EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A Badejo	**v**	**Royal Free London NHS Foundation Trust**

Heard at: Watford **On**: 11 November 2019

Before: Employment Judge Bartlett (sitting alone)

Appearances

For the Claimant: Mrs Hodgson
For the Respondent: Ms Kennedy

JUDGMENT

1. The claimant's claim for unfair dismissal fails and is dismissed.

REASONS

The issues

1. A detailed list of issues had not been agreed prior to the hearing. Therefore at the start of the hearing I clarified the issues with the parties and the issues were agreed as follows:

   1.1 What was the reason for the claimant's dismissal – section 98(1) of the Employment Rights Act 1996?

   1.2 Was this reason potentially fair – section 98(2) of the ERA?

   1.3 Was the dismissal procedurally fair?

   1.4 Was the dismissal within the range of reasonable responses open to the employer?

   1.5 **British Homes Stores Limited v Burchell [1978] IRLR 379** sets out a three limbed test which must be applied to misconduct dismissals:

1.6 Did the employer believe the employee to be guilty of misconduct at the time of dismissal?

1.7 Did the employer have in mind reasonable grounds on which to sustain that belief?

1.8 When the employer formed that belief had it carried out a reasonable investigation in the circumstances?

1.9 If the claimant was unfairly dismissed and the remedy is compensation:

1.9.1 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825;

1.9.2 would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

1.9.3 did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Evidence

2. At the hearing the Tribunal heard evidence from Ms Jane Woollard (JW) and the claimant. Each witness swore on the Holy Bible and was asked questions in cross examination. The evidence is recorded in full in the record of proceedings.

3. The claimant's evidence was that she had not left patient X in his own faeces. She had not attended to him before going on her break and left him while she took her break. She considered that this was a case of mistaken identity and that SA was the individual who left patient X in his own faeces. She believes that patient X and or his family had made this mistake because she and SA looked similar: they were of the same build and height, they both wore large glasses and SA was Ghanian and whilst the claimant was Nigerian. She had put this to the respondent as part of the disciplinary process.

Background

4. The claimant worked for the respondent from 14 February 2008 until she was dismissed with a payment in lieu of notice on 31 January 2018. The claimant had been initially employed as a housekeeper and around 2014 she had changed into the role of a healthcare assistant (HCA). Since 2014 she had

been employed on the Spruce ward which cared for patients suffering from stroke and other neurological problems.

5. The claimant's dismissal was confirmed in a letter dated 23 February 2018.

6. The incidents giving rise to this claim can be summarised as follows:

   6.1 on 15 May 2017 the daughter of patient x became angry and upset about the care her father had received on the ward. An incident occurred in which the daughter vocalised her upset and it is not disputed that the daughter shouted at the claimant at this time;

   6.2 shortly after the incident the family submitted a formal written complaint which alleged that patient X had been left lying in his own faeces for one hour at 4:45 PM on 15 May 2017. The complaint sets out that patient X alerted the claimant at 4 PM that he was in need of urgent assistance and she knowingly left him uncared for until approximately 5:45 PM when a separate nursing assistant arrived to assist the patient. The complaint also alleges that the claimant was rude, failed to apologise and was far from professional.

Undisputed facts

7. By a letter of 22 May 2017 the claimant was invited to a line management meeting by Jennifer McKoy (who was the head nurse on Spruce ward) (JM). The line management meeting was scheduled for 24 May 2017 and stated "*the purpose of the meeting is to discuss a serious complaint…*" It then went on to outline the complaint made by patient X's family.

8. The respondent commissioned an investigation and the allegations against the claimant that were defined as follows:

   "1. left patient X on 15 May 2017 lying in his own faeces while she went on her break.
   2. Failed to clearly and appropriately communicate with patient X and patient X's relatives.
   3. Was neglectful in the discharge of her duties in providing appropriate personal hygiene care for patient X in line with the job description.
   4. She failed to ensure appropriate dignity in care the patient X.
   5. She was argumentative with patient X's relatives causing distress and anxiety."

9. By a letter dated 5 July 2017 the claimant was asked to submit a signed formal written statement to Julie Oliver by 14 July 2017 as part of the investigation process.

