EMPLOYMENT TRIBUNALS

Claimant: **Mrs J D Stawell**

Respondent: **Royal Naval Benevolent Trust**

Heard at: London South, West Croydon **On: 3, 4, 5 February 2020**

Before: **Employment Judge Tsamados (sitting alone)**

Representation
Claimant: Mr A Adamou, Counsel
Respondent: Ms Rachael Levene, Counsel

RESERVED JUDGMENT

The **Judgment** of the Employment Tribunal is as follows:

1) The Claimant was not dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996. Her complaint of unfair dismissal therefore fails and is dismissed.

2) The Claimant's complaints of entitlement to a redundancy payment, holiday pay and arrears of pay are dismissed on withdrawal.

REASONS

Claims and issues

1. By a Claim Form received by the Employment Tribunal on 14 September 2018, following a period of early conciliation from 30 August to 14 September 2018, the Claimant, Mrs Stawell, brought complaints of unfair dismissal and entitlement to outstanding holiday pay and arrears of pay, against her ex-employer the Respondent, the Royal Naval Benevolence

Trust.

2. In its Response which was received by the Employment Tribunal on 5 November 2018, the Respondent has denied the various complaints. The Response was belatedly accepted by the Employment Tribunal on 7 December 2018.

3. The Claimant provided voluntary further and better particulars and a response to the Respondent's grounds of resistance to her Claim on 8 December 2018.

4. There were a number of applications by both parties on various dates prior to this hearing which I do not propose to go into any detail of here.

5. For the hearing the Respondent provided a List of Issues. This has been agreed by the Claimant's representative, Mr Adamou, with one amendment to the second line to paragraph 1. i. changing the word "of" to "or". These are the agreed issues for this hearing and I attach them as an appendix to this Judgment.

6. In summary, the issues arising are as follows. The Claimant brings a complaint of constructive unfair dismissal. Her dismissal relies on the Respondent's alleged breach or breaches of the implied term of mutual trust and confidence. In the event that the Tribunal accepts that the Claimant was dismissed within section 95 of the Employment Rights Act 1996 ("ERA"), the Respondent avers that the potentially fair reason is conduct and that this was a sufficient reason for dismissing the Claimant within section 98(4) ERA. In terms of remedy, the Tribunal is required to consider matters of contributory conduct on the part of the Claimant, any **Polkey** reduction, any failure by the Claimant to mitigate her losses and the impact of any failure by the parties in following the ACAS Code of Practice 1: Discipline and grievance procedures (2015).

7. I clarified with Mr Adamou that the Claimant was not bringing complaints in respect of outstanding wages or holiday pay. Further, although the administration had also coded this case as one involving a complaint of entitlement to a redundancy payment, this was never a complaint that had been brought. In as far as necessary I therefore record that the complaints of entitlement to a redundancy payment, holiday pay and arrears of pay are dismissed on withdrawal.

Preliminary applications

8. The Respondent had made an application to the Employment Tribunal by email of 29 January 2020 to allow one of its witnesses, Mrs Pauline Shaw, who is one of its Trustees, to give evidence by way of video link, namely Skype. The email explained that due to a recent accident she was suffering a broken shoulder and had been medically advised not to travel any distance due to the fracture still being vulnerable. The email attached a medical note in support.

9. At the start of the hearing, I ascertained that the Claimant had no objections to this application. But I indicated that I had been advised by the Tribunal administration that the Respondent needed to provide the necessary technical facilities, the Tribunal not having any of its own. Ms Levine stated that her instructing solicitors would make the necessary arrangements. In the event, as the hearing proceeded, this did not prove possible and so the Respondent did not call Mrs Shaw to give evidence.

10. I reminded the parties that this was a public hearing and that the judgment of the Tribunal and reasons would be placed on a public website. I invited the parties to consider any matters arising from this, particularly as the case appeared to involve patients in a hospital. I was advised that there was only one patient involved and that person's name has been anonymised.

Documents

11. I was provided with two bundles of documents running to 907 pages. These were divided into two lever arch files the first of which I will refer to as "R1" and contains pages 1 to 447 and the second of which I will refer to as "R2" and contains pages 448 to 907.

12. I was also provided with a bundle containing the parties' witness statements.

13. I heard evidence from the Claimant by way of two written statements, one dated 21 November 2019, the other dated 29 November 2019 which was exhibited to the former along with a number of other documents, totaling 42 pages. I also heard evidence from the Claimant in oral testimony.

14. I heard evidence on behalf of the Respondent from Mr Rob Bosshardt, Mrs Tarnia Harrison and Mrs Gail Leacock by way of written statements and in oral testimony. There was also a written statement from Mrs Pauline Shaw, however as indicated above she was not able or present to give oral evidence. As indicated later on in these reasons, I considered the extent to which any weight could be placed upon her testimony in her absence.

My findings

15. I set out below the findings of fact I considered relevant and necessary to determine the issues that I am required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and I have borne it all in mind.

Background

16. The Claimant was employed by the Respondent is a Registered General Nurse ("RGN") at Pembroke House from 28 February 2012 until 27 August 2018. As an RGN, the Claimant was obliged to comply with the Nursing &

Midwifery Council ("NMC") Code of Professional Standards of Practice and Behaviour for Nurses and Midwives (2015). This would appear to be the document at R1 146-165. There is a further document entitled NMC Future Nurse standards of proficiency for registered nurses dated 17 May 2018 at R1 100-139.

17. The Respondent is a registered charity which was established in 1922 under Royal Charter. It provides assistance and relief in cases of necessity or distress to those who have served or are serving in the Royal Navy and Royal Marines in the rank up to and including that of Warrant Officer. This includes the provision of care, maintenance, training and welfare of their families and dependents.

18. As part of the provision of care, the Respondent has since 1952 run a care home, Pembroke House, which is in Gillingham, Kent. Pembroke House can accommodate up to 55 residents, with full nursing care available for up to approximately one third of those residents.

19. The Home Manager of Pembroke House is Mrs Tarnia Harrison. Her duties include overall management to ensure the smooth and efficient running of Pembroke House, for its residents and staff, complying in full with the Health & Safety Executive and Care Quality Commission ("CQC") regulations to provide a safe environment for the Respondent's beneficiaries, staff and visitors. She has overall accountability for all staff including the RGNs. Mrs Harrison was effectively the Claimant's manager, but for day to day matters, the Claimant would report to the Lead Nurse, the Deputy Home Manager or to Mrs Harrison. There was no Lead Nurse in post at the time of the events in question. In crossexamination, Mrs Harrison stated and I accept that although it was not ideal, many nursing homes did not have a lead nurse and functioned without one. The Respondent also employed a Care Standards Manager, Ms Bernice Stephenson.

20. The Claimant worked nights at Pembroke House and was very often the only employed nurse on duty. There was one nurse on the floor at any time and staff worked a shift pattern of early, early late, and early night shifts. So there would be 3 nurses working during the course of any 24 hour period. It was important for staff to be able to trust what their colleagues had done. Whilst it was not unreasonable for an RGN to take what s/he was told or advised of in a patient's notes made by another nurse on face value, there were times when s/he would need to check the position first-hand.

21. I was referred to the Claimant's terms and conditions of employment at R1 73-76. Clause 8 refers to the Respondent's policies and procedures including those relating to health and safety, dismissal, discipline and grievance procedures. I was also referred to the Claimant's requirements and terms of reference for an RGN (her job description) at R1 81-83. I was further referred to the Respondent's disciplinary and grievance procedure policy at R1 140-145.

22. The Respondent operated an I-Care electronic system for the delivery of patients' medication and information relating to such medication. At Pembroke House I-Care was monitored by Mrs Harrison and Mrs Leacock. The system was introduced as a result of previous concerns raised by the CQC in its report of August 2016. Details of the tendering process, the choice of the successful tender and information and training for staff are set out within the bundles. In particular, I refer to the letter from Mrs Harrison to the Claimant dated 24 August 2018 at R2 599-600 and the documents at R2 623-865.

23. I was not referred to all of the documents in this section, but as I understand it from the evidence I heard, the staff were involved in the tender process and the choice of the successful tender and system. I-Care was chosen, and staff were notified that the Respondent intended to transfer its medication care systems from paper to the electronic system on 13 December 2017. The Respondent set about a training process whereby it decided to train those staff who were the least computer literate so as to increase their confidence and so that they could then cascade training to other members of staff. Training took place in March and May 2018. I-Care when live on 21 May 2018.

24. I-Care was intended to contain scanned copies of all relevant documentation and correspondence relating to each patient. However, this had not happened across the board by the time of the events in question relevant to the Claimant's case. But each patient still had a paper file and any letters or other documents not scanned and placed on ICare could be found there. In oral evidence, the Claimant accepted that this was the case and that this is where a nurse would look for a patient's correspondence. She added that this is what she did.

<u>The incident with resident "SS"</u>

25. At the time of the matters relevant to the claim, the Deputy Home Manager was Mrs Gail Leacock. She was responsible with Mrs Harrison for ensuring the smooth running of Pembroke House.

26. Mrs Harrison was on annual leave the week beginning 9 July 2018 but was called into Pembroke House regarding an incident. At that time Mrs Leacock was absent from work due to ill-health.

27. On 10 July 2018, Ms Bernice Stephenson, the Respondent's Care Standards Manager, informed Mrs Harrison of an incident involving a resident of Pembroke House. Ms Stevenson had been at a local hospital and overheard hospital staff saying that they could not believe a patient had missed a cycle of chemotherapy. On taking another look she realised that the patient was a resident of Pembroke House. This resident (referred to for reasons of confidentiality as "SS"), who was suffering from cancer, had not received a cycle of chemotherapy which had been prescribed to her by her consultant.

28. In essence, what happened is as follows. On 12 June 2018, SS had attended the local hospital with one of her carers. She had been given a prescription for her chemotherapy medication. There had been a long queue at the hospital pharmacy. To save her waiting for possibly several hours that day, the pharmacist provided her carer with a docket for someone to come back to the pharmacy to collect the medication the following day. The docket was provided to the nurse in charge by SS's carer on her return to Pembroke House. However, it was not dealt with.
This only came to light at SS's subsequent appointment at the hospital accompanied by another carer on 10 July 2018. The consequence of this was that SS missed a cycle of chemotherapy medication.

29. Whilst SS was a patient whose care the Claimant had been involve in for two years, it is fair to say at the outset that her duties did not involve the collection of medication and she had not been involved in the events leading to the missing cycle of SS's chemotherapy medication. However, this was not necessarily a matter that was apparent to the respondent at this point in the chronology. I simply raise it now because it was clear to me that it was an issue that the claimant was concerned about.

30. Mrs Harrison was very shocked and devastated when she found out about this incident. SS had been in remission earlier in the year and had come out of remission again. Mrs Harrison was shocked that anyone could be looked after in a care home and not receive an entire cycle of chemotherapy. She had to speak to the SS and her family on the Monday after the incident and tell them that as a home the Respondent had been negligent. She did not blame any individual. She apologised profusely, telling them that the Respondent was investigating the matter.

31. The Respondent viewed this incident as amounting to a serious care failure. Mrs Harrison reported it to the Adults and Children's Services Team of the local authority on an adult social care safeguarding alert form on 10 July 2018 (at R1 304-312), the Charity Commission as a Serious Incident Report on 16 July 2018 (at R1 331-332). The Respondent also reported the matter to the CQC (at R1 316-328). It also appears that the Respondent referred the matter to the NMC although I am unclear of the specific date of this (R2 483-493 at page 487).

32. Mrs Harrison informed Mr Robert Bosshardt, the Respondent's Chief Executive, of the incident and as to the action that she had taken (her email to Mr Bosshardt of 10 July 2018 is at R1 312a). He was also very shocked and surprised by what had happened.

33. The Claimant accepted in oral evidence that this was a very serious matter that required investigation and that it was necessary for the Respondent to speak to all of the nursing staff at Pembroke House in order to ascertain how the cycle of chemotherapy had been missed. She further accepted that it was a matter that had to be reported to the Respondent's Trustee Board and to the Charity Commission and CQC.

