EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4120783/2018

Held in Glasgow on 19 and 20 March 2019

Employment Judge: Lucy Wiseman
Members: Peter O'Hagan
Peter Kelman

Ms Pamela Morrison — **Claimant**
Represented by:
Mr R Milvenan - Solicitor

Nuffield Health — **Respondent**
Represented by:
Ms C Hollins - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 27 September 2018 alleging she had been unfairly dismissed. The claimant, in particular, argued the sanction of dismissal had been too harsh.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of conduct, but denying the dismissal had been unfair.

3. We heard evidence from Ms Sharon Campbell, Matron, who carried out the investigation; Mr Richard Comley, Senior General Manager, who took the decision to dismiss; Mr Matthew Lamb, Hospital Director, who heard the appeal; and from the claimant and Ms Kirsty Harper, RCN trade union representative.

4. We were also referred to a jointly produced set of documents. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

5. The claimant is a registered nurse, and was employed by the respondent as a Fertility Services Manager based at the respondent's hospital in Glasgow.

6. The claimant commenced employment on the 5 January 2016. The claimant's employment terminated on the 29 May 2018.

7. The claimant earned £3083 gross per month, giving a net weekly take home pay of £575.

8. The claimant's terms and conditions of employment were produced at page 34. The terms and conditions of employment included a section entitled Confidentiality (section 21). This section included a clause (clause 21.6) stating *"any confidential information relating to Nuffield Health's clients/service users, must not be discussed with third parties". Clause 21.7 provided that "any breach of confidentiality will be regarded as serious misconduct and is likely to result in summary dismissal."*

9. The claimant, as a registered nurse, was also subject to the Nursing and Midwifery Council Code, which set out the professional standards which must be upheld.

10. Ms Sharon Campbell, Matron at the Nuffield hospital in Glasgow, was asked to carry out an investigation into posts made on social media by the claimant, which related to one of the respondent's patients.

11. Ms Sharon Campbell met with the claimant on the 9 May to inform her of the allegation and of the fact an investigation would be carried out. The claimant was suspended from work on full pay.

12. Ms Sharon Campbell obtained a statement (page 187) from Ms Julie Campbell, Hospital Director. Ms Julie Campbell confirmed that on the 1 May 2018 she reviewed recent Linkedin posts and discovered the claimant had shared an article from a daily newspaper, and had added comments of a

personal nature. Ms Julie Campbell decided to speak to the claimant to ask if she had signed consent from the patient to speak about her relationship with the respondent publicly. The claimant initially told Ms Julie Campbell that she had the patient's consent, but then clarified that she had assumed consent because of the newspaper articles. Ms Julie Campbell told the claimant she did not have consent from the patient, and to remove the posts. Ms Campbell also informed the claimant her actions had breached patient confidentiality and the respondent's Social Media policy.

13. Ms Julie Campbell referred to an email dated 2 May (page 189) from the patient, in which she thanked the respondent, and in particular the claimant and the wider staff, who had been professional, caring, supportive and clear in all of the procedures. The patient also noted they had been unbelievably discreet and utterly supportive. The patient continued to state she had *"chosen not to talk publicly in too much depth about the medical procedures involved …. This decision means I am unable to publicly praise the Nuffield for their wonderful treatment."*

14. Ms Julie Campbell concluded her statement by confirming she had had to contact the patient following the claimant's social media posts to inform her of them, and to apologise on behalf of the organisation. The patient explained there were a number of reasons why they did not want to acknowledge or give consent to the respondent to disclose that they were a patient of the respondent.

15. Ms Julie Campbell, on the 10 May, sent an email to her team (page 190) informing them she had fully disclosed the incident to the patient and apologised. Ms Campbell confirmed the patient wanted her to understand why they did not want media attention. The patient felt the breach was not made with any malicious intent, and she thanked Ms Campbell for the wonderful care they had received at the hospital.

16. The Linkedin post was produced at page 179. The post shared the newspaper article regarding the patient's pregnancy and added the comment *"Well done and the ups and downs have been well worth it! So pleased for you [name of*

patient] and [name of patient's partner]. And now breathe!!". The post named the claimant, her role and the respondent.

17. Ms Sharon Campbell met with the claimant on the 17 May. The claimant wanted to meet offsite and Ms Campbell accommodated this request by arranging to meet the claimant at the respondent's gym site in Glasgow. Ms Campbell and the claimant met in the café area of the gym, and a booth where they could not be overheard and where Ms Campbell could see anyone approaching.