10. The claimant was invited to attend an investigation meeting on 25 July 2017 to discuss the allegations set out above. The letter also stated that:

    "In addition if the above allegations are proven then did you

- *Not behave in accordance with the trust values or expected standards of behaviour that all employees must strive towards;*
- *Portray an unprofessional image to patients/patient's relatives.*
- *Adversely impacted on the reputation of both the service/Ward and the trust."*

11. The notes of the investigation meeting which took place with the claimant set out that it lasted for 45 minutes and the appellant was accompanied by a Unison rep.

12. Investigation meetings were held on 25 July 2017 with Erlinda Velasco (EV), Jr sister Spruce ward, Lorraine Day (LD) staff nurse Spruce Ward, Sharon Adeji (SA) agency staff nurse and JM, Ward manager Spruce ward.

13. A witness statement was not taken from Emmanuella Strian, a nursing assistant, because she was on sick leave at the time of the investigation and did not supply a statement.

14. Svetlana Naceva-Garcove and Emily, both nursing assistants on Spruce ward did not provide witness statements.

15. Julie Oliver (JO) completed an investigation report dated 25 August 2017.

16. A letter dated 21 December 2017 from JW set out that JW considered there was a case to answer and that the claimant was required to attend a formal disciplinary hearing on 31 January 2018. It again repeated the five allegations set out above against the claimant. The letter set out that the claimant could be accompanied by a trade union representative or work colleague, that a sanction up to and including dismissal could be made against the claimant and JW must be informed if the claimant wished to call any witnesses.

17. The disciplinary hearing took place on 31 January 2018. Evidence was heard from the claimant, JK and EV. After an adjournment JW gave her decision that the claimant was to be dismissed with a payment in lieu of notice.

18. The outcome of the disciplinary meeting was confirmed in a letter dated 23 February 2018.

19. The claimant appealed against her dismissal. In June 2018 the claimant was invited to an appeal meeting but on 4 July 2018 she informed the respondent that she would not attend. Her letter of that date sets out the following:

> *"Personally, I am not ready to go through another tense and emotional turmoil of facing another NHS panel, looking back at the way I was treated at the dismissal hearing. And it is logical to conclude that if the NHS appeal hearing panel still upholds the original decision to dismiss, I will definitely still go to the tribunal which will obviously be independent, free and fair… You have acted so late in arranging an appeal hearing that I am now not obliged to attend.*
>
> *Finally, I have sought legal advice and from my discussions and confirmation from ACAS, I have no legal obligation to attend your late*

appeal hearing because of the timeframe and as such I will not be attending. I will rather wait the employment tribunal hearing already fixed for later in the year."

20. No appeal meeting took place and no further steps were taken by either party in relation to the appeal.

Submissions

21. Mrs Hodgson's submissions can be summarised as follows:

21.1 the burden of proof lies on the respondent;

21.2 the respondent's investigation was flawed for the following reasons:

21.2.1 the respondent did not obtain evidence from the site manager, Nick, as part of the investigation or disciplinary process;

21.2.2 the respondent did not call LD as a witness at the disciplinary hearing. LD's statement contradicts the evidence of other witnesses and therefore she should have been called;

21.2.3 evidence was not taken from the three other healthcare assistants who were on duty on the ward at the time of the incident;

21.2.4 there was undue delay in inviting the claimant to an appeal meeting. It is accepted that the claimant declined to attend an appeal meeting and that an appeal meeting was not held however the invitation was not issued until July 2018. The dismissal letter had been issued at the end of February 2018;

21.3 the respondent's decision to dismiss was flawed for the following reasons:

21.3.1 the decision letter does not set out a detailed analysis of what occurred or which pieces of conflicting evidence were accepted and why;

21.3.2 the investigation report and dismissal letter referred to matters extraneous to the incident on 15 May 2017. These influenced the decision to dismiss and it was not fair to take these matters into consideration because the claimant did not know the case against her;

21.3.3 the respondent failed to establish the timeline surrounding how long patient X was left in his faeces. If it had conducted a proper analysis it would have demonstrated that a different situation to the one the respondent alleges could have occurred. Mrs Hodgson did recognise that she found it in very difficult from the evidence to work out the timing of the May incident;