34. On 12 July 2018, Mr Bosshardt attended Pembroke House with the Respondent's Financial Controller and HR Manager. They had a meeting with Mrs Leacock and Ms Stevenson. Ms Stevenson explained what had happened on 10 July 2018 and on request provided the names of all of the nurses that may have been involved.

35. Mr Bosshardt reported the matter to the Respondent's Board of Trustees on 12 and 13 July 2018 and to the Charity Commission (at R1 314A, 331332 and 331-332).

36. On 16 July 2018, Mr Bosshardt engaged an independent expert, Mr Phil Hale, to conduct an investigation and prepare a report on Pembroke House. This was in order to understand the context of this failure and to improve performance and procedures so as to prevent any re-occurrence. It was undertaken after consultation with the Chairman of the Board of Trustees, the Vice-President and Chairman of the Care of Older People Committee, and Mrs Pauline Shaw OBE, Specialist Trustee for Care (at R1 328b-d).

37. Mr Hale visited Pembroke House on 23 July 2018 and prepared a report the following day. His report identified a number of issues in the nursing unit there, whilst finding that the resident unit was working effectively and efficiently. The issues he identified within the nursing unit included ineffective communication between the nurses and confusing recording of medical information (R2 451-456).

38. Mr Bosshardt arranged for Mr Hale to attend an extraordinary meeting of the Trustee Board's Care of Older People Committee on 4 September 2018 so as to review the report and for Trustees on the committee to ask Mr Hale questions without staff present. The minutes of this meeting are at R2 608-609b.

39. Ms Stevenson identified seven nurses who were potentially involved in the incident, which included the Claimant. One of these, who for reasons of confidentiality I will refer to as "JM", was discussed in particular and she was suspended that day because it was felt by all present that she was the key individual involved in the development of the incident. JM was the RGN on both of the relevant days and should have remembered to send the docket for SS's medication.

40. Mr Bosshardt asked Mrs Leacock to carry out the investigatory hearings with those nurses identified, with assistance from Ms Stevenson. He did not involve Mrs Harrison at this stage because it was likely that she would be needed later on should the matter escalate to disciplinary proceedings.

<u>The investigation process</u>

41. As part of its investigation, the Respondent held investigatory meetings with the seven RGN's including the Claimant.

42. Whilst in oral evidence the Claimant stated that two other nurses were not investigated, this was the first time she had raised the matter although her explanation was that she had not been asked before. In any event the matter was not taken any further by Mr Adamou. In oral testimony, Mrs Harrison explained that one nurse worked on the flexi bank and only did two shifts a week, a total of 15 hours per month and was not involved in giving the medication and the other worked one night a week and was not involved.

43. Mrs Leacock wrote to the Claimant on 12 July 2018, requesting her to attend an investigatory meeting on 16 July. The letter, which is at R1 315, states that:

"An investigation will take place into allegations of failure to ensure that a resident's medication was collected and administered to that resident as per the orders of the Consultant."

44. The letter continues:

"This investigation amounts to a fact-finding exercise. Until the investigation has concluded, no decision will be made as to whether or not it will be necessary to instigate the Trust's Formal Disciplinary Procedure. The investigation will be concluded impartially and fairly and I would expect to be able to determine whether or not this investigation will lead to a disciplinary hearing."

45. The Claimant accepted in oral evidence that she had no objection to being invited to such a meeting and that it was a right and proper thing to do.

46. In advance of the meetings, Mrs Leacock spoke with one of SS's carers, who was with her at the hospital appointment on 12 June 2018 and asked her to write a statement regarding the medication that was prescribed and should have been collected. Mrs Leacock did not speak to the carer who was with SS at the hospital on 10 July 2018 because she understood that Mrs Harrison had already spoken to her and she had provided a statement.

47. Mrs Harrison, Mrs Leacock and Ms Stevenson had a meeting to discuss how to proceed with the investigation meetings. They wanted to make the process fair for members of staff and so decided it would be best to have a common list of questions to be asked of the nurses being investigated. This list is at R1 333.

48. The investigatory meetings with all of the nurses took place over the period of 16 to 23 July 2018.

49. The meeting with the Claimant took place on 16 July 2018 as scheduled. Present at the meeting were the Claimant, Mrs Leacock, Ms Stevenson and Ms Karen Flynn, who took notes. Audio recordings were made of the meetings of all of the nurses interviewed and written minutes were produced. The transcript of the Claimant's meeting is at R1 334-350. This is referred to variously as the notes of the meeting or the minutes of the meeting. As will become apparent, whilst the transcript of the meeting was provided to the Claimant, the audio recording was not.

50. The Claimant's fact-finding meeting started at 11:37 am and was concluded at 12:35 pm. Prior to the meetings, all of the nurses were given the opportunity to submit a written statement. The Claimant did not provide one. At her meeting this issue was raised by Mrs Leacock and the Claimant indicated that her statement had been provided to her RCN representative and was awaiting clearance. I assume by this the Claimant meant approval by her representative. Mrs Leacock explained to the Claimant that she had been informed by the Respondent's head office that they should conduct the meeting today in the absence of her statement.

51. Mrs Leacock said in cross examination that the Claimant had not provided a statement for use at the investigatory meeting. She asked Mrs Harrison to ask Mr Bosshardt if in the circumstances it was okay to go ahead and his response was that she should. I accept this evidence.

52. Mrs Leacock explained to the Claimant that the purpose of the meeting was to gather information relating to allegations that SS did not receive an entire cycle of chemotherapy and the poor documentation and communication between the nurses who cared for her.

53. At the start, Mrs Leacock explained to the Claimant the events relating to the incident involving SS and the missed cycle of chemotherapy. At R1 334 of the minutes of the meeting, the Claimant stated that she believed that at the time there were no letters from the local hospital's Haematology Department relating to SS's chemotherapy cycles. She further stated that SS had told her that she had not received any letters. She further stated that the nurses did not receive any communication as to when one cycle starts and another finishes because SS was in remission at one point. Mrs Leacock accepted that SS was in remission but told the Claimant that there were letters in SS's paper folder stating that the chemotherapy should have continued.

54. At this point in the meeting Mrs Leacock showed the Claimant the letters which were in SS's paper folder indicating that her chemotherapy should have continued. The minutes state that the Claimant looked at some paperwork. Whilst in written and oral evidence the Claimant's position is that some documents were waved in her face which she did not have the chance to read, the minutes indicate otherwise (reference to the exchange between the Claimant and Mrs Leacock from the bottom hole punch at R1 335 over to R1 336 onwards, in particular the Claimant's words "So that was when she started?" and Mrs Leacock's reference to matters which clearly she is reading from one of the letters).

55. Mrs Leacock then continued to explain to the Claimant the dates of the cycle of chemotherapy that had been missed and the sequence of events in which the carer who with SS had attended the hospital pharmacy and the failure to collect the medication.

56. Mrs Leacock made the point that had the Claimant read this letter she would have seen that SS was in remission but the cancer had come back and that

she should have been having 6 cycles of chemotherapy, the 3rd cycle of which was missed. Mrs Leacock added that none of the matrons had picked up that an entire cycle been missed.

57. The Claimant responded to her that she was not aware that medication should have been collected at the time. Mrs Leacock accepted that this was the case but stated that the Claimant knew that SS was receiving chemotherapy. The Claimant stated that this was the first time she had seen these letters but accepted that she knew SS was receiving chemotherapy and accepted that it was not a one-off treatment even if she was not at work every single day. However, she maintained that she had not seen the letters before.

58. Mrs Leacock then moved on to ask questions which she stated were being asked of all of the nurses. The first of these was what did the Claimant know about SS's condition in terms of the chemotherapy medication and why she was receiving it. The Claimant accepted in the meeting that she knew that SS was receiving chemotherapy treatment in the past, that it had stopped for whatever reason and that she went back to hospital although she did not know much more because they did not receive regular letters from the hospital. Mrs Leacock repeated that the letters were in SS's folder (at R1 338).

59. It would appear from the minutes that the Claimant's focus was more on how the cycle of chemotherapy had been missed and who was responsible. It also appears that she did not understand the exact sequence of events relating to the missed cycle of medication and Mrs Leacock had to repeat those events to her on several occasions.

60. The Claimant's focus was also on establishing that she was not to blame for what had happened (at R1 338-340). Mrs Leacock repeated that she was not blaming the Claimant for the incident but was asking what she knew about SS's condition given that the responsibility for picking up the medication was that of the matrons providing SS with care.

61. The Claimant responded that she was aware that when SS first came to Pembroke House she had cancer of the spine but that was all. Mrs Leacock responded that if every person had read the letters which were in SS's folder they would have seen that she had myeloma. She asked the Claimant if she knew what this was. The Claimant responded that she was not too sure because she is not an oncology nurse but she thinks it is a secondary condition. Mrs Leacock responded that she did not have to be an oncology nurse to know certain conditions, that the Claimant was being very defensive, and if she was taking care of a resident and a resident had a condition that she did not know about, then she would look it up. Mrs Leacock then explained that myeloma is cancer of the bone marrow and this is why SS was on chemotherapy. She further explained that SS was in remission before the previous year and that was why she had to restart medication and have a cycle of medication. She further pointed out that

there had also been a mistake as to the provision of the first cycle of medication in April 2018. However, the Claimant was unaware of this.

62. Mrs Leacock then asked the Claimant if she understood anything about SS's treatment (at R1 341). The Claimant responded that she did not because she was never around when SS had gone or come back with any information. She explained that she had only ever given SS two tablets for the chemotherapy, one was on Wednesday prior to this interview and the other on 5 May 2018. She said that this was the only two tablets of chemotherapy she had ever given to anyone.

63. Mrs Leacock said that the Claimant did not understand anything about SS's medication or why she was having it because she had not read anything that was handed over to her. She added that even though SS had two cycles of chemotherapy before the incident in question arose, the Claimant had never thought of looking it up to see why SS was on it and what had happened. The Claimant responded that this was the first time she had seen the letters and that she is not an oncology nurse, but she knew in the past SS had gone for blood tests at the hospital and goes
back to see a consultant to find out the results. Mrs Leacock stated that at least the Claimant knew something and that she did not need to be an oncology nurse to know that SS was having treatment and going back to see what the results were so that she could continue chemotherapy. She stated that:

> *"So it doesn't take an oncology nurse to, it takes a nurse who is actually taking care of SS to know what actually happens, she is in the Nursing Home and not on an oncology ward. She is in a nursing home being taken care of by nurses who should be responsible, because if I have a resident who is on a particular medication that I don't know about I would ensure to glean information, to ask information. So you didn't know that she was on chemotherapy?" (at the bottom of R 341).*

64. Mrs Leacock then asked the Claimant if she knew what the side-effects would be of SS's medication given that she had given her two lots and so would have looked at the side-effects. The Claimant responded that she had not looked at the side-effects, but she was aware in the distant past that when SS first came to Pembroke House she had episodes of loose stools and nausea at times (at R1 342). Mrs Leacock responded that these are really basic side-effects which can arise from most medications and that she was asking about specific side-effects.

65. Mrs Leacock then stated that the Claimant was not an oncology nurse but if she was administering a medication that is dealing with someone with cancer, then she did not think of looking up the side-effects. She added that the reason for this was in case SS complained and in case she saw certain signs and symptoms, she would know whether these are ones that might need her to take immediate action.

66. The Claimant responded that in the past she would look at what has been recorded on the Medical Administration Record ("MAR") sheet or on I-Care because the nurses can only see what they have to give any patient on a particular day. Mrs Leacock again repeated that her question was as to the side-effects of the medication and not what medication she had

administered. The Claimant responded that she had already answered this question and Mrs Leacock again explained that the question was as to the side-effects and not as to the medication which had been administered. The Claimant again repeated that SS could have loose stools and nausea. Mrs Leacock again repeated that these are basic side-effects and asked about specific side-effects to which the Claimant responded that she did not know all of the side-effects. Mrs Leacock again repeated that if the Claimant was giving this medication then even if she was not an oncology nurse there was all the more reason to check the side-effects to find out. She then explained some of the possible side effects to the Claimant (at the bottom of R1 342).

67. The interview then moved on to discuss whether the Claimant knew that SS was in remission. The Claimant responded that she had been told by Mrs Harrison in a discussion about SS's treatment although she could not recall when. Mrs Leacock responded that if the Claimant had been told by Mrs Harrison did she not think to seek more information from her colleagues and go through SS's notes from which she would have seen the letters.

68. The Claimant added that she would also check the care plans as well to which Mrs Leacock agreed. The Claimant then said that she would not have checked SS's care plan because she is not the named nurse (at the middle of R1 343). Mrs Leacock replied that care plans are not checked for a named nurse, care plans are checked when you deliver care from a care plan. She further stated that if you went to the floor now and picked up a care plan for a resident it would be apparent that it was written not by just one nurse. The Claimant responded that if she needed to pick up a care plan for a resident for any reason she would do so, but she did not have a reason to pick up SS's care plan and at the time a nurse was responsible for manually updating the documents. Mrs Leacock asked if she was aware whether this was done or not (although it is not clear from the notes whether she was referring to the manual update or the cycles of medication) and the Claimant repeated that she did not know because she had not touched SS's care plan. Mrs Leacock replied that if she was providing SS with chemotherapy medication she would need to read her notes and if she looked at the care plan would she think, let me see how many cycles SS is having and why she is having this medication. Mrs Leacock added that this was why the care plans were there.

69. The discussion then turned to whether information about the administering of chemotherapy was on I-Care. It appears that the Claimant and Mrs Leacock were talking at cross purposes (from the middle of R1 344 onwards).

70. Mrs Leacock then asked the Claimant about the provision of SS's medication one morning. The Claimant said that she was aware of this from the system and from the MAR chart previously. Mrs Leacock asked her if she knew why it had been changed to the morning. The Claimant responded no. Mrs Leacock repeated the need to read up on these medications, all the more so if as she says she is not an oncology nurse. She added that the medication states that it should be given at the same time of day and on the

same day and so if it was changed, the Claimant did not query this. The Claimant said she did not know why it was changed, she just thought it was a new cycle to start. Mrs Leacock made the point that the two other cycles were on the MAR chart and referred to a particular MAR chart which she showed to the Claimant. The Claimant again repeated that she did not know why the time was changed, she did not think to question it, she assumed it would be correct on the chart that was signed by 2 nurses. This exchange can be found at the bottom of R 1 345-346.

71. The discussion continued and Mrs Leacock repeated her point as to the need to question why the time of the medication had been changed. Mrs Leacock also made the point that it was simply not apparent from the MAR chart who it was who had changed the time of the medication. The Claimant made the point that the MAR chart had been signed by two trained nurses and Mrs Leacock stated "yes well with what is happening here I wouldn't trust any of the nurses" (at the top of R1 347). This comment has to read in the context of the incident in question.

72. Mrs Leacock then explained at some length how SS's entire cycles of chemotherapy had been administered incorrectly because of the error with her first cycle, the second cycle being administered at the wrong time and then she missed the third cycle (the middle of R1 347 onwards).

73. The Claimant expressed her sadness that SS had missed out on her medication and repeated that she had no idea that the medicines were to be collected from the pharmacy and that the day staff usually arrange collection and receipt of collection during the day. Mrs Leacock accepted this, but stressed that it was everybody's responsibility regardless of whether they work days or nights and that "documentation should be up to standard and if communication is up to standard then every nurse should have realised that SS had missed her cycle of medication" (at the bottom of R1 347). Mrs Leacock further explained at length the impact on the patient in the middle of all of this and that the responsibility for ensuring that she received her medication was not just one person's, it was everybody's.

74. Mrs Leacock then asked the Claimant that as someone who works nights what could she do in the future to ensure that this does not happen again to any nurse. The Claimant responded that she could only say that better communication has got to be the key. Mrs Leacock then stressed to her the importance of the documents (within SS's paper folder) which were there from the beginning which indicated from the very first letter the need to be more vigilant (from the middle of R1 348 onwards).

75. The meeting then turned to discuss the future position as to the treatment received by SS and whether this had been re-evaluated by her consultant. In short, Mrs Leacock stated that this needs to be checked on I-Care and that was the responsibility of the matrons after SS had returned from seeing her consultant (at R1 349-350).

76. Mrs Leacock then repeated the need for vigilance and to question treatment.

77. Finally, Mrs Leacock thanked the Claimant for attending the meeting, stressed that it was an investigation, a fact-finding meeting and that they would review the notes and then contact her as to the outcome and further action.

78. Mrs Leacock did not have any further involvement in the investigation of the disciplinary proceedings.

79. The Claimant was absent from work due to ill-health from 17 July 2018 onwards. A Report of Sick Leave/Absence is at R1 142 indicating that the Claimant was suffering from migraine. A private medical certificate from the Claimant's doctor dated 20 July 2018 states that the Claimant was unable to attend work from 17 to 24 July 2018 suffering from a urinary tract infection. A further Report of her Sick Leave/Absence dated 31 July 2018 is at R2 502 which states that she is "generally unwell - would not be in for the remainder of the week". There is then a fitness for work certificate from her doctor dated 10 August 2018 stating that the Claimant was not fit for work due to "stress at work" for the period of one month at R2 527.

80. The Claimant's position in evidence (which from her witness statement it is apparent that she gave at a later date as a response to the intervention of the NMC) is as follows:

    a. She was not involved in the events relating to the missed cycle of chemotherapy. As a member of the night care team, she played no role in the collection of medications. She was entitled to rely on her nursing colleagues and managers to fulfil their own roles and to follow the care plans and delivering the medication as disclosed to her by ICare.

    b. She never stated that she never read the letters sent to the Respondent with regard to SS. She read all of the letters on patients' files. During the investigatory meeting a bundle of letters were waved in front of her face. She was told that these included a letter referring to 6 sessions of chemotherapy in 2018. However, she has never seen this letter and it has never been provided to her. Another letter was dated 13 July 2018 and would not have been on SS's file when the Claimant had last been on duty. One letter had been addressed to SS in person and was not on the file on the several occasions that the Claimant reviewed her file. What the Claimant stated at the hearing was that this was the first time she had seen the letters referred to her.

    c. It was incorrect to suggest that she failed to update her knowledge of each patient's condition and the side effects of the medication that they were prescribed. The potential side effects of medication is set out on the packaging of the medication. The Claimant read this each time she administered the medication. The potential side-effects are also highlighted by I-Care. The Claimant had a long-standing relationship with SS and understood the potential side-effects and the actual side-

effects that she experienced. What she was asked, as she understood it, was as to the side-effects that SS had exhibited. She detailed these in the meeting and then agreed a list of potential sideeffects.

d. It is incorrect to state that by her own admission she did not read the care plans of any resident that she was not the named nurse for. The reading and updating of care plans relating to every one of the patients was part of her nightly routine. It was what she did each night as part of her job. The Claimant repeatedly asked for copies of the care plans that would contain her updates and would reveal the allegation to be baseless. She made it clear in the interview that if she needed to pick up a particular patient's care plan she would do so.

e. When she stated that she would not have checked SS's care plan because she is not her named nurse, she was speaking about a particular moment in time when Mrs Harrison had told her that SS was in remission.

81. This is at odds with the minutes of the fact-finding interview in many respects.

82. In cross examination, the Claimant was taken to the letters that the Respondent states were on SS's file and were referred to in the factfinding interview. These are at R1 173, 175, 273, 275 and 278.

83. I have gone through all of the letters from SS's hospital and set out the gist of each below. This includes the letter of July 2018 at R1 313-314.

a. R1 173-174 is a letter from a consultant to Pembroke House dated 18 May 2016 which within the heading diagnosis states inter alia that SS had been diagnosed with myeloma initially in September 2015 and has been treated with 6 cycles of CTD (chemotherapy) and achieved VGPR (very good partial response). The letter goes on to set out details of the treatment received, the medication prescribed, the outcome of blood tests and that from the myeloma point of view, SS was in complete remission.

b. R1 175-176 is a letter from a consultant to what appear to be a doctor's surgery and copied to Pembroke House dated 20 December 2016, again setting out the diagnosis at the heading. Inter alia the letter states that SS had completed 4 cycles of a VCD to which it had an excellent response following relapsed myeloma in August 2016 and will continue to complete 6 cycles of chemotherapy. Neither party advised me of the meaning of the abbreviation VCD.

c. R1 273-274 is a letter from the same consultant to another doctor's surgery but copied to Pembroke House dated 15 May 2018, setting out SS's diagnosis and treatment. The letter indicates that as of the date of the letter SS had completed 2 cycles of chemotherapy medication and

provided her blood counts remain stable she will continue with cycle 3 at the same dose. The letter ends with the consultant stating that s/he will review SS in the clinic in 4 weeks' time.

d. R1 278-279 is a letter from the same consultant to the same doctor's surgery and copied to Pembroke else dated 13 June 2018. Again, the letter sets out SS's diagnosis and treatment. The letter indicates inter alia that SS will continue with cycle 3 of the chemotherapy at the same dose and that she will again be reviewed in the clinic in 4 weeks' time.

e. R1 313-314 which a letter from the same consultant the same doctor's surgery and copied to Pembroke House dated 12 July 2018. Again, the letter sets out SS's diagnosis and treatment. The letter indicates that SS missed her last dose of chemotherapy because it was not collected by the nursing home team, that she has been given cycle 4 at the same dose and that the consultant has notified the nursing home team to ensure that SS gets the chemotherapy and does not miss the treatment. SS is again to be reviewed in clinic in 4 weeks' time.

84. In cross examination, the Claimant was taken to the letters which the Respondent asserts were in SS's paper file at the time of the incident in question.

85. It was specifically put to the Claimant that each of these letters set out SS's diagnosis and treatment and in particular made reference to 6 cycles of chemotherapy and she accepted that this was the case.

86. Her position at the fact-finding interview was that none of the letters were on SS's paper file and she had not seen them before. In cross examination she accepted that the letter dated 15 May 2018 (at R1 273274) was in the folder, but she did not remember seeing the letters dated 20 December 2016 (at R1 175-176) and 13 June 2018 (at R1 278-279). She accepted that these letters could have been in the folder at the time, and she added, or they were not in the folder when she picked it up. However, this is not something she said during the fact-finding interview although her explanation was that she never got the opportunity to say so because the meeting was fast paced.

87. In cross examination the Claimant was also questioned as to her inability to state what SS's condition was during the fact-finding interview although the letters which the Respondent asserts were in the paper folder stated clearly that it was myeloma and she had care of this patient for over 2 years. The Claimant responded that she was stressed in the meeting and under stress you cannot sometimes recall all of the information you know.

88. In cross examination the Claimant was also questioned about her inability during the meeting to mention any specific side-effects of SS's medication beyond any general and basic ones. The Claimant responded that the meeting was very fast and aggressive, she could not think and who could under duress. She further answered that whilst she had not looked at the

side-effects of the medication at the time of the interview, she had looked them up, although this was not something she said at the time.

89. Generally, the Claimant's position as to matters she was stating for the first time at this hearing was that she was not given a chance to say anything during the fact-finding interview.

90. At a further point in the cross examination, the Claimant stated that she was not given a chance to say everything during the interview, it was very fast paced and that is why she is here (ie at this hearing) today.

91. When it was put to her that she was given the opportunity to speak, that the Respondent was entitled to rely on what she said and that the interpretation placed upon the minutes was entirely fair, the Claimant's response was that a lot of what she said was twisted and that it was entirely unfair.

92. Mrs Leacock said in oral evidence that it was not correct to suggest that the fact-finding meeting was conducted in an aggressive manner affording the Claimant little chance to speak although she did accept that this did not mean that someone else might view it differently even if it was not intended. She did say in cross examination that other nurses did raise concerns about feeling pressurised at their interviews.

93. Mrs Leacock said in re-examination that she did become frustrated with the Claimant during the fact-finding interview because the Claimant kept interrupting when she was speaking. She particularly referred to R1 338 where she said "listen Julie" and the Claimant responded "I am listening". She said that the Claimant at this point had turned away from her and was not looking at her and was taking notes, and she was actually hyperventilating. I asked her if she had cause for concern that this might affect her ability to continue with the meeting. Mrs Leacock responded that at the time she did not take any action but it did not give her cause for concern because the Claimant relaxed immediately afterwards when she spoke to her.

94. In answer to my question whether the meeting was as the Claimant stated fast paced and she was stressed by it, Mrs Leacock replied that she saw no indication that the Claimant was stressed beyond the hyperventilating that she referred to. She said that the minutes of the meeting indicate that she asked questions and the Claimant answered them and that the meeting progressed and that the Claimant was given time to answer the questions.

95. In cross examination, Mrs Harrison stated that she saw all of the letters in SS's folder, those letters were needed in order to make her next appointments to see her GP and she never missed an appointment. However, she accepted that not all of them had been scanned onto the ICare system and it might be that some had been taken out and left loose pending scanning.

96. In cross examination, Mrs Leacock stated that it was only the June 2018 letter that was not in SS's folder when she went to investigate. However, the carer had been to the hospital with SS and collected the prescription docket. She established that the nurse had that information. Whilst that letter had been removed when she looked at the folder, she did not know whether it was there when the Claimant would have looked at the folder. However, the Claimant would have known from the other letters that SS was undergoing further chemotherapy. She made the point that in any event at the fact-finding interview the Claimant admitted that she had not seen any of the letters. In response to my question she stated that the July letter had not yet been provided by the consultant and some is not on file. The June letter was not there when she looked at the file, but it must have been at some time, otherwise the nurses would not have known about the next hospital appointment.

97. In answer to my questions, Mrs Leacock explained that the letters from SS's folder were on the desk at the fact-finding interview. She did not actually hand them to the Claimant. They were on one side (as opposed to being upside down to the Claimant). While she did not read them, the Claimant could have asked to read them but she did not do so. She clarified to me that a cycle of chemotherapy medication meant taking the medication over a period of one month, it was not one tablet but several types of tablets taken at different times and days.

98. On balance of probability, I reached the conclusion that whilst at this hearing the Claimant has given evidence that indicates that she had seen the letter of May 2018 and that she did not remember seeing the letters of December 2016 and June 2018, at the time of the fact-finding interview she was shown several letters and she said that she had seen none of them before. Further, it does seem that on balance of probability that the June and July 2018 letters were not ones that were shown to the Claimant at the fact-finding meeting. I accept Mrs Leacock's evidence as supported by the references to the letters within the minutes of the fact-finding interview as to the letters in SS's paper folder at the time of investigation. From these it is self-evident, even to me a non-medical person, the nature of SS's diagnosis and further treatment. Whilst there is no specific reference to the chemotherapy in 2018 consisting of 6 cycles, it is clear that SS had two previous treatments consisting of 6 cycles and was progressing to cycle 3 in the letter of May 2018. In any event, the Claimant stated in the fact-finding meeting that she was aware that SS was receiving chemotherapy and this was administered in 6 cycles.

99. On balance of probability, after considering the Claimant's evidence and that of Mrs Leacock and reading the minutes of the fact-finding interview, whilst I can see that there was an element of frustration and exasperation in what Mrs Leacock said to the Claimant on occasions, the Claimant was given every opportunity to respond and did so. The meeting does not come across as being fast paced or aggressive and there is no obvious indication of stress although I do accept I am just reading a transcript. I can well understand that the Claimant would feel stressed and pressurised by such

a meeting. The Claimant did appear to be adding things in her testimony which she did not say at the time and attempting to explain this away when challenged by stating that it was because she was not given the opportunity to do so. But on balance I do not accept what the Claimant has said as to the conduct of the meeting being aggressive, fast paced and that she was not given the opportunity to speak.

100. On balance of probability, I find that the Claimant made a series of admissions relating to lack of knowledge as to SS's condition and treatment and her understanding of the nature of the medication provided to SS and as to not reading the care plans of patient's for which she was not the named nurse. These are matters which the Respondent was entitled to react to on face value. Whilst the Claimant has provided written and oral testimony which seeks to distance herself from those admissions and to suggest that they have been taken out of context or twisted, the minutes of the fact-finding interview to me are clear. It may have been that perhaps the belated explanations provided by the Claimant in her testimony which largely repeats what she said during the subsequent NMC investigation may have been of more use to her at the time of the ensuing disciplinary process rather than after the event.

Action following the investigation

101. After all of the investigatory hearings had taken place, Mrs Harrison reviewed the transcripts of the hearings, the Code of conduct and Standards expected for RGN's (NMC The Code at R1 146-165 and NMC Future nurse: Standards of proficiency for registered nurses at R1 100 to 139). This was to determine whether any of the individual nurses had acted in breach of the Code or the Standards and to help prepare a conclusion that could be sent to Mr Bosshardt.

102. In her written evidence, Mrs Harrison said that it was apparent from the investigatory meeting that by her own admission the Claimant had said that she did not read the care plans of those she was not the named nurse for (at R1 343), despite the fact that she was required to provide care to all patients. Further, the Claimant also said that she never read the letters sent to the Respondent about SS's care from her consultant (at R1 335336 and 341). In addition, it was clear that the Claimant could not name the basic side-effects of the medications she had given to SS (at R1 342) meaning that she would not have been able to instruct the carers as to what they needed to be aware of with regards to the side-effects of the chemotherapy. Mrs Harrison concluded that these were all areas that are in breach of the NMC Code of Conduct and the NMC standards for Registered Nurses.

103. Following her review, Mrs Harrison wrote a "findings memo" which she sent to Mr Bosshardt. In this she summarised the findings of the Claimant's investigatory meeting as follows (at R1 351):

"I would suggest that Julie (the Claimant) is negligent in the care for the majority of the residents on the nursing floor. By her own admission she does not read the care plans of those that she is not the

named nurse for; she also said that she would never read the letter sent to us with regard to (SS's) care. She would be unable to instruct carers about what they needed to be aware of with regards to the side-effects of the chemotherapy. These are areas that are all in breach of the NMC code of conduct and the NMC standards for registered nurses."

104. On 25 July 2018, after reviewing the investigation notes and Mrs Harrison's memo, Mr Bosshardt sent an email to Mrs Harrison in which he stated that he believed that a call should be made to the NMC (at R2 458).

105. The matter was referred to the NMC on 10 August 2018. The NMC Advice and Information for Employers of Nurses and Midwives is at R2 459-482. The referral is at R2 483-492 and is in respect of all seven nurses that were under investigation.

Disciplinary proceedings

106. On 25 July 2018, Mrs Harrison wrote to the Claimant requesting that she attend a disciplinary hearing on 1 August 2018 (at R2 493). The letter stated that having read the statements and the summary of the investigation she had concluded that there was a disciplinary case to answer in that:

107. *"… you were negligent in the care of the majority of the residents on the nursing floor."*

108. The letter set out the purpose of the disciplinary hearing and warned that the outcome could lead to a dismissal and a report to the Nursing Regulatory Body. The letter enclosed a summary of the investigation notes and statements and a copy of the Respondent's Disciplinary Procedure Policy (which is at R1 140-145). The letter also advised the Claimant of her right of accompaniment to the hearing by a fellow worker or trade union official.

109. I would note that the enclosures which are listed at the bottom of the letter indicate that a record of the investigation meeting dated 16 July 2018 was also attached.

110. On 25 July 2018, the Claimant wrote to Mrs Harrison asking for evidence in support of the allegation against her and for clarification of what the allegation was. This letter is at R2 495. Her letter also stated that 1 August 2018 was not suitable for her representative body. It ended with the sentence:

"I believe I am being victimised and unfairly treated and for the record I deny negligence."

111. On 26 July 2018, Mrs Harrison responded to the Claimant (at R1 496). Her letter explained that the Claimant had been asked to submit a statement prior to her investigation meeting, but she declined and therefore the evidence against her were her answers provided to the questions asked at the investigation meeting, a copy of which had been enclosed with her previous letter. The letter further explained that Mrs Harrison had enclosed minutes taken from a previous meeting held on 16 April 2018, which the

Claimant already has copies of, at which poor standards of care and safety were raised. The letter also notified the Claimant of a new hearing date of 6 August 2018.

112. On 26 July 2018, the Claimant wrote to Mr Bosshardt, repeating her request to Mrs Harrison for disclosure of evidence relied upon by the Respondent. She also asked to liaise directly with him as to agreement of a new disciplinary hearing date convenient to her representative body. This letter is at R1 497.

113. On 27 July 2018, the Claimant wrote a letter to Mrs Harrison in somewhat strident terms. This is at R2 499. She accused Mrs Harrison of knowingly making an untrue statement with regard to her allegedly declining to provide a statement. She pointed out that it had been agreed that her statement would be sent to her professional body for prior consideration before it was submitted. She further complained that further accusations were being made against her, she just wanted to be treated fairly to clear her name and needed time to prepare her case and have the appropriate input from professional representatives. She further complained that it was unreasonable to set hearing dates without consultation. The letter ended that in view of the new allegations and the absolute unfairness of the procedure, she would expect to be granted the right to be legally represented at the hearing. Her letter was copied to Mr Bosshardt.

114. On 30 July 2018, Mrs Harrison responded to the Claimant confirming that the disciplinary hearing had been postponed at the Claimant's request and that in line with the ACAS Code of Practice (presumably relating to disciplinary and grievance procedures), the disciplinary hearing should be held without unreasonable delay and previous cases have shown that one week has been a reasonable length of time for this to happen. The letter explained that at the disciplinary hearing the Claimant would have the opportunity to set out her case and respond to the allegations. It also repeated her right of accompaniment by a fellow worker or trade union official. The letter ended that the hearing would take place on 6 August 2018 as previously stated. This letter is at R2 501.

115. On 1 August 2018, Mr Bosshardt wrote to the Claimant, noting that Mrs Harrison had replied to her request for evidence. This is at R2 503-504. His letter also noted that the Claimant had not agreed to the new hearing date set for 6 August 2018 and he suggested an alternative hearing date of 14 August 2018. His letter further clarified the allegations against the Claimant as follows:

- *you have admitted that you do not read the Care Plans for those nursing residents that you are the Named Nurse for;*
- *you have admitted that you have never read the letters sent to Pembroke House concerning care for SS (a nursing resident suffering from cancer);*
- *you were unable to instruct care workers concerning possible side effects of the chemotherapy regime for SS."*

116. The letter also indicated that there was a Warning Form which had been issued to the Claimant on 5 September 2012, this appeared relevant and so a copy was therefore enclosed (the Warning Form is at R1 167).

117. On 1 August 2018 at 14:27, the Claimant sent an email to the Respondent's generic email address and later forwarded a copy FAO Mr Bosshardt at 18:59 requesting acknowledgement of receipt. This is at R2 505-506 and contains a list of documents that the Claimant stated that she needs to have in order to answer the case against her.

118. On 3 August 2018 the Claimant sent a letter to Mr Bosshardt in which she made a further request for evidence in the form of documents as well as provision of further particulars of the allegations against her and renewed her request to be legally represented. This letter is at R2 508-509.

119. On 7 August 2018, Mr Bosshardt wrote to the Claimant in which he responded to all of her requests (in both her email of 1 August and her letter of 3 August 2018), either enclosing the documents requested or explaining why he was not providing them. In particular, he responded to her request for a copy of the tape of her investigatory interview, stating that he did not consider that this request was reasonable or necessary given that she had been provided with a transcript of that interview. The letter also stated that there was no provision within the Respondent's disciplinary procedure for legal representation. This letter is at R2 512513.

120. On 8 August 2018, the Claimant wrote a further letter to Mr Bosshardt in which she expressed her concern that she had not received the documents requested or a response to her emails of 1 and 3 August 2018. This is at R2 514. It would appear that their letters crossed in the post.

121. On 9 August 2018, the Claimant wrote to Mr Bosshardt by a letter headed *"Withdrawal of original allegation regarding collection and delivery of medication, your letter of 7 August 2018"*. This is at R2 516-519. Her letter submitted that Mr Bosshardt's letter of 7 August 2018 confirmed that the original cause of the fact-finding enquiry, namely an investigation into the collection and delivery of medication to a patient, resulting in the alleged complaint by the patient, had been discontinued. As a result, the letter further submitted this showed that she was not in any way at fault with regard to the matter which was under investigation. The letter further stated that she was now facing new allegations which were not subject to any fact-finding and were in apparent breach of the Respondent's disciplinary policy. The letter continued that the Claimant was now preparing to answer the new case raised against her, but she required the documents requested in order to substantiate what she knows to be incorrect allegations. The letter then set out at length the Claimant's position with regard to each of the documents that she had requested, a request for legal representation and as to further agreement of the hearing date. The letter also expressed concern about the stress caused to her as a result of the original allegation which has now been discontinued. The letter concluded by suggesting a hearing date be listed for either the 10, 11 or 12 September 2018.

122. On 13 August 2018, the Claimant wrote a further letter to Mr Bosshardt in which she sought to agree facts in order to reduce the length of the hearing. This is at R2 529-530.

123. On 14 August 2018, Mr Bosshardt wrote to the Claimant in which he set a final rescheduled date for the disciplinary hearing of 10 September 2018. The letter indicated that the Claimant was not entitled to legal representation and clarified that the allegations against her were those arising from the interview held with her on 16 July 2018. The letter went on to deal with the Claimant's various requests for provision of documentation, indicating what would be provided (and enclosing it) and repeating the Respondent's position as to non-provision. With regard to the request for tapes of interviews held with the Claimant on both 16 April and 16 July 2018, Mr Bosshardt proposed as a gesture of goodwill and by way of compromise that the Claimant could listen to the tapes in a private room at Pembroke House accompanied by a member of staff not involved in the case. The letter further stated that his role in conducting the disciplinary case does not include being in a position to accept or reject the Claimant's opinions (ie her proposed agreed facts) in advance of the hearing. The letter concluded that this was the last communication that Mr Bosshardt would allow concerning the provision of information in as far as he considered that the Claimant had been provided with all necessary and appropriate information concerning the allegations against her. This letter is at R2 540-542.

124. On 15 August 2018, the Claimant again wrote to Mr Bosshardt. This letter is at R2 547-548 and is headed *"Cover Up Management Failure*?" The letter explained that the Claimant needed the documents requested in order to defend herself and repeated her request for the outstanding documents and answers to questions. The letter also asked for an *"honest"* answer to the 10 questions set out within her letter of 13 August and set them out again. Her letter closed by stating that the answer to each of the questions she maintained was *"true"* and that if the
Respondent disagreed or challenged this in any way then it should tell her. The final sentence of the letter states:

> *"Your silence will be regarded as an admission of the truth and looks like an attempt to cover up management failures".*

125. On 15 August 2018, Mr Bosshardt replied repeating the paragraph from his letter of 14 August in which he made it clear that their correspondence was at an end. He indicated that he would not be responding to the comments contained within her letter of 15 August and he did not accept her assertion that silence would be regarded as an admission as stated. This letter is at R2 549.

126. On 16 August 2018, the Claimant wrote to Mr Bosshardt in which she advised him that she had provided her MP with details of her situation, the documentation requested and a response to her 10 questions. This is at R2

551. The letter was headed *"Refusal of a Fair Hearing*" and closed with the paragraph:

"I can hardly be expected to have faith in a procedure which has proved false to me from the very outset and denies me documents in my defence and denies me a response to straightforward enquiries.

Please reconsider."

127. On 16 August 2018, Mrs Harrison wrote to the Claimant seeking among other things confirmation that she would be attending the disciplinary hearing on 10 September 2018. This letter is at R2 555.

128. On 18 August 2018, the Claimant responded to Mrs Harrison again requesting provision of the documents to prove her case and an answer to the 10 enquiries that she had raised. Her letter set out concerns that she had been misled and misinformed from the beginning to the end in the socalled investigatory and disciplinary procedure and set out a number of specific instances. This letter is at R2 558-559.

129. The letter ended:

"Let me be clear – I will not let this drop. I was not negligent in relation to the majority of patients in the nursing floor as you alleged and I am equally not at fault on any of the three matters which are subject to the disciplinary hearing. What is more the documents I have requested would prove my case. There seems to me to be no reason the documentation is not provided and until disclosed there is a cover-up of your failings".

130. On 20 August 2018, Mrs Harrison wrote back to the Claimant explaining that she had been advised by Mr Bosshardt that there should be no further communication with her until the disciplinary hearing for which she awaited confirmation of attendance and the names of any witnesses. This letter is at R2 597.

131. On 20 August 2018, the Claimant wrote what appears to be a round robin letter to all members of staff at Pembroke House, to a number of third parties including HRH Prince of Wales and to what purported to be the Respondent's Trustees, in which she denied the allegations against her, criticised the Respondent, its disciplinary procedure and Mr Bosshardt. These letters are at R2 561-596 and were all addressed to the Respondent's head office.

132. On 23 August 2018, Mr Bosshardt sent an email to the Respondent's Trustees advising them that the Claimant had sent letters to all members of staff in apparent error having taken the names from the Respondent's website believing them to be Trustees. Mr Bosshardt explained in general terms that the letters were from a nurse facing disciplinary action and that given the strong possibility of a subsequent appeal following the disciplinary hearing, which would involve Trustees, it was inappropriate to involve them at this stage and so he did not intend to forward the letters to them. His email explained that he was taking legal advice and would respond appropriately

on behalf of the members of staff addressed. This email is at R2 598. At R2 598a-e are a number of emails by way of response from various of the Trustees.

133. On 24 August 2018, Mrs Harrison wrote to the Claimant providing her with the information she requested regarding the introduction and subsequent use of the Respondent's electronic I-Care system. This is at R2 599-600.

134. Mr Bosshardt had prepared a letter asking the Claimant not to contact other members of staff or third parties in relation to what was a confidential disciplinary matter. He also took the opportunity in his letter to confirm to the Claimant the precise words used by her during the investigatory meeting from which the allegations arose. In particular he corrected a typographical error in his letter of 1 August 2018 which had stated that she admitted to not reading care plans for those residents she was Named Nurse for. He explained that this should have stated that the Claimant admitted to not reading care plans for those residents that she was not the Named Nurse for. The letter ended by repeating the offer to make the recording of the investigatory meeting available to her to listen to at Pembroke House and in addition he offered to arrange at the same time for the requested care plans and MAR charts to be made available for her review. Mr Bosshardt had hoped to send this letter to the Claimant on 24 August 2018. However, he was not able to do until following the bank holiday weekend and the letter was not sent until 28 August 2018. His letter is at R1 604-606.

The Claimant's resignation

135. On 28 August 2018, prior to his sending the above letter, Mr Bosshardt received a further letter from the Claimant tendering her resignation. The letter from the Claimant was addressed to Mrs Harrison and dated 27 August 2018. It is at R2 601-602 and set out below:

> *"I am ending my employment today (27/08/18) as you are in fundamental breach of my contract by making my working for Pembroke House no longer possible.*
>
> *I have been repeatedly mis-informed.*
>
> *My reasonable written requests for information have remained unanswered.*
>
> *In breach of your obligations as my former employer I have been denied communication with you.*
>
> *I believe you have introduced an unsafe system of work and required me to rely upon it.*
>
> *I have been told by Deputy Manager Gail Leacock that:*
>
> *… I was not able to trust my Nursing Colleagues…*
>
> *I was told by Management that I was not to trust the paperwork at Pembroke House.*
>
> *I have found I can not (sic) rely upon the Management of Pembroke House.*
>
> *This breaks the bond of trust which must exist in the employer/employee relationship.*

Management have not been straightforward in their dealings with me.

The System of work involving the I-Care Electronic System has not proved reliable.

A safe system of work no longer exists.

Without good reason carers were asked to provide statements critical of me.

Without good reason you told me I was:

… "Negligent towards the majority of patients on the Nursing floor"…

I have been subjected to a so-called Fact-Finding Interview which was designed not to gain knowledge but to add weight to pre-determined assumptions. All of which assumptions disregard the Managements (sic) short-comings and the failings of the I-Care Electronic system introduced into the home on 17 May 2018.

I have been so badly treated and wrongly accused, not least in relation to your accusation concerning the majority of the patients on the Nursing Floor, that I have been made unwell-on (sic) medical advice I have been unable to work due to the stress directly caused by your actions. A case has been maintained against me which you know to be false. Documents which you know prove my innocence have been denied me.

In legal terms I have been constructively dismissed."

136. In her written evidence, the Claimant explains in detail the reasons why she decided to resign on 27 August 2018. These are set out at paragraph 17 of her witness statement dated 29 November 2018. I have taken this evidence into account.

137. Following receipt of her resignation, Mr Bosshardt wrote to the Claimant the same day on 28 August 2018, enclosing a copy of his intended letter of even date. The covering letter invited the Claimant to reconsider her resignation and to attend the disciplinary hearing on 10 September in order to present her case. This letter is at R2 603. The attachment is at R2 604-606.

138. In response, the Claimant wrote to Mr Bosshardt by letter dated 4 September 2018 in which she stated:

"The absurdity of the allegations made against me I feel warranted my action. I remain of that opinion."

139. The letter went on to refute Mr Bosshardt's assertion that there had been a small error in the allegations originally made against her and to state that a moment's reflection over what she had said about the care plans in the interview would have revealed that her reference to SS's care plans related to events in 2016 and that to suggest she had not looked at the care plans was absurd. This letter is at R2 610.

140. Having considered this response, Mr Bosshardt formed the view that because the Claimant did not specifically confirm whether she intended to withdraw her resignation and in view of the Respondent's regulatory

requirements, it was appropriate for him to proceed with the disciplinary hearing on 10 September 2018.

The disciplinary hearing

141. The Claimant did not attend the hearing. Mr Bosshardt considered the allegations against the Claimant and the various letters that she had sent. From this he concluded that the allegations against the Claimant were well founded and that, had the Claimant not resigned, it would have been appropriate to terminate her employment without notice by reason of gross misconduct.

142. On 18 September 2018, Mr Bosshardt wrote to the Claimant advising her that the hearing had proceeded in her absence. His letter set out his findings and reasons for them and his conclusion that her behaviour amounted to gross misconduct, for which she would have been dismissed without notice had she still employed by the Respondent. The letter notified the Claimant that the matter would be referred to the NMC. The letter also advised the Claimant of her right of appeal. This is at R2 611613.

143. The Claimant did not exercise her right of appeal.

Earlier incidents

144. During the course of the evidence reference was made to a number of earlier matters involving the Claimant. In answer to my question with regard to the documents which was sent to the Claimant prior to the disciplinary hearing from April 2018 meeting and a warning in September 2012, Mr Bosshardt stated that neither of these was a factor in his decision to dismissal the Claimant and that he did not rely on those documents. In any event, these earlier matters did not form part of the Claimant's case. I therefore do not know is to make any findings as to them.

The audio recording of the fact-finding interview

145. I was concerned that the Respondent had not provided the Claimant with a copy of the audio recording of her fact-finding interview. In cross examination, when questioned about his stance on the Claimant's request in correspondence (at R2 541 point 1), Mr Bosshardt stated that he used his judgement and was of the view that the recording contains confidential information. It was for this reason that he declined her request, but he felt that he had offered the Claimant a reasonable and workable compromise in offering to make the recording available to her to listen to at Pembroke House.

146. In evidence, the Claimant did not accept that the transcript of her factfinding interview was accurate because she had never been provided with a copy of the audio tape. Ms Levene submitted that the accuracy of the transcript

was never challenged in any of the Claimant's letters sent after its receipt. Further, the Claimant had been offered the opportunity to listen to the tape at the Respondent's premises but did not do so. The Claimant responded that her concern about having the tape was that when hearing it this would support her allegations as to the tone of the interview, the aggressive and oppressive nature and the pace.

147. Mrs Harrison said in cross examination that in determining whether there was a case to answer she had not listened to the audio recordings because she had verbatim notes and so did not feel the need to.

148. Mrs Harrison accepted in cross examination that she had discussed the position with regard to disclosure of the audio tapes to the Claimant with Mr Bosshardt and explained that this was in order to find a compromise. However she did not accept that it was inappropriate for her to have this conversation because there was only a remote chance of her being involved in the disciplinary hearing and only if there was any medical clarification required. I did not see anything untoward in Mrs Harrison's involvement in such a discussion.

149. Whilst it would perhaps have been better with hindsight to have provided the Claimant with a copy of the audio recording, I cannot find anything untoward in the Respondent's reasons for declining her request and in any event a reasonable compromise was provided to the Claimant which she did not avail herself of. This extended to the provision of an opportunity for her to review the Care Plans and MAR charts and again the Claimant did not avail herself of this opportunity.

Referrals to the NMC

150. On several occasions in evidence, reference was made to the outcome of the Respondent's referral of the Claimant to the NMC. The referral is at R2 483 at 487. In cross examination, Mrs Harrison did not accept that she pre-empted the outcome of the disciplinary hearing by making the referral at the point she did. She explained that under the NMC guidelines the Respondent did not have to await the outcome (R1 470 as to NMC referrals at the second paragraph below the sub-heading). Whilst I was not taken to any documents relating to the outcome, the Claimant stated that she was not found guilty of any wrongdoing. Without hearing any further evidence it was not possible to make any findings as to whether this was of any consequence to the matters arising in this claim.

151. Similarly, on several occasions, the Claimant made reference to having referred Mrs Harrison and Ms Leacock to the NMC. It was put to her that she had done this out of spite. However, she did not accept this and stated that she did so because she did not feel that they had dealt with her honestly or truthfully. In oral evidence, Mrs Harrison stated that she had heard from the NMC on 3 February 2020 that there was no case to answer. I have no reason to suppose that the Claimant made such referrals out of spite. Without hearing any yet further evidence is not possible for me to make any

findings as to whether the referrals were of any consequence to matters arising in this claim.

The I-Care system

152. The Claimant raised concerns about the I-Care system. I have set out my understanding of the I-Care system and its implementation above and I appreciate that at the time of the events in question not all of the documentation relating to patients had been scanned and put onto the system. The Claimant accepts that she received some training but her position is that this was not adequate and interrupted and whilst there was a 24-hour helpline this was not answered at night. She also alleged that the system repeatedly failed.

153. Mr Bosshardt accepted that I-Care did crash but was not aware that it did so to the extent the Claimant alleged. In any event, Mr Bosshardt stated that if it did, the information was retained and there was the backup paper system. The Respondent did accept the allegations as to the 24-hour helpline.

154. Mr Adamou started to ask Mr Bosshardt questions about concerns raised by one of the other nurses as to the I-Care system. Ms Levene objected on the basis that this related to a separate nurse, had not been raised before and was not relevant to the Claimant's case. Mr Adamou said he would leave it there.

155. I was referred to a statement from RT, a Senior Health Care Assistant at Pembroke House as to the training that the Claimant received in May 2018. This is at R2 510. This sets out the nature of the training provided to the Claimant, that it lasted between one hour and one hour and a half and that as far as the trainer can remember the Claimant had not approached for any additional support.

156. Mr Hales' made reference to I-Care in his report at R2 454 and whilst he indicated some specific shortcomings, he records that there was a general feeling amongst staff that it was a good system and will make a difference to the efficiency of the units, especially in record keeping. His report indicates that the red flag system of alerts within I-Care was an effective means of minimising the risk of missing something important with regard to patient care. His recommendations include several relating to I-Care at R2 455 at paragraphs numbered 7 and 9. However, he identifies that the clear cause for concern is with the nursing unit and communication, although it is fair to note that in one part of his report he does state that "ICare is not used as effective (sic) as it could be to minimise the risk of missing an important action".

ICE folders

157. New evidence emerged during cross examination of Mrs Leacock as to the existence of ICE folders (In Case of Emergency folders). I clarified that these are distinct from the patient folders which have already been referred to, which are kept in the nurses base in a locked cabinet and contain visits to hospital sheet, details of when assessed by other members of multi-disciplinary team and letters from hospital and consultants.

158. There are also separate ICE folder for each resident which are kept on the nurses base. These contain information for each patient as to their medical condition, details of next of kin, MAR charts and DNR forms (Do Not Resuscitate).

159. Mr Adamou, more by way of submissions, stated that if no ICE folder existed or could not be found for a patient, this would cause problems and would constitute a non-safe system of work. Ms Levene responded that this was a purely hypothetical contention and constructive dismissal is based on a repudiatory breach, i.e. what happened and not what could have happened.

The other nurses under investigation

160. Of the 7 nurses under investigation, 3 including the Claimant resigned, one did not return to work, one was suspended and one left after receiving a final warning.

Unfair treatment relied upon

161. In cross examination in relation to the Claimant's reliance on the Respondents alleged unfair treatment towards her from April 2018 until 27 August 2018 the Claimant accepted that she was not relying on the events in April 2018 as part of the reasons for her resignation. However, she stated that she had been looking for alternative employment since April 2018 having made up her mind to leave at that time. She accepted that she was planning to leave but only when something suitable came up.

The NMC Code

162. In cross examination the Claimant was taken to various parts of the NMC code. The introduction at R1 147 states that the Code contains the professional standards that registered nurses and midwives must uphold. It further states that UK nurses and midwives must act in line with the Code, whether they are providing direct care to individuals, groups or communities or bringing their professional knowledge to bear on nursing and midwifery practice in other roles.

163. Paragraph 1 at R1 149 is headed treat people as individuals and uphold the dignity and at sub-paragraph 1.2 to achieve this, you must make sure you deliver the fundamentals of care efficiently. The Claimant accepted that this included full and proper knowledge of the patient's treatment and the likely side-effects.

164. Paragraph 6 at R1 152 is headed always practice in line with the best available evidence and sub-paragraph 6.1 states that nurses and midwives must make sure that any information or advice given his evidence-based, including information relating to using any healthcare products or services. The Claimant accepted that this reinforces the need to know the evidence and the side-effects.

165. Paragraph 8 at R1 153 is headed work co-operatively and sub-paragraphs 8.3 and 8.6 states to achieve this you must keep colleagues informed when you are sharing the care of individuals with other healthcare professionals and staff and share information to identify and reduce risk, respectively. The Claimant accepted that this reinforces that if the time of taking medication has been changed you must work with your colleagues to find out why and she stated that this is what she did.

166. It was put to the Claimant in cross examination that in line with these principles, the Respondent had to consider whether there was a case to answer. The Claimant's response was that she had been invited to the fact-finding meeting on the premise that the Respondent wanted to find out why SS's medication had not been collected.

Mrs Shaw's witness statement

167. I considered the witness statement provided by Mrs Pauline Shaw. Mrs Shaw was unable to attend the hearing for medical reasons. Her witness statement was signed and dated. The Respondent attempted to arrange for her to give evidence by video link. This did not prove possible. In the end it was not necessary to attach any specific weight to the contents of her witness statement because the matters she dealt with were covered by the testimony of the Respondents other witnesses and the documentary evidence.

Closing Submissions

168. I heard closing submissions from both Counsel. Ms Levene provided written submissions which she spoke to and Mr Adamou gave oral submissions.

Respondent's submissions

Was there a dismissal?

Repudiatory breach

169. There is no dismissal within the meaning of section 95(1)(c). There is no repudiatory breach either as a single or cumulative breach. In any event the Claimant has never made it clear whether she relies on a single breach or a cumulative breach and she has never spelt out what the final act was or how it added something to what happened before. The Respondent did not act in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence.

170. The Claimant had made a series of admissions during the fact-finding meeting held on 16 July 2018. It was quite reasonable of the Respondent to follow up these admissions as they were indicative of potential negligent conduct. The Claimant was invited to a disciplinary hearing. The Claimant resigned prior to the disciplinary hearing and was not constructively dismissed. The simple explanation is that she did not wish to attend a disciplinary hearing where a potential outcome was her dismissal. In evidence, the Claimant admitted that she had decided to leave the Respondent's employment in April 2018 and was actively seeking other work. So, the backdrop is that the Claimant had already decided to leave before any of the later events occurred.

171. The Respondent submits that there was no repudiatory breach either in individually or in the round.

Acts or omissions relied upon

172. The submissions then dealt with each of the alleged acts or omissions by the Respondent which the Claimant relies upon, which are set out at paragraph 1 i. a) to k) of the agreed list of issues:

Pursuit of a case against the Claimant that it knew to be false

173. The Respondent denies this. It had valid reasonable grounds to investigate the Claimant, who was a treating nurse, following the incident involving the missing cycle of chemotherapy. Particularly so, given the series of admissions made at the fact-finding meeting which gave the Respondent cause for concern. These included, not reading letters, not knowing the side effects of medication, not knowing that SS's condition was myeloma and not reading care plans unless she was the named nurse. Whilst the Claimant in evidence complained about the conduct of the fact-finding meeting, this was not something she raised as part of her stated case, it was not set out in her witness statements, it was denied by Mrs Leacock and was not raised in the copious correspondence which the Claimant sent to the Respondent. The Claimant simply made these comments in an attempt to explain away her various admissions during that meeting.

Refusal to communicate with the Claimant or provide her with evidence

174. The Claimant sent copious requests for information, clarification and evidence. The Respondent was courteous and reasonable in reply. It denied that there was a refusal to communicate or that the Claimant was denied any relevant evidence and when it did not provide the evidence requested the Respondent provided reasoned explanations. Attempts were made to facilitate access to the recording of the fact-finding interview and also for the Claimant to look at the patient's care plans whilst maintaining confidentiality of the information.

An allegation of negligence against the Claimant without reasonable belief

175. The fact-finding meeting created a real concern that the Claimant was acting negligently. This formed the basis of the case against the Claimant in the disciplinary invite letter (R2 493). It was further clarified in correspondence (R2 503). Given the Claimant submissions and with the NMC Code in mind, it was reasonable to frame the overarching in this way.

Acting unfairly against the Claimant from April to August 2018 including threatening dismissal without proper cause

176. This is denied. The issues in April 2018 related to drug disposal, were dealt with at the time and were not ongoing. The Claimant never raised a grievance about this. She does not rely on the April issues in her resignation letter. In any event the Claimant was not treated unfairly during the April drug issues. In cross examination the Claimant stated that the issues in April 2018 were not part of her case.

177. With regard to the events arising from the incident with SS, the Claimant was not treated unfairly when she was invited to the investigation meeting, she was not treated unfairly at the meeting on 16 July, which was handled in a reasonable manner with consistent questions of all nurses interviewed. Given the serious care failure over the missed chemotherapy cycle, it was necessary for the Respondent to plan an investigation with a series of questions but also consider what each nurse said. The only contact between July to August 2018 was in correspondence. The correspondence was respectful and helpful towards the Claimant and reflects the huge amount of work that was undertaken the Respondent.

178. The allegation of a threat of dismissal is without foundation. The mention of dismissal as a possible outcome in the disciplinary investigation letter is a fair thing to do and is in line with the Respondent's policy (R1 140). Indeed, the Claimant conceded this was not a threat in cross examination.

Making a false allegation that the patient had made a complaint

179. There was never any allegation that the patient made a complaint, this was explained in the letter at R2 541 at point 8. It is not something that the Claimant in any event mentioned in her resignation letter and it was not a point that was put to any of the Respondent's witnesses.

Misinterpreting the interview of 16 July 2018

180. This is denied. The admissions in the investigation notes are plain for all to see.

Telling the Claimant that she could not trust her colleagues or the paperwork

181. This is to be seen within the context of the comment made by Mrs Leacock which appears at the top of R1 347 of the minutes of the factfinding meeting.

Given what Mrs Leacock heard regarding serious nursing failings, she was simply impressing on the Claimant to be reasonable herself to check things. The comment does not amount to a breach of contract it is simply the Respondent telling the Claimant that standards are being breached so she has to act critically and responsibly as a practitioner.

Having no safe system of working place due to the above and the loss of nursing staff

182. The Claimant worked on her own at nights. Any loss of nursing staff did not affect her. Further the loss of nursing staff was because those nursing staff were not upholding safe standards. Therefore, their removal was to promote a safe system of work not the opposite. The Respondent had received a good rating from the CQC which indicates a safe system in any event (at R1 280). Whilst in her oral evidence the Claimant made allegations about the I-Care system and ICE, any precise criticism beyond there being no safe system of work has ever been put and in any event, it cannot shift like sand. Whilst the paper documents had not all been scanned into the patients' I-Care files, there was a backup paper system.

Failure to implement the I-Care electronic system safely, with a lack of supervision, testing and training on I-Care

183. This is denied, there was adequate training and supervision as clarified by Mrs Harrison in evidence. The Claimant received training from RT and never went back to RT to raise any concerns or seek any further guidance.

Waiver or delay?

184. In any event the Claimant has affirmed the alleged breaches of contract. She never raised a grievance. She continued to correspond with the Respondent. Various allegations are in relation to the meeting itself which was 6 weeks before she resigned. It is unclear what the last straw is. The last chronological event that she raises in her written evidence (witness statement bundle page 17 paragraph 16) is Mr Bosshardt's letter of 14 August 2018. This letter reflects a reasonable approach to her correspondence and does not add anything that could amount to repudiatory breach. In any event a further 13 days pass until the Claimant's resignation during which she continued to correspond and affirm the contract. Additionally, her new evidence during the hearing was that she had decided to leave in April 2018 and was looking for other employment.

Resignation in response to the breach

185. The Claimant did not resign in response to the breach of contract. The only reason that she resigned was to avoid attending the disciplinary hearing and in addition she admitted in oral evidence that she had already decided to leave some months before and was looking for other employment in any event.

186. She attempted to exert pressure on the Respondent to drop the charges, such as using aggressive language (R2 547 “Cover Up In Management Failure?”), Telling the Respondent that she had written to her MP (R2 551), accusing the Respondent of an unfair procedure and trying to secure an outcome via ACAS (R2 558-9).

187. If the Claimant had a solid defence to the charges, she would have attended the hearing to put her side across. There was also an appeals mechanism open to her if so required. Instead she did not enter into the process and resigned to avoid what she anticipated would be a disciplinary finding against her.

188. I asked the Respondent’s counsel if her submissions on constructive dismissal are the same for unfairness if I were to find that there was a dismissal. She responded yes in the light of the Claimant’s conduct and behaviour she would have been fairly dismissed on 10 September 2018.

Remedy

Contributory fault

189. The Claimant committed blameworthy conduct and she contributed to her dismissal by 100%. This is based on her admissions at the investigation and the reasoning within the disciplinary outcome letter as expanded by the Respondent’s evidence.

Polkey

190. If there was a constructive unfair dismissal, which is denied, the Claimant was fairly dismissed on 10 September 2018 in any event. The loss should be restricted to that date. This was a hearing of which she had ample notice, it had been rearranged for her benefit many times, there was a reasonable investigation and Mr Bosshardt had reasonable grounds for his genuine belief in gross misconduct. It should be remembered that the Respondent is a charity. Taking into account its size and administrative resources, the Respondent acted fairly and properly.

ACAS Code reduction

191. The Claimant failed to submit a grievance and did not appeal against her dismissal. Any compensation awarded should be reduced by 25%.

<u>The Claimant’s submissions</u>

Was there a dismissal?

192. There was a dismissal within the meaning of section 95(1)(c).

Repudiatory breach

193. What the Respondent did was to embark upon a course of conduct which at least was seriously intended to affect mutual trust and confidence. When it reached the point at which the Claimant decided to resign it was clear to her that the Respondent no longer wish to be bound by the terms and conditions of her contract of employment.

194. The overarching position is that each time the Claimant sought to obtain information and documents, whilst she was granted some of these, she was seeking information by which to prove her innocence and this was refused. And then the Respondent simply refused to correspond with her, and this was the point at which the matter crystallised.

195. It was right for the Respondent to follow up the admissions made at the fact-finding meeting. But one thing that needs to be considered is how that was followed up. There was no further investigation as to the admissions. No clarification was obtained in that meeting as to the comments made by the Claimant. Her comments were taken out of context and used to spearhead the allegations which were then brought against her.

196. Whilst the Claimant did not use the word "oppressive" about the conduct of the meeting or raise it in cross examination, that is what she has said - she could not get a word in edgeways, was not given time to articulate her points. This is cogent evidence that can be taken into account.

197. The Claimant was someone who has been in post for many years, she loved her work and was then put in the position where she faced the potential of having that snatched away. This has to be taken into account.

Acts or omissions relied upon

Pursuit of a case against the Claimant that it knew to be false

198. The disciplinary invite letter dated 1 August 2018 set out that one of the allegations against the Claimant was that she had admitted that she did not read care plans for patients for whom she was the named nurse. Whilst this error was caught it was not until 26 days later. To explain that this was something that nobody noticed beggars belief. It must have been abundantly clear that it was plainly false.

199. There was a need to investigate the Claimant's comments after the meeting had taken place. The allegation states that the Claimant had been negligent to the majority of the patients in her care and yet the factfinding meeting had focused on one patient. The admissions that were relied upon were taken out of context to the rest of the discussion and have been used as a jumping off charge without the evidence. There is nothing in the patient's hospital letters that supports the view that there were 6 cycles of chemotherapy and yet it was relied upon heavily that the Claimant should have known this.

200. The scope of the questioning at the fact-finding meeting was greatly extended to the matter which was identified in the fact-finding meeting invite letter. The Claimant was wholly unprepared for the scope and level of questions that she was asked. It was said that she had refused to provide a supporting statement, and yet even on the notes of the meeting this is simply not the case.

Refusal to communicate with the Claimant or provide her with evidence

201. On multiple occasions the Claimant attempted to obtain evidence which would have exonerated her. She repeatedly asked for care plans because on her evidence she updated and wrote the care plans. Whilst it is accepted that she was invited in to listen to the recording of her factfinding interview and to read the care plans, this only came about after her repeated attempts to obtain evidence.

An allegation of negligence against the Claimant without a reasonable basis

202. It is clear on the purported admissions, that the Respondent has taken the individual comments made by the Claimant and has extrapolated them to apply to her general conduct and without any further investigation is going to have a hearing to find that she was negligent. Whilst it is accepted that the disciplinary hearing was where the Claimant could put forward her view of events and the outcome would not necessary be a finding of negligence, the Respondent had made it clear that there was a case to answer but in fact there was not.

Acting unfairly against the Claimant from April to August 2018 including threatening dismissal without proper cause

203. The Claimant accepts that this does not include April 2018 or indeed the events in September 2012 so we will not dwell on these.

204. The focus is from July 2018 onwards. When one looks at the letter of invitation to the fact-finding interview it is stated that this is to enquire into a failure to administer a cycle of medication. The Claimant worked nights and so could not have been responsible for this. So, she is invited to an investigation in which in any assessment was to deal with something which could not be held at her door. We appreciate that all the nurses were called to meetings but that does not mean that it was right to call the Claimant in the first place.

205. The Claimant repeatedly asked for the documents and information. Mr Bosshardt was discussing what response to make to these requests with Mrs Harrison. Mr Bosshardt should not have done this because it affected his ability to maintain impartiality during the disciplinary process.

206. Whilst it is accepted that there was no overt threat of dismissal, threats can come in many shapes and sizes. The Claimant concedes the mention of dismissal in the disciplinary invite letter was not a threat But we must consider the effect of what was said given her concerns that she did not

think she would get a fair hearing and so she could read those words with the view that this could be an outcome.

Making a false allegation that a patient had made a complaint

207. This is not pursued by the Claimant.

Misinterpreting the interview of 16 July 2018

208. In cross examination of Mrs Leacock this point was laid bare.

Telling the Claimant that she could not trust her colleagues or the paperwork

209. To be told in a formal interview that she cannot trust her colleagues, one can appreciate what a blow this would be to the Claimant and then told after the meeting we do not trust you.

Having no safe system of work in place due to the above and the loss of nursing staff

210. Whilst Pembroke House had a good CQC rating, the Claimant's evidence was that it was the nurses who achieved this. So, having the nurses leave and agency staff in place to replace them would jeopardise this rating and the safeness of the system of work.

Failing to implement the I-Care electronic system safely, with a lack of supervision, testing and training on I-Care

211. This is simply down to the evidence. They Claimant said she had limited training which was interrupted. The electronic system was designed to replace paper system, there were issues, it crashed, it was accepted it crashed, and was not functioning properly. This necessarily impacts on the entirety of the issues that came before it. And it must be noted that this was a system still seeing issues as recently as July 2018 and issues were being raised by other individuals and I did not touch upon as raised by others and were in the Claimant's evidence.

Waiver and delay?

212. Whilst it is accepted that the Claimant raise no formal grievance, it was put to Mr Bosshardt that the Claimant raised a number of concerns and these continued up to the date of resignation. There is therefore no waiver or delay. The idea to resign is a very serious decision to take especially with no alternative employment in place. The Claimant was entitled to assess her position and reach a decision. 13 days is not an unreasonable period of time.

213. I commented that it is generally accepted that one is entitled to thinking time but the amount of that depends on the circumstances.

214. Whilst the Claimant did not attend the disciplinary hearing, she was entitled not to do so in the circumstances.

Did the Claimant resign in response to the breach?

215. Yes, she did. She was entitled to look for alternative employment. Nothing has been shown that she had another job offer or was actually leaving and no job was taken. Just looking for alternative employment is not indicative in itself.

216. With regard to any appeal process, this would be looking at the findings that Mr Bosshardt had already made and in the Claimant's mind it would be an exercise in futility.

217. If there was a dismissal, we submit that the points raised in relation to the constructive dismissal would be reiterated in the case of unfairness.

Remedy

Contributory fault

218. There is no culpable conduct and so no reduction

Polkey

219. The Claimant would not have been fairly dismissed so there should be no reduction. But in the event, we would argue that the Respondent did not have a genuine belief in misconduct.

ACAS Code reduction

220. The Claimant had raised issues and had raised concerns, even if not formally raised, and so any reduction in the award of compensation for breach of the ACAS Code should not be 25% and should only reflect her not filing a formal grievance.

Relevant Law

221. Section 92 of the Employment Rights Act 1996:

> *'(1) An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal—*
>
> *(a) if the employee is given by the employer notice of termination of his contract of employment,*
>
> *(b) if the employee's contract of employment is terminated by the employer without notice…'*

222. Section 94(1) of the Employment Rights Act 1996:

'An employee has the right not to be unfairly dismissed by his employer.'

223. Section 98 (1), (2) and (4) of the Employment Rights Act 1996:

'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.'

Conclusions

Constructive dismissal

224. For the purposes of a claim of unfair dismissal there of course has to be a dismissal. This has to fall within section 95 ERA 1996. A termination of the contract of employment between the parties by the employee will constitute a dismissal within section 95(1)(c) if s/he is entitled to so terminate it because of the employer's conduct. This is colloquially and widely known as a 'constructive dismissal'.

225. The leading case is *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27, CA. As Lord Denning indicated an employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct which

is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

226. Thus in order for an employee to be able to claim constructive dismissal, four conditions must be met:

a. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

b. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his/her leaving.

c. S/he must leave in response to the breach and not for some other, unconnected reason. S/he must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

d. If an employee leaves in circumstances where these conditions are not met, s/he will simply have resigned and there will be no dismissal within

the meaning of ERA 1996 and so there can be no claim of unfair dismissal.

227. The House of Lords in *Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606*, *[1997] IRLR 462* defined this as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

228. This follows the formulation adopted in a series of cases by lower courts, eg *Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347*, *[1981] ICR 666* per Browne-Wilkinson J, approved by the Court of Appeal in *Lewis v Motorworld Garages Ltd [1986] ICR 157*.

229. However, a note of caution needs to be expressed in relation to the precise terms of the formulation adopted by Lord Steyn in the *BCCI* case, as referred to above. In *Baldwin v Brighton and Hove City Council [2007] ICR 680*, *[2007] IRLR 232* the EAT had to consider the issue as to whether in order for there to be a breach the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view taken by the EAT was that this use of the word 'and' by Lord Steyn in the passage quoted above was an error of transcription of the previous authorities, and

that the relevant test is satisfied if either of the requirements is met ie it should be 'calculated or likely'.

230. In the *BCCI* case, the House of Lords in particular held that this term may be broken even if subjectively the employee's trust and confidence is not undermined in fact. It is enough that, viewed objectively, the conduct is likely to destroy or seriously damage the trust and confidence. The term may be broken even where the employee actually remains indifferent to the conduct in issue. Similarly, it also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see *Omilaju v Waltham Forest London Borough Council [2005] IRLR 35, CA*).

231. In *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445, the Court of Appeal confirmed that the question of whether the employer has committed a fundamental breach of the contract of employment is an objective test. It is not to be judged the range of reasonable responses test which applies to the later issue of whether a dismissal is unfair, if of course a constructive dismissal is made out. Whilst the Court of Appeal acknowledged that reasonableness could be considered by the Employment Tribunal as one of the tools for deciding whether there had been a fundamental breach and there were likely to be cases in which it would be useful, it was not applicable as a principle of law.

232. Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.

233. In *Lewis v Motorworld Garages Ltd [1985] IRLR 465, CA*, Glidewell LJ expressly commented that:

"… the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?"

234. However in *Omilaju v Waltham Forest London Borough Council [2005] IRLR 35, CA,* the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It follows that although the final act may not be blameworthy or unreasonable it has to contribute something to the breach even if relatively insignificant. As a result, if the final act did not contribute or add anything to the earlier series of acts it was not necessary to examine the earlier history.

235. In *GAB Robins (UK) Ltd v Triggs* [2007] IRLR 857, the Employment Appeal Tribunal derived the following principles from *Omilaju*:

236. The final straw need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.

237. Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, she cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.

238. The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. It will, however, be an unusual case where the final straw consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.

239. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence.

240. Turning to the first issue set out in the agreed list of issues. Was the Claimant dismissed within the meaning of section 95(1)(c)? Specifically, did the Respondent's conduct amount to a repudiatory breach of contract whether as a cumulative breach with a last straw or otherwise) which entitled the Claimant to terminate her contract of employment?

241. The Claimant was relying on a course of conduct by the Respondent which was at least seriously intended to affect the implied term of mutual trust and confidence which cumulatively reached a point where she decided to resign because it was clear to her that the Respondent no longer wish to be bound by the terms and conditions of her employment.

242. To put this in context, the Claimant was invited to a fact-finding interview in a letter dated 12 July 2018, she attended the meeting on 16 July 2018, she was then absent from work for a number of reasons from 17 July 2018 onwards and did not return to work, she was invited to a disciplinary hearing in a letter dated 25 July 2018, she sent a series of letters to the Respondent from 25 July 2018 onwards, the disciplinary hearing date was changed a number of times, the Claimant resigned by letter dated 27 August 2018, the disciplinary hearing took place in her absence on 10 September 2018. The Respondent decided that had the Claimant not resigned she would have been dismissed for gross misconduct.

243. It was difficult to establish what exactly the final straw was that caused the Claimant to resign. The list of issues identifies a number of acts/omissions by the Respondent which are relied upon which would appear to be largely derived from the contents of the Claimant's resignation letter at R2 601602.

However these matters in themselves do not readily identify the nature or date of the last straw.

244. Mr Adamou puts it that the Claimant resigned at a point when the course of conduct had cumulatively reached a point at which it was clear to her that the Respondent no longer wish to be bound by the terms and conditions of her employment.

245. In evidence, it emerged that as to the general complaint of unfair treatment, the Claimant was only relying on what happened from the start of the investigation into the SS incident, that is from 12 July 2018 onwards, until her decision to resign on 27 August 2018.

246. At the point of her resignation, the Claimant had received a request to attend a disciplinary hearing which indicated that there was a disciplinary case to answer in respect of alleged negligence in the care of the majority of the residents on the nursing floor. The letter set out clearly the purpose of the hearing, the possibility of dismissal and enclosed a copy of the minutes of the investigatory meeting and the Respondent's disciplinary procedure. It also advised her of the statutory right of accompaniment to a hearing with a fellow worker or trade union official.

247. The allegation against her arose from comments that she had made during the fact-finding interview. Having read and analysed at some length the minutes of that meeting in my findings of fact, whilst I can understand that the Claimant may have felt under pressure and found the meeting stressful, I do not accept that the meeting was aggressive or conducted in an oppressive manner. Further, I do not accept that the Claimant was stifled in responding to what was said to her. Indeed, if anything there were a number of occasions where she appeared to misunderstand what was said and it was repeated to her and her focus was more on distancing herself from the incident relating to SS and the missed cycle of chemotherapy (which from the minutes it is clear that Mrs Leacock did not hold her responsible for), rather than focusing on what she was being asked and the deficiency of her answers.

248. From what the Claimant said in this meeting, quite understandably the Respondent had serious concerns, it was reasonable to determine that the matter be dealt with at a disciplinary hearing and to deal with it under its disciplinary procedure. Indeed, when this was put to the Claimant in cross examination, she accepted that this was a reasonable approach to take.

249. The Claimant then embarked upon correspondence in which she sought to pin down the exact nature of what she was alleged to have done wrong and to seek evidence in support. Whilst I can understand that this was quite reasonable an approach, certainly in the outset, it did seem to miss the point that the allegations arose from her own mouth and so beyond what she said there was no obvious evidence in support to provide to her.

250. Additionally, the correspondence became increasingly accusatory in tone, legalistic in approach and attempted to litigate the matter on paper, when the simpler approach was obviously to go along to the disciplinary hearing and put her case.

251. Dealing with a number of her smaller requests, whilst I accept that the Respondent simply set the dates of meetings which did not prove suitable for the Claimant's representative body, it did move the dates several times and in the end took the view that the matter had to proceed and could not indefinitely be moved. The Claimant asked for legal representation but of course there is no automatic right of this and indeed the statutory right of accompaniment and the Respondent's own disciplinary procedure limited representation to a trade union official or a work colleague.

252. I would add that whilst the Claimant has alleged that the Respondent falsely accused her of refusing to provide a statement to the fact-finding interview, whilst the Respondent might not have set out the full circumstances relating to her statement within correspondence it merely stated that she declined to do so.

253. The Claimant made a large number of requests for information and for documents, including the audio recording of her fact-finding interview and copies of the patients' care plans. The Respondent dealt with each of her requests either declining the request with reasons or granting the requests.

254. With regard to the audio recording, whilst I think that possibly with the benefit of hindsight the Respondent should have provided this, it raised concerns as to confidentiality and put forward a compromise, which the Claimant declined. A similar compromise was offered, albeit belatedly, with regard to the provision of the patient's care plans.

255. There was an obvious mistake as to the nature of the specific allegation relating to the non-reading of care plans. Whilst this may have caused some confusion, it was self-evidently clearly in error and was corrected, albeit after the Claimant had submitted her resignation.

256. In further correspondence, the Claimant wrote as to the withdrawal of the original allegation regarding collection and delivery of medication. However, it is quite clear from the documentation that this never was part of the allegations and I am not sure how the Claimant reasonably concluded that it was. In any event the Respondent clarified that this was never an allegation against the Claimant.

257. At a later point in correspondence the Claimant was seeking to agree facts which whilst it might be a process at home in legal proceedings was not something that was appropriate for a disciplinary hearing. Mr Bosshardt quite reasonably responded explaining the inappropriateness of this approach.

258. On a later date, the Claimant in correspondence was attempting to take silence with regard to the 10 questions set out in her earlier letter as acquiescence and acceptance of their truth. This again is quite inappropriate a process to adopt in correspondence during a disciplinary process.

259. At this point, and I would say quite reasonably in the circumstances, the Respondent took the view that the correspondence was at an end. Indeed, the appropriate way to take any of these matters forward was in the disciplinary hearing itself.

260. However, the Claimant's correspondence continued and the Claimant made it clear that she would not let the matter drop as she put in her letter of 18 August 2018. Again, this appears an inappropriate way to deal with a disciplinary process and quite disproportionate to the tone of the response to her correspondence from the Respondent.

261. Whilst, the Respondent had indicated that the correspondence was at an end, the Respondent did correspond with the Claimant further, providing her with some information about I-Care and had intended to write to her in response to her round robin letter to members of staff, Trustees and third parties. However, before Mr Bosshardt had the opportunity to send that letter, the Respondent received the Claimant's resignation letter dated 27 August 2018 which she expands upon at paragraph 17 of her witness statement dated 29th of November 2018. From this it does seem that the culminating event or the last straw was what Mr Bosshardt had said in his letter to the Claimant on 14 August 2018.

262. However, the Claimant continued to correspond with Mr Bosshardt and Mrs Harrison after that date until 18 August 2018 before sending correspondence to members of staff, Trustees and 3rd parties.

263. I struggle thus far then to understand how a Respondent investigating a serious incident involving a patient in its care by speaking to the nursing staff providing care to that particular patient, then responding to admissions giving rise to serious concerns about the Claimant's conduct at work, initiating disciplinary proceedings which were moving towards a disciplinary hearing, attempting to accommodate and to provide for the Claimant's requests for information and documents, is acting in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence.

264. I also struggle to see if this was an accumulation of breaches what it was that amounted to the final straw that tipped the Claimant into resigning during a period of events which at the very latest arose on 12 July 2018 when she was invited to an investigatory meeting and 27 August 2018 when she resigned, the last letter from Mr Boll's heart being dated 14 August and the last letter from Mrs Harrison being dated 18 August 2018?

265. Going through each of the acts or omissions relied upon as set out agreed list of issues and considering in each alleged breach and whether the

Respondent was acting in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence.

Pursuit of a case against the Claimant that it knew to the false

266. I do not accept that on an objective analysis of the situation that the Respondent was pursuing a case against the Claimant that it knew to be false or that it acted in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence.

267. The Respondent had valid grounds to carry out an investigation which included the Claimant. It had valid reasons to take disciplinary action given the nature of the admissions that were made at her fact-finding meeting: namely, not reading the letters on SS's file, not knowing the side effects of the medication she received, not being aware of her medical condition and not reading care plans unless was then named nurse for that patient.

268. These were legitimate grounds for disciplinary action and this was the matter that needed to be determined in the forum of a disciplinary hearing.

269. There is nothing to indicate that the Respondent was pursuing a case that it knew to be false.

270. Whilst there was an error as to the specific allegation as to not reading care plans, this was one component part of the allegations and on a simple reading of the minutes of the fact-finding interview, it was clearly in error and would have taken a moment to correct if it had not been done by the time of the disciplinary hearing/

Refusal to communicate with the Claimant or provide her with evidence

271. I do not accept that on an objective analysis it can be said that the Respondent refused to communicate with the Claimant or provide her with evidence amounting to a breach or that it acted in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence.

272. The Claimant wrote numerous letters for information, the Respondent replied courteously and provided information in some cases and declined to provide information in other cases but gave reasoned explanations as to why it was not providing the information. I do not see that its position was unreasonable or untoward.

273. The difficