talking about this romance, which I gather was a fantasy, the Claimant accepts that in her presence he used a rather bad New Zealand accent. The evidence goes wider than that apropos the evidence obtained from Patient E as to whether he said something along the lines of "now you can twig it, ie it's me". The Claimant disputed that although initially he said he could not remember or recall. He changed as the months went by in that respect. All that matters is, and here again I am with the Respondent, that with a very vulnerable, highly suggestive patient, it was professionally unwise to say the least, to play up to her obsession, even if it was delusional. Yet again he overstepped the professional boundary. This series of events came to light when she was seen by a social worker on 26 April 2016. She gave further details at a home visit on 5 May 2016 (see chronology to the MS inquiry Bp 460-461).

23. So where does it take me? I can take it simply. The START investigation was therefore as far as I can make it out overtaken by the investigation which was commissioned not by Ms Horsley (JH) but another senior member of management staff, Michelle Malone, into the accusations of Patients E and F . Taking on board the closing written and oral submissions of Counsel and in particular Mr Bunting the following can be gleaned in a scenario where I have not heard from JH. Despite Mr Start having completed his investigation on 19

[8] I have added DH prior to her texts. SB was already on the same for his texts.

[9] Disciplinary Hearing chaired by Andrea Ward 20 December 2026 (Bp530-

December 2015, JH continued to issue monthly continued suspension letters up to 16 June 2016 (Bp 451) in which she inter alia stated:" "the conduct investigation has not been deemed as completed for the allegations as contained in my previous letters…"

24. On the 17 June MM came into the picture and informed the Claimant (Bp452) that " have been asked to take on the oversight of your suspension from duty and the investigation relating to DH…" This was clarified by her second letter of 24 June as also engaging the allegation viz Patient F which was also spelt out; that there would be a first meeting on 24 June and that MS was being appointed as the investigator. That in turn completed on 4 November with the unsurprising conclusion that there was a case to answer. There was a disciplinary hearing before a panel chaired by Andrea Ward (AW) on 15-16 December 2016 (Bp527). The outcome pronounced on 28 December 2016 was findings of misconduct, but I repeat not of any sexual relationship, and a two year final written warning was imposed. The START investigation was not before that panel albeit the Claimant referred to how it encompassed "*18 allegations …I never got any correspondence…it just says the suspension is ongoing.*" He confirmed it did not encompass any allegations of inappropriate relationships with female patients or in general (Bp551-5).

25. On the evidence that I have I do not conclude there is a sinister connotation in terms of no actioning by JH of START. But there was at least incompetence. However from the bundle it means that when I come to the MB hearing, prior thereto no decision had ever been made in terms of prosecuting the START findings or to turn it round another way I have no evidence that a decision was taken not to proceed. I will come back to the significance of START when addressing the issues that arise out of the decision of the MB panel and in particular to include consideration of the SMART report.

26. As to the MS investigation it was thorough. Objectively it cannot be faulted. As I have already said, the Claimant did volunteer some of the texts I have referred to. Mr Sherbourne then looked at the Claimant's phone and found the rest. Mr Sherbourne was not actually satisfied that this was the totality of communications but he decided to not pursue that. That is obvious from some of the remarks he makes towards the end of the Ward hearing.

27. All that needs to be said is that not surprisingly charges were raised against the Claimant in relation to these two episodes. Initially the charge which he was going to have to face in relation to Patient E was a sexually inappropriate relationship. In the light of Mr Sherbourne's findings, and in particular that Patient E had said she did not want it pursued, it changed to an inappropriate relationship and that of course focusses on these texts. That disciplinary hearing took place, as I have already said, before a panel chaired by Andrea Ward and this was heard on 20 December 2016 as to which see Bp 530-570. The thoroughness of that hearing cannot be faulted. The Claimant was represented by a senior trade union official, namely Harry Harrison (HH). He accepted that these were serious allegations and that the Claimant could be fairly dismissed. Doubtless by deploying the mitigation to which I will briefly touch upon, he succeeded in rescuing the Claimant. That this panel thought very long and hard about dismissing the Claimant is so obvious from the outcome letter where they took the step of giving him a two year final written warning with a large number of restrictions on his practice. I am entirely with Mr Crow that it is obvious that he narrowly escaped dismissal and which given my previous findings, and in particular the texts, would have been fair.

28. In the context of that hearing the issue that he had been facing fifteen allegations viz START but they had not gone anywhere was raised by him and HH. This was really more on the mitigatory front to explain why he had done the texting in particular to Patient E . But HH never said I want you to stop this proceeding because I want the START report to be put in. Stopping there I can surmise why HH would not take that approach given that he clearly knew the thrust of what had been alleged. It would have been fatal to the Claimant if he had required START to be before the Ward panel.

29. Mr Start had concluded at Bp 151:

" The available evidence shows there is a lack of independent evidence in respect of many of the allegations against (Patient A) *as they appear to rest on perceptions…"*

30. But I am with the Respondent witnesses and again the submissions of Mr Crow despite the commendable efforts of Mr Bunting. Within the totality of START is clear evidence to support that the Claimant wrongly failed to act on the bathing issue or grasp the implications viz RR despite years in the job, regular training, and being professionally registered with the NMC and inter alia bound by its code (Bp 60-79). And there was as I have said corroboration for GS. Finally although Mr Start may have though the MoD interviews over robust objectively they were not. These were very serious allegations. The picture portrayed in the statements taken by Mr Start is that Claimant has a big personality and can very much hold his own. There was fourth person present I surmise as a witness. Finally MoD in particular is a senior safeguarding investigator and so expert in what to focus on. Mr Start is a former police officer and I have no evidence as to his experience in investigating safeguarding issues.

31. In any event as to the AW panel, given it was on the cusp of dismissing the Claimant, had the contents of START been before it, in particular first the interviews conducted by MoD; second GS including her contemporaneous complaint and the ROI's, I conclude that he would have been fairly dismissed there and then; and I would venture to observe not with notice but summarily for gross misconduct.

32. On the other hand I am with Mr Bunting that once START got flagged up HR who were advising the AW panel ought to have stopped and thought where is this report and obtained it. But it cannot be a conspiracy to shut evidence out and so prejudice the Claimant, because if it had been deployed it would have only reinforced a finding by that panel which would have inevitably turned into one of dismissal. But it was a shortcoming.

33. Taking it then short the Claimant having received the two year final written warning, then raised a grievance on 31 January 2017 (Bp 577-579). I am with Mr Crow that although not as such appealing it, the Claimant was implicitly not accepting the final written warning. Read in its totality he is challenging all that has happened to him. He wants it all independently externally investigated.

34. At this stage I bring into the picture Michelle Bateman (MB). She was not long in post but is a very senior nurse with years of experience. When she got into harness she was appraised of the decision of the AW panel and for reasons which I can understand she was deeply concerned at the decision. She clearly

thought that it was too lenient. But I accept her evidence that she was stuck with it.

35. The Claimant having raised his grievance, Lisa Dinsdale (LD),then a lead General Manager within the Local Partnerships Division[10] was seized with investigating it. Inevitably she read START. And of course once she had read it she was very concerned which is reasonable given the findings I have now made. She also interviewed the Claimant as part of the process. On 15 May 2017 she dismissed the grievance(Bp597-9). Suffice it to say her reasoning, given my findings so far, was objectively justified. The Claimant appealed

36. But given her concerns as to the compass of issues now including those within START, LD had already met with BM on 11 May 2017 and who shared her concerns as to the wider safeguarding issues as to the Claimant's practice now of course revealed. Thereafter on 26 May 2017 MB announced that all matters would now be revisited. She also further suspended the Claimant (Bp 603-4), albeit somewhat technically as he had in any event been off sick since 4 February 2017 with work related stress. Her reason for suspension was "serious concerns about the safety of your safeguarding practice." Then on 22 June 2017 she made plain in her letter to the Claimant that she was arranging a hearing (Bp 608-9). The allegations were set out and within the compass of " concern you are not safe to practice as a registered nurse in our employment" . On the 17th July he received a further letter (Bp610-11) repeating the allegations; listing the panel for the hearing; providing him with copies of the documentation including START. Made plain was his right to be accompanied and that a potential outcome inter alia could be his dismissal. This letter clearly meets ACAS CP best practice.

37. The hearing took place on 23 August 2017(Bp 612-630). The Claimant was again represented by HH. Now it is correct for Mr Bunting to argue that some of the issues to which I have referred were not actually discussed in any detail but I do observe that the issue relating to RR and the bathing of the female patient; the O'Driscoll interviews and the issue of private mobile phone/ text in that context and thus its relevance in terms of what happened later viz DH and with cross reference to the texts, was; and at considerable length.

38. MB and her panel decided that taking the totality of the evidence which I have now rehearsed, they were entitled to now dismiss him on notice. This was confirmed by the letter to the Claimant dated 30 August 2017 (Bp631-3). The core part thereof is as follows:

> "As you are aware, Nottinghamshire NHS Foundation Trust provides services to some of society's most vulnerable adults and we have a duty *of care to ensure their safety and well-being. There have been concerns over your relationship with patients, your actions towards patients, and also in respect of your involvement with a particular matter where you allowed inappropriate contact between a member of staff[11] and a female patient. These issues have been the subject of investigation and internal proceedings however, for the reason that follows, I continue to have grave concerns about your practice as a nurse.*
>
> *The main reason for my continued concern is regarding your relationship with* (Patient E) *and the exchange of text messages during 2016 that*

[10] Now a service director in the same division.

[11] Obviously a reference to RR.

demonstrates a clear breach of professional boundaries with a vulnerable patient.

You have given no adequate explanation of why you allowed this to take place particularly when the issue of staff having patient phone numbers was raised with you as part of the safeguarding meeting with Mr Mick O'Driscoll as long ago as 4 June 2015. And you acknowledged having received texts from the same patient since 2013.You said you had blocked her Facebook but did not block her from your phone.
I am of the view that you have had plenty of time to stop this behaviour but instead seem to have chosen not to, and have allowed it to continue. I conclude from this that you have shown a lack of consideration both of safeguarding issues and practise, and also your professional boundary responsibilities.

I have taken note of the numerous reports from your colleagues and your assertions that, over time, you have reflected on the series of events which contributed to the concerns being raised initially. Despite that I remain unconvinced that you will practice safely in the future.

Therefore, in all the circumstances, having given due deliberation and consideration to the concerns, the panel are not assured that you will practice safely as a registered nurse in our employment and that as a result the panel has no confidence in you as a nurse in this Trust and we have taken the decision to dismiss you from the Trust with twelve week' pay in lieu of notice. Your last day of employment is Thursday 31st August 2017…."

39. So the issue becomes should they ever have deployed START and having done so does it justify them reviewing and revisiting the decision of the AW panel. The Claimant appealed and the issue was raised at the appeal hearing before Peter Wright as to which see Bp 640-656 with the Claimant again being represented by HH. His tack had now changed. He had previously thanked the MB panel for a fair hearing as indeed had the Claimant. But having taken legal advice from the GMB lawyers, the argument now in effect was one of "double jeopardy"[12]. That is as summarised by me: You cannot do this to the Claimant because you have dismissed him for the same reasons vis the texts". But we get the subtle distinction point. The letter of dismissal which MB had issued on 30 August BP 631-633 at first blush could be seen as being only a focus on the texts but it needs to be closely read. It is not just about the texts. It is about the other issues albeit they are not all spelt out and it is clearly about the impact of START including the interviews with MoD upon the veracity of the decision of the AW panel looked at now from a safety point of view vis inter alia the (Patient E) texts in the wider compass of issues such as RR and the interviews with MoD in which the Claimant had accepted that communication with patients via such as the personal mobile including texting should not occur and in the context of crossing professional boundaries. So it is not just revisiting solely the text messages viz Patient E and therefore in that sense if it be correct wrongfully seeking to have a second bite of the cherry, the inference being that MB was looking for any opportunity to get rid of the Claimant because she did not like the Ward outcome.

[12] This phrase was specifically used it was also pleaded in the ET1.

40. As to MB's evidence before me, I found her extremely impressive. I find as a matter of fact that she did not seek to extract revenge so to speak for the Ward failings, but that having read the START report she realised that the Ward panel had firstly not had before it fundamental evidence, which it should have had, and that second she was not going to revisit the matter as one of misconduct but she was going to look at it overall in terms of what is labelled before me by the Respondent as some other substantial reason (SOSR) viz s98 of the ERA focussing on safeguarding/ lack of trust and for the reasons I have now gone to.

Conclusions

41. So the first issue I have to decide is whether or not it was unfair within the range of reasonable responses test for the employer to deploy the evidence of START and its appendices given the shortcomings, which I make clear deeply concern me, in relation to the handling of that report by Jo Horsley. I am grateful for Counsels' very detailed written submissions and their reference to various legal authorities and the help that they have given me. This has been the main issue really since this case started. I get help more than anything else from their Lordships in the case of **Christou and Another v Haringey London Borough Council** [2013] EWCA Civ 178 and as per the judgment of Elias LJ. Res judicata does not apply to the Tribunal. Double jeopardy thus does not apply. Strictly speaking the test of abuse of process equally does not apply but it might do in the sense that an employer and with no good reason deployed evidence which it did not deploy previously. What the judgement makes plain is that it can in circumstances be fair, given the reasons and the significance, to revisit matters previously determined. In that case the two social workers concerned had originally received warnings. Subsequently when the matters were revisited they were dismissed. It does not seem that the facts were any different. In this case however there is a distinction. In this case there were facts which were not before the Ward hearing which would have undoubtedly made a difference. This Respondent Trust has an overarching responsibility for the safety of its patients. The issues that emerge from START link in that sense through to Patients E and F. Therefore, the Respondent is entitled to link them up even if there was incompetence in failing to do so before. It is the needs of the public that come first in this type of scenario.

42. And so what it means is that I am persuaded by Mr Crow that for the reasons I have now gone to the Respondent was acting fairly, albeit I can see the perception that the Claimant and HH would have had, in those circumstances in admitting START and then revisiting matters as per the decision of the MB panel but on the basis that they would do so it in terms of evaluating whether they could trust the Claimant in the circumstances and thus deal with it under SOSR. One final observation there. Sometimes reasons can blur. There can be a fine dividing line. In this case it is self-evident that much of what is under the focus here is in fact really more conduct because it is so clearly out with the professional standards that this Claimant should have been adhering to. But if the Respondent decides to go down a route which spares the Claimant the indignity and indeed the career implications of being dismissed by reason of misconduct and in that sense chooses to label it under SOSR and on the basis of the trust issue, how can that be unfair? The employer is not thus giving a reason under the first limb of 98 which does not exist, there is more than one reason here. It has decided to focus on SOSR. I have no doubt incidentally that MB genuinely believed in that as a reason for the dismissal.

43. So I find that the Claimant was fairly dismissed. In the alternative as is perhaps obvious if I had found that he had been unfairly dismissed then applying Section S122 of the ERA for the basic award and S123 for the compensatory award, as to conduct it is self-evident that this Claimant brought this upon himself, thus engaged would be first Section 122(2):

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

Second 123(6):

> *"Where the Tribunal finds 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 regards to that finding."*

44. Thus but for his conduct which as I have already said I find was seriously below the standard the Respondent was entitled to expect, he never have been in the position which he was. It follows that he wholly contributed to his dismissal and thus had I been finding this was an unfair dismissal I would have reduced compensation by one hundred per cent.

Final observation: Inordinate delay

44. Mr Bunting quite rightly cited **RSPCA v Cruden 1986 ICR 205 EAT**. Yes there was delay in this case but I have gone to the reasons why. Overall for the reasons I have now rehearsed I do not find that the delay was such as to render the process unfair.

Conclusion

45. The claim is dismissed.

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Employment Judge Britton

Date: 24 September 2019

REASONS SENT TO THE PARTIES ON
25 September 2019

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FOR THE TRIBUNAL OFFICE

Footnote** Having completed this judgment I have been informed that the actual ultimate conviction of RR was not for rape but was for a lesser sexual offence.