21.3.4 JW's evidence was that she did not disregard LD's evidence but there is no evidence that she did consider it;

21.3.5 SA's evidence does not support the allegation that patient X was left in his faeces for a long period;

21.3.6 JO or JW should have asked why the patient had not used the bell to call for attention if he was left in distress;

21.3.7 there is contradictory evidence about the claimant arguing with patient X's family;

21.4 the disciplinary policy was not followed in the following respects:

21.4.1.1. it is not clear that a workforce representative was involved in all parts of the process;

21.4.1.2. the questions JW asked of the claimant at the start of the disciplinary meeting demonstrate that she did not comply with the policy which sets out that the investigating manager will initially present the case firstly outlining their findings and secondly calling any witnesses.

21.5 the respondent did not consider alternatives to dismissal;

21.6 the respondent could not have formed a reasonable belief in the claimant's misconduct because the investigation was so flawed and it was not able to show that it had considered all the relevant evidence.

22. Ms Kennedy's submissions can be summarised as follows:

22.1 the respondent followed a fair dismissal process:

22.1.1 the investigation was clear;

22.1.2 the healthcare assistants were asked for statements and they had nothing relevant to the investigation to say. JO had turned her mind to the issue as to whether or not they had relevant evidence;

22.1.3 the claimant was given the opportunity to bring her own witnesses including LD to the disciplinary meeting and she did not;

22.2 the claimant's case is that the respondent's witnesses were involved in a conspiracy against her: several witnesses stated that they heard the claimant shouting including EV and SA and the patient's family. The claimant denies she shouted and therefore her claim is that all these individuals were lying as part of a conspiracy against her;

22.3 there is overwhelming evidence that what the respondent decided had happened on 15 May 2017 is what happened;

22.4 clear reasons were provided to the claimant for her dismissal which was the incident on 15 May 2017 and related issues which included that

patient X was competent, the claimant had cared for him three or four times previously and the claimant had seen him three or four times on the day of the incident. Therefore patient X knew who the claimant was and was not confused about her identity;

22.5 the respondent is not required to identify a precise timeline concerning what happened to patient X on 15 May 2017. If he was left in his own faeces for 20 minutes or one hour or even more it still amounts to abuse and neglect;

22.6 the investigation process was reasonable:

22.6.1 on the claimant's own evidence she bumped into the site manager, Nick, after the event and narrated to him what had happened to her. He did not see the incident and did not have useful evidence for an investigation process;

22.6.2 LD's statement sets out that she did not hear the claimant shouting but on LD's account she was not present with patient X throughout the duration of the incident because she stated that she went to get EV. Therefore her evidence does not exclude the possibility that the claimant shouted;

22.6.3 the failure to take evidence from Nick and/or consider LD's statement at the disciplinary hearing are not a basis for a reasonable employer to conclude that the two other witnesses SA and EV were lying about the claimant shouting;

22.7 the respondent came to a reasonable decision in dismissing the claimant for gross misconduct:

22.7.1 the allegations against the claimant included leaving a patient in his faeces, not giving patients appropriate dignity in care, being argumentative with relatives and having poor communication. These were all relevant to the disciplinary sanction and no other sanctions were appropriate. In addition the claimant's evidence was that she did not apologise and she would not apologise because she was not at fault. She did not recognise that an apology in respect of the patient's family's distress was appropriate;

22.8 in relation to Polkey and contributory fault any fair process would have resulted in the claimant's dismissal for gross misconduct.

Findings

23. I find that the respondent carried out a substantial investigation and disciplinary process. As part of the investigation an investigating officer was appointed (JO), she undertook investigation meetings with individuals who worked on the ward and took notes of those meetings. She gave a reasonable explanation why three witnesses were not interviewed (as set out above). She produced an investigation report which was dated 25 August 2017.

24. The investigation report was reviewed by human resources who had discussions and then it was referred to JW who made the decision to proceed with a disciplinary meeting.

25. I do not accept that the commissioning officer did not make the decision to proceed. JW's unchallenged evidence was that the initial commissioning officer had passed away. It was the respondent's case that by the time the decision needed to be made as to whether or not to proceed to a disciplinary meeting JW was the commissioning officer. I accept this. Therefore I do not accept that the respondent's disciplinary policy was breached in this way.

26. Mrs Hodgson sought to argue that the respondent's disciplinary policy had not been complied with because:

    26.1 a workforce representative was not involved at several stages despite the policy stating that they would be. I do not accept that a workforce representative is a trade union representative or similar because the term "trade union representative" is used in the policy in a different context. When reading the disciplinary policy it seems that the term workforce representative refers to the HR Department as can be seen from section 5.3.

    26.2 JW asking the claimant questions at the start of the disciplinary hearing was a breach of the policy concerning how the disciplinary meeting should be run. I find that JW did ask some questions of the claimant at the start of the disciplinary meeting. However I do not accept that this is a breach of the policy because JO was then invited to call witnesses, question the claimant and the claimant was given the opportunity to say or present anything she wished to do so. JW's evidence was that she asked the subject of disciplinary proceedings these questions to determine whether or not the disciplinary process was suitable or if a capability process should be considered. I consider that this is a reasonable and fair action.

27. Overall I find that the respondent has complied with the disciplinary policy. For completeness I record that no argument was made that this was a contractual policy.

Decision and Conclusion

28. The burden of proof lies on the respondent in relation to the first aspect of the Burchell test. The burden of proof in respect of the other two elements of the test is neutral.

Did the respondent believe the claimant was guilty of misconduct at the time of dismissal?

29. Mrs Hodgson argued that the employer took into account matters that were not relevant namely the views of some of the claimant's work colleagues about her and other incidents arising from her employment. In effect this is an argument that these were the real reasons for dismissal rather than the

allegations arising from the May 2017 incident. I accept that there is reference to conduct of the claimant and her attitude in work generally and not just limited to the May 2017 incident in the dismissal letter. There were also questions on these topics in the disciplinary meeting.

30. I find that JW and therefore the respondent reached conclusions on these matters after taking evidence from the claimant in the disciplinary meeting and considering objective evidence such as the notes about the claimant's performance. I find that the inclusion of these matters does not undermine the conclusions about leaving a patient in faeces and communication and argument with patient X's family. I find that as a result of the investigation and disciplinary meeting the respondent believed the claimant was guilty of misconduct at the time of dismissal. I find that the respondent made conclusions about the claimant's conduct in relation to the May 2017 incident as well as some more general conclusions on related matters such as complying with the respondent's dignity in care requirements. In addition, I find that some consideration of the claimant's work outside the May 2017 incident is legitimate as it can pertain to the sanction imposed. I do not accept that there was some ulterior motive or reason for the dismissal or that the reasons for dismissal are other than stated in the dismissal letter.

Did the respondent have in mind reasonable grounds to sustain its belief that the claimant had committed gross misconduct?

31. I find that the respondent decided that the claimant had:

    31.1 left patient X lying in his own faeces and chose to go on a break. This could reasonably be considered to amount to neglect and abuse of the patient;
    31.2 shouted at patient X's daughter;
    31.3 that the claimant had not clearly and appropriately communicated with patient X and his relatives and that she was argumentative with patient X's relatives causing distress and anxiety;
    31.4 was neglectful in discharging her duties in relation to the carers patient X; and
    31.5 failed to ensure patient X was cared for with appropriate dignity.

32. I find that the respondent did have in mind reasonable grounds to believe that the claimant had committed gross misconduct at the time of dismissal for the following reasons:

    32.1 the respondent relied on evidence from a number of different sources which supported the allegation that the claimant left patient X in his own faeces whilst she went on a break. The sources included but were not limited to the complaint from the family and to some extent SA's statement. As the allegation was that only the claimant attended patient X and then left him in his faeces no other staff member would be able to confirm in an eyewitness account whether or not this happened. I find that the respondent acted reasonably in relying on the patient's family's account, particularly as patient X was fully mentally competent, able to express himself and had had repeated contact with the claimant

previously and on the day in question. It was also undisputed that patient X was found in a soiled state. There was some dispute about how long this was for and how the circumstances arose. This is a situation involving different individuals giving different accounts of events. I find that it is reasonable for the respondent to have declined to accept the claimant's account and relied on other evidence it had obtained in the course of the investigation. The evidence from the patient's family was not obviously untrue and some other circumstantial evidence supported it;

32.2 the respondent noted the conflict in evidence between the claimant and EV concerning whether the claimant argued with patient X's family. I find that the respondent's decision to prefer EV's evidence was reasonable and open to the respondent. The evidence from all the other nurses was that the claimant was angry and that there was some sort of altercation. SA's statement to JM stated "*I cannot comment exactly what Abi and the patient's daughter were arguing because I was not present, I could only her loud shouting (both Abi's and the daughter's voice).*" I find that SA's statement could reasonably be interpreted as evidence that the claimant was shouting at patient X's daughter because "her" could be interpreted as a misspelling of "hear". Therefore I find that the respondent took into account conflicting evidence and formed a reasonable basis for its conclusions. These conclusions went to the allegation that the claimant failed to clearly and appropriately communicate and whether she was argumentative with patient X's family;

32.3 I do not consider the fact that LD's statement, stating that she did not hear the claimant raise her voice against patient X's family, renders unreasonable the respondent's conclusion that the claimant did raise her voice against patient X's family. Investigations into situations often give rise to conflicting accounts from different individuals. The respondent had evidence from a number of sources which set out that the claimant raised her voice to patient X's family. These sources were the patient's family, SA's statement and EV's statement. It is reasonable for the respondent to have preferred those sources than the evidence of the claimant and/or LD.

33. Mrs Hodgson made criticisms of the dismissal letter that it did not set out a summary of the conflicting evidence and did not explain why some evidence was preferred and others dismissed. I do not accept that a reasonable employer is required to set out all the pieces of conflicting evidence and how they weight them in the decision letter.

34. As I have set out above the respondent considered evidence from a number of sources including the claimant, other staff members and the family of patient X before coming to its belief.

35. I find that these were reasonable grounds on which a reasonable employer could conclude the claimant had committed gross misconduct. Therefore I find that the respondent's decision to dismiss the employee for gross misconduct was in the band of reasonable responses. The test of the band of reasonable responses means that the tribunal must not apply a test of what decision the

tribunal would have made instead it must consider what a reasonable employer acting reasonably would have done. This legal test gives the respondent a margin in which it can make decisions. The test is not whether another employer would have acted differently and it is not whether I would have made a different decision. The tribunal must not substitute its judgement for that of the employer. The test is whether or not the respondent's actions fall within the band of reasonable responses of a reasonable employer. This test applies to both the decision to dismiss and the procedure by which the decision was reached.

36. I recognise that the claimant had no written warnings or final warnings on her file. I have also considered that she had approximately 10 years of service with the respondent. The initial six years of which were as a housekeeper rather than as a healthcare assistant. 10 years is a considerable period of service. It may be the case that some employers would not have summarily dismissed the claimant however I consider that the findings against the claimant were so serious (specifically in relation to the care of patient X when combined with the communication and argument with patient X's relatives) that a reasonable employer acting reasonably could have concluded that they amounted to gross misconduct.

When the employer formed that belief had it carried out a reasonable investigation in the circumstances?

37. An employer must have carried out a reasonable investigation in all the circumstances before forming its belief in misconduct. After an investigation or disciplinary process has concluded it is almost always possible to identify how it could have been more fulsome or improved in some way. That is not the correct test. The relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

38. I find that the investigation was reasonable in all the circumstances for the following reasons:

    38.1 witness statements were taken from relevant witnesses i.e. those who witnessed the May 2017 incident. I find that the reasons why witness statements from the healthcare assistants were not taken were reasonable: one was on sick leave and two others said that they had nothing of note to add. I recognise that the bundle did not include the emails from the latter two healthcare assistants and that is regrettable. However it is also reasonable to conclude that not everybody on the ward would have witnessed the incident and would have had relevant evidence. A reasonable investigation does not require that every person who may have been in the vicinity should be required to provide a statement Further, I accept that JO as the investigating officer turned her mind to the issue of who should properly be interviewed about the May incident and took steps to ensure that they were;

    38.2 as witness statements were taken from the nurses on the ward some of whom were directly involved in the immediate aftermath of the

May incident, I do not accept that the failure to take a witness statement from the site manager, Nick, was a material flaw in the investigation or made it unreasonable. On the claimant's own account she narrated to Nick what she felt had happened to her. There was no claim that Nick had witnessed the incident and therefore could provide evidence on the contentious issue of how the claimant had treated patient X and her behaviour with the family;

38.3 the claimant was given fair notice of the disciplinary meeting;

38.4 she was provided with the investigation report and its appendices which included the evidence from the nurses on the ward amongst other pieces of evidence;

38.5 it was stated in the invitation to the disciplinary meeting letter that she could call witnesses and could submit written evidence. However she chose not to do so. I recognise that the claimant has suffered from some mental ill-health but she did not request more time or a delay to proceedings so that she could address her mental health or to enable her to fully participate in the disciplinary process. The claimant did not make any claim in these proceedings to that effect;

38.6 JO, as part of the investigation, took a witness statement from LD and in her investigation report she referred to LD's evidence (paragraph 34). Therefore I find that it was taken into account as part of the investigation and was part of the evidence before JW as the decision maker in the dismissal. JW's evidence was that she could not recall if she considered LD's evidence or not but she had weighed information before coming to her decision to dismiss. I accept this evidence;

38.7 the respondent did not take the complaint from patient X's family at face value and instead carried out an investigation.

39. Mrs Hodgson argued that the employer could have taken other actions in the investigation and disciplinary proceedings such as creating a timeline and assessing the differing accounts about how long patient X was left for and questioning why a mentally competent patient in distress did not use a bell to call for assistance. I find that these are things that an employer could have done but I do not find that not doing them renders the employers investigation unreasonable in all the circumstances. It is correct that there are differing accounts about how long patient X was left for, there are differing accounts as to whether the claimant shouted at the family or not however the fact that there were differing accounts does not render conclusions adverse to the claimant unreasonable. The respondent gathered the evidence and considered it. The suggestion that JO and/or JW should have asked more questions about the May 2017 incident such as why did patient X not ring the bell and why were different witnesses' timelines different are a claim that the investigation should have been more fulsome. However, I do not find that such criticisms render the investigation that took place unreasonable.

Was the dismissal within the range of reasonable responses open to the employer?

40. As I have recorded above, I find that dismissal was within the range of reasonable responses open to an employer. The claimant did not have any warnings on her file however I consider that the conduct which the respondent reasonably believed the claimant had committed can reasonably be considered to amount to gross misconduct resulting in summary dismissal. It is sufficiently serious in nature to amount to gross misconduct.

Procedural fairness

41. I consider that the dismissal was procedurally fair. There was an investigation, a disciplinary meeting at which the claimant gave evidence and it was open to her to submit evidence in support of her case before that and she was given a written outcome. The claimant was given a right of appeal which she initially exercised however there was a delay of approximately four months in scheduling the appeal meeting. By this time the claimant was in contact with ACAS and communicated that she did not wish to attend an appeal meeting. The appeal meeting did not take place. I find that the appeal process was abandoned by both parties and therefore I do not accept that the failure to complete the appeal process amounted to unfairness on the respondent's part. The situation is effectively the same as if the claimant had decided not to exercise her right of appeal. I recognise that there was a delay of over four months in the appeal process and that there had been delays in the dismissal process however I do not consider that these amounted to procedural unfairness in all circumstances.

42. Therefore I conclude that the respondent has established that the claimant was dismissed for misconduct and that this is a fair reason within the meaning of section 98(2) of the ERA.

43. For all of these reasons, I find that the claimant was fairly dismissed.

44. Therefore I am not required to consider any reductions in respect of **Polkey** or contributory fault.

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Employment Judge Bartlett

Date: 28 November 2019……..

Sent to the parties on: ....17.12.19.....

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For the Tribunal Office