18. A note of the meeting was produced at page 195. The claimant confirmed she had shared the newspaper article on the respondent's Facebook page and on Linkedin, and posted a comment on Linkedin. She had removed both after speaking with Ms Julie Campbell.

19. The claimant was shown a copy of Ms Julie Campbell's statement and confirmed she agreed with its contents. The claimant confirmed she had a full understanding of consent and associated issues but had not considered patient consent at the time of the Linkedin post. She had assumed consent because of the newspaper article, and had thought her post was "ok" because the patient had announced her treatment and pregnancy via the media. The claimant was pleased for the patient and *"wanted to be part of the pregnancy and success"*, and *"was proud of [my] contribution to the patient's treatment as were the whole team"*. The claimant, whilst aware of the respondent's policies, had not thought about the consequences or implications.

20. Ms Sharon Campbell produced an Investigation Report (page 193) concluding the claimant had shared an article on two social media sites (Linkedin and Facebook) that referenced a patient's treatment at Nuffield Health Hospital in Glasgow and made comments on Linkedin without the consent of the patient. The allegation amounted to a breach of the respondent's Social Media Policy and the Group Data Protection Policy.

21. The claimant was, by letter of the 25 May (page 198) invited to attend a disciplinary hearing on the 29 May. The disciplinary hearing was chaired by Mr Richard Comley, Senior General Manager. The claimant attended and was

accompanied by her trade union representative, Ms Kirsty Harper. A note of the hearing was produced at page 200.

22. Ms Sharon Campbell attended the hearing to explain the investigation carried out. The claimant was given an opportunity to question Ms Campbell. Ms Campbell confirmed the issue related to the comments made by the claimant on the Linkedin post, because, from this, a personal relationship could be inferred and the claimant was clearly identifiable on the post as an employee of the respondent and someone who specialised in fertility treatment.

23. The claimant confirmed she had posted the article on Facebook but had not commented on it. The claimant understood the alleged breach of confidentiality was focussed on the comment she had made on the Linkedin post. The claimant accepted she knew the patient did not want to be affiliated with the respondent or have it made public that she had been treated by the respondent. The claimant's main motivation in posting the article had been to raise awareness, but she had also wanted to boost her team because she was proud of them. The claimant had assumed consent, but now understood and regretted her actions.

24. Mr Comley questioned the claimant about the fact great care had been taken during the patient's treatment to be discreet, and he contrasted this with making the post.

25. The claimant's representative, Ms Harper, provided Mr Comley with links to other posts of the same article (page 241, 242, 243 and 247). Mr Comley considered this information but the posts had been made by a variety of external organisations none of which had been involved in the treatment of the patient.

26. Mr Comley took no further action in respect of the post on Facebook. He concluded, with regard to the comments posted on Linkedin, that there had been a breach of patient confidentiality and that the claimant's actions had a damaging effect on the respondent. Mr Comley acknowledged the claimant had not made the post maliciously and that she understood she should have obtained written consent. He decided to summarily dismiss the claimant for

gross misconduct because the claimant had breached patient confidentiality by posting comments on Linkedin which implied a relationship with the patient and her partner and knowledge of the treatment, in circumstances where the claimant had been aware the patient had requested that her treatment not be associated with the respondent. The claimant's conduct had breached the respondent's Social Media policy and was likely to cause serious damage to the relationship between the respondent and the patient and bring the respondent into disrepute. The claimant's actions had resulted in a loss of trust and confidence in the claimant's ability to carry out her duties in a manner that is consistent with the requirements of her role in respect of confidentiality.

27. Mr Comley confirmed his decision by letter of the 30 May 2018 (page 222). The letter confirmed the decision to dismiss had been taken because the claimant made the post on Linkedin without patient consent and in circumstances where she knew the patient had requested that, for personal and professional reasons, she did not wish her treatment to be associated with the respondent. This was a breach of patient confidentiality and a breach of the respondent's Data Protection policy.

28. Mr Comley further concluded that the claimant's actions were a breach of the Social Media policy because inappropriate comments had been made about a patient, and confidential information had been posted about a patient. The comments made were a reflection of the patient's treatment experience with the respondent. The conduct was also likely to cause damage to the relationship between the respondent and the patient and bring the respondent into disrepute.

29. The claimant appealed against the decision to dismiss. The appeal hearing took place on the 28 June, and was chaired by Mr Matthew Lamb, Hospital Director based in Newcastle. The claimant attended with Ms Harper. A note of the hearing was produced at page 227. The claimant's position at the appeal was that there had been no explicit reference to the patient's treatment or to the treatment having taken place at the respondent's hospital. Ms Harper, the claimant's representative, accepted the post had been *"silly"* and *"irresponsible"* and that someone could jump to conclusions because the

claimant's job title and employer had been referred to in the post, but she argued the post had not breached patient confidentiality. She also argued the claimant had merely quoted what had been said in the article.

30. The claimant, during the appeal hearing, confirmed she understood confidentiality was paramount, and that whilst she had assumed she had the patient's consent, she in fact had not.

31. The main focus of the claimant's appeal was that the sanction of dismissal was too harsh. The claimant referred to the lengths she had gone to during the treatment to preserve confidentiality, and reiterated that no personal details had been shared. The claimant also argued that others had shared the link to the article, and she produced pages 245 and 246 being Facebook pages of other employees who had shared the article.

32. Mr Lamb took time to consider his decision. He concluded that people who saw the claimant's post could have drawn a link between the claimant, the respondent and the patient based on the comments made by the claimant. Mr Lamb acknowledged the fact of treatment was in the public domain by virtue of the newspaper articles; however, the patient had made very clear she wanted no link between her and the respondent. The post had used first names and through this established a degree of familiarity. It was very personal and read as if the claimant was addressing people she knew well. The phrase "ups and downs" was in the newspaper article, but someone would have to have read the article to know this.

33. Mr Lamb considered the respondent's policies and also the obligations of medical professionals. He concluded the claimant had breached confidentiality. He decided to dismiss the appeal.

34. Mr Lamb confirmed his decision in writing by letter of the 6 July (page 248). Mr Lamb set out the points raised by the claimant during the appeal, and his response to them. This included accepting the claimant's point that she had not overtly referenced the patient's treatment in her comments. However, Mr Lamb concluded the detail on the Linkedin page had identified the claimant, her job title and that she was a manager with the respondent. He concluded

it was reasonable to believe that individuals who read the post could infer the treatment took place at the respondent given the familiarity of the message posted combined with the claimant's job details.

35. The claimant obtained alternative employment as a Staff Nurse (Assisted Conception Service). She applied for this role in July; was notified she had been successful in August (page 250) and commenced this employment on the 1 October 2018. The claimant will earn a salary of £23,113.

Credibility and notes on the evidence

36. There were no issues of credibility in this case. The claimant maintained the same position as she had had during the disciplinary process. The claimant was critical of the investigatory process because of the location of the meeting with Ms Campbell and because she had not been given time to prepare for the meeting. The claimant also argued that she had not breached confidentiality because she had not exposed the patient was a patient of the respondent. The claimant considered a *"leap of imagination"* would have been needed to make the link. The claimant maintained her comments quoted the newspaper article, and that others who had shared the article had not been disciplined.

37. We found the respondent's witnesses to be credible and reliable, and they gave their evidence in an honest and straightforward manner. Mr Lamb in particular was a very clear witness who explained in very clear terms the paramount importance of confidentiality and the fact written signed consent is required from a patient regarding what can be shared with other people. The claimant, against that background and knowing the patient did not want any link between her treatment and the respondent, had posted comments which linked the patient to the respondent.

38. Ms Harper was also a credible and reliable witness but her evidence did not add to what the claimant had told the tribunal.

Respondent's submissions

39. Ms Hollins referred the tribunal to the terms of section 98 Employment Rights Act and to the cases of **British Home Stores Ltd v Burchell 1978 IRLR 379**; **Iceland Frozen Foods Ltd v Jones 1993 ICR 17** and **Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23**.

40. Ms Hollins set out the facts which she considered were not in dispute and this included the fact the claimant had posted the Linkedin post; she knew the patient did not wish to be associated with the respondent and she had initially informed Ms Julie Campbell that she had the patient's consent.

41. The claimant challenged the fairness of her dismissal by arguing she had not disclosed confidential information; there was no reasonable basis for concluding a link would be drawn from the post between the patient and the respondent and the decision to dismiss had been too harsh in the circumstances.

42. Ms Hollins submitted the reason for dismissal was conduct, which is a potentially fair reason for dismissal falling within section 98(2)(b) Employment Rights Act. The employer had carried out a fair procedure when dismissing the claimant. The claimant took issue with the fact the investigation meeting had been held in the gym café. Ms Hollins submitted Ms Campbell had taken sufficient precautions in holding the meeting there, and if there was any breach of procedure, it was minor.

43. This was a case where the claimant admitted making the post on Linkedin. The respondent accordingly had reasonable grounds for believing the claimant guilty of the misconduct. The claimant, on reflection, accepted she had affiliated the news of the patient's successful treatment with the respondent, in circumstances where she knew the patient did not wish for that affiliation to be made. The claimant's trade union representative also accepted the connection could be inferred.

44. Ms Hollins invited the tribunal to have regard to the evidence of Mr Lamb. He had explained in some detail both the professional obligations on clinicians and why he believed the inference, that the patient was a patient of the respondent, could be established. The claimant had not considered the

consequences or implications of making the comments, and this, it was submitted, was unforgiveable from such an experienced nurse.

45. Ms Hollins reminded the tribunal the respondent is engaged in the provision of healthcare services including medical services. It is subject to independent regulation relating both to its leadership and the care it delivers. It is of paramount importance and known to all medical professionals that there is an absolute duty to protect and maintain patient confidentiality. Mr Lamb told the tribunal there is no discretion in this matter. The fact a patient has been treated by the respondent is confidential.

46. The claimant is subject to the Nursing and Midwifery Council Code of Conduct which requires her to respect people's privacy and confidentiality. The respondent also has its own policies regarding these matters. The claimant accepted she was familiar with the respondent's Social Media policy and her duty to protect patient confidentiality.

47. Ms Hollins submitted the respondent had reasonable grounds to sustain their belief the claimant had, by posting the comment, breached confidentiality and breached its Social Media policy. This was an act of gross misconduct and a breach of trust and confidence. In all of the circumstances, dismissal fell within the band of reasonable responses which a reasonable employer might adopt. Ms Hollins invited the tribunal to dismiss the claim. If however the tribunal found the dismissal unfair, Ms Hollins submitted compensation should be reduced following the application of **Polkey** principles, contributory conduct and a failure to mitigate losses in circumstances where there is a national shortage of nurses.

Claimant's submissions

48. Mr Milvenan accepted the respondent had established a potentially fair reason for dismissal. He invited the tribunal to accept the claimant's evidence as credible and reliable and to treat the evidence of the respondent's witnesses with caution because they had framed their answers in a way to best suit their own circumstances.

49. Mr Milvenan submitted the claimant had received a text message whilst suspended, inviting her to meet with Ms Sharon Campbell. The claimant had not known this was a disciplinary investigation meeting and had been unprepared for the meeting, which had taken place in the café area of the gym. The failure by the respondent to hold the investigatory meeting in private was a breach of the basic principles of fairness and a breach of the ACAS Code.

50. Mr Milvenan submitted Mr Comley had not established that he had a clear and genuine belief that the claimant was guilty of misconduct. Mr Comley found misconduct based on the claimant having made the post without consent. There was no proof the comment on Linkedin demonstrated the patient had been treated by the respondent, and this could not be inferred.

51. Mr Comley had also concluded the wording of the comment reflected the patient's experience under treatment with the respondent. It was submitted there was no reasonable basis to form a link between the comment in the post and the patient's treatment. Mr Coley had also concluded the conduct was likely to cause serious damage to the relationship between the respondent and the patient and to bring the company into disrepute. It was submitted there was no reasonable basis for the conclusion in circumstances where the patient had not complained about the post.

52. Mr Milvenan invited the tribunal to find the respondent failed to obtain sufficient information to establish the facts necessary to support their conclusions. In particular there was no evidence to show a link between the post and the patient having been treated in the respondent's care; and no basis for concluding that damage was caused to the relationship between the respondent and the patient. The appeal had not rectified any of these errors.

53. Mr Milvenan submitted that in light of the foregoing, dismissal was outside the band of reasonable responses. The claimant had added the Linkedin post for a legitimate purpose, and that was to share a good news story. The respondent should have attached more weight to the claimant's lengthy experience as a nurse.

54. The claimant sought compensation in terms of the schedule of loss provided, and an uplift of 25% in respect of the respondent's unreasonable failure to comply with the ACAS code.

Decision and Discussion

55. We had regard firstly to the terms of section 98 Employment Rights Act which sets out how a tribunal should approach the question of whether a dismissal is fair. There are two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2). If the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair under section 98(4). This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

56. In the case of **British Home Stores Ltd v Burchell** to which we were referred, the Employment Appeal Tribunal said the employer must show:-

- it believed the employee was guilty of the misconduct;
- that it had in mind reasonable grounds upon which to sustain that belief and
- at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

57. We had regard to the investigation carried out by Ms Sharon Campbell. The employer's task is to gather all of the available evidence. Ms Campbell interviewed Ms Julie Campbell and the claimant, obtained statements from them and also obtained a copy of the posts made by the claimant. We noted there was no suggestion by the claimant that others ought to have been interviewed by Ms Campbell.

58. This was a case where many of the facts were not in dispute between the parties. The claimant accepted she had shared the newspaper article on Linkedin, and made a comment (as set out above). The claimant also accepted she was aware of the respondent's Social Media policy, the duty of

confidentiality and her professional duty of confidentiality. The claimant did not dispute what Ms Julie Campbell had set out in her statement.

59. The claimant's criticism of the investigation related to the fact the meeting with Ms Campbell had been held in the café area of the gym, and that she had not known in advance of attending that it was a disciplinary investigation meeting. We accepted Ms Campbell's evidence that she would have preferred to have the meeting on site, but she agreed to the claimant's request to have the meeting off-site because the claimant did not want to see other members of staff. We noted the claimant made no complaint about the venue of the meeting at the time.

60. We considered that it would, as a matter of good practice, have been preferable for the meeting to have taken place in a private area (on or off site). This was particularly so given the nature of what was to be discussed. We acknowledged Ms Campbell selected a quiet area where they would not be overheard, and could see people approaching; but this was a sensitive and serious matter which ought to have been dealt with accordingly.

61. The claimant did not suggest she had been hindered in any way by the fact the meeting was held in the café area. She did not suggest she had felt unable to explain her position; or unable to concentrate. We accordingly concluded that although it would have been preferable for the meeting to have been held in a private room, the decision to meet in the café area did not impact on the claimant's ability to participate in the meeting and did not impact on the fairness of the procedure followed by the employer.

62. The claimant raised two further points about the investigation and they were (i) she had not known the meeting with Ms Campbell was a disciplinary investigation meeting and (ii) she was not given time to prepare for the meeting. We preferred Ms Campbell's evidence regarding the claimant being aware the meeting was a disciplinary investigation meeting. We preferred her evidence because the investigation had already started. The claimant knew Ms Sharon Campbell was carrying out an investigation and she knew the allegation against her. We could not accept, against that background, that the

claimant did not know she was meeting Ms Campbell in connection with the investigation.

63. We could not accept the claimant's position that she had no time to prepare for the meeting in circumstances where she knew Ms Campbell was carrying out the investigation. Furthermore, the claimant at no time suggested that if she had had more time she would have had points to add.

64. We concluded the respondent carried out as much investigation as was reasonable in the circumstances of the case, and in circumstances where the claimant admitted making the posts which were the subject of the investigation.

65. We next considered whether the respondent had reasonable grounds upon which to sustain the belief the claimant had done what was alleged. The allegation was that the claimant had, on the 29 April 2018, posted comments on the social media site Linkedin that referenced a patient's treatment at Nuffield Health Hospital, Glasgow, without the consent of the patient. This was said to be a breach of the respondent's Social Media policy; a breach of the respondent's Data Protection policy; a breach of patient confidentiality; a risk to the respondent's reputation and the potential for the respondent's brand to be brought into disrepute.

66. There was no dispute regarding the fact the claimant had made the posts. The respondent accepted the claimant had not made any comments on Facebook, and accordingly the issue was whether the comments made on Linkedin referenced the patient's treatment at Nuffield Health, Glasgow without the consent of the patient.

67. The claimant's position was that she had not referenced the patient's treatment in the post, and had not breached confidentiality in circumstances where she had not expressly stated the patient had been treated by the respondent. The respondent accepted there had not been an express statement: the issue concerned whether someone reading the claimant's post would infer the patient had had treatment by the respondent. Mr Comley and Mr Lamb, in concluding someone could make that inference, had regard to

the fact the claimant's name, job title (Fertility Services Manager) and the name of the respondent appeared on the post. They also had regard to the words used in the message: first name terms had been used which implied familiarity. We were satisfied there were reasonable grounds to sustain their belief this inference could be drawn from the post.

68. The claimant also argued that she had simply quoted from the newspaper article. There was no dispute regarding the fact the term "ups and downs" was used in the post and the newspaper article. The respondent rejected the claimant's argument that she had been quoting from the article. Mr Lamb told the tribunal that someone reading the Linkedin post would not necessarily read the newspaper article. Further, the comment was a personal message from the claimant to the patient and her partner. We considered they had reasonable grounds to do so in circumstances where the claimant accepted the term was not in quotes in her post, and she also accepted there had been ups and downs in the treatment.

69. The respondent also had regard to the fact the comments posted concerned a patient under the care of the claimant; the fact the comments had been made constituted a breach of patient confidentiality. There was no dispute regarding the fact the claimant did not have the consent of the patient to make the comments, and the claimant knew it was of particular importance to the patient not to have her treatment affiliated to the respondent.

70. We concluded, having had regard to the above points, that the respondent had reasonable grounds upon which to sustain their belief the claimant breached the Social Media policy, the Data Protection policy and patient confidentiality when she made the comments on Linkedin.

71. The respondent also concluded the claimant's conduct was likely to cause serious damage to the relationship between the respondent and the patient and bring the company into disrepute. The claimant challenged this on the basis there had been no complaint from the patient and the email of the 2 May was filled with praise for the care the patient had received.

72. Mr Comley and Mr Lamb accepted the patient had not complained, and accepted there had been nothing but praise for the claimant, her team and the care the patient had received. However, at the time of writing the email of the 2 May, the patient had not been aware of the email. The Hospital Director, Ms Julie Campbell, had had to contact the patient to inform her of the post, and to apologise.

73. Mr Lamb explained to the tribunal that confidentiality was crucial not only from a professional point of view but also for the respondent. He said *"confidentiality is a given in our industry: we do not disclose patient information regardless of the circumstances. There is no area for discretion. We need written signed consent about what we can share with other people."* Mr Comley and Mr Lamb attached weight to the fact the patient had specifically told the respondent she did not want her treatment to be affiliated with the respondent; and the claimant was aware of this. We concluded, having regard to these facts, and to the nature of the respondent's business, that there were reasonable grounds to sustain the belief the claimant's conduct was likely to cause serious damage to the relationship between the respondent and the patient, and bring the company into disrepute.

74. We, in conclusion, were satisfied the respondent had reasonable grounds upon which to sustain their belief the claimant had acted as alleged and had breached patient confidentiality and the policies referred to, and that her actions were likely to cause serious damage to the relationship between the respondent and the patient and bring the company into disrepute.

75. We next considered whether dismissal was reasonable in the circumstances. We were referred to the case of **Iceland Frozen Foods Ltd v Jones** (above) and it is helpful to set out the guidance from that case. It was said that the correct approach for the tribunal to adopt in answering the question posed by section 98(4) Employment Rights Act is as follows:

"(1) the starting point should always be the words of section 98(4) themselves;

(2) in applying the section a tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."

76. We, in considering whether the decision to dismiss was fair or unfair, had regard to the fact there was no dispute regarding the fact the claimant did what was alleged, without the consent of the patient, and in the knowledge the patient did not want to be affiliated with the respondent. We were satisfied the employer had reasonable grounds upon which to sustain their belief that someone reading the Linkedin post could draw an inference from the comment made and the fact the claimant's job role and the name of the respondent were included in the post, and affiliate the patient and her treatment with the respondent.

77. We also had regard to the fact confidentiality is a key part of the claimant's professional standards, and a crucial part of the respondent's standards given the nature of their business. The claimant's terms and conditions of employment make clear that any breach of confidentiality will be treated as serious misconduct likely to result in summary dismissal. The claimant is an experienced nurse: she knew of the standards expected of her and she knew of the patient's wishes.

78. The claimant, at this hearing, raised several points regarding the procedure followed by the respondent when dismissing her. We have dealt with the points above and do not repeat them here. We were satisfied the respondent followed a fair procedure when dismissing the claimant (although we recognised that as a matter of good practice it would have been preferable for the investigation meeting to have been held in a private room).

79. We decided, having had regard to all of the above points, that the decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might adopt. The decision to dismiss was fair, and the claim is dismissed.

Employment Judge: Lucy Wiseman
Date of Judgement: 29 March 2019

Entered in Register,
Copied to Parties: 02 April 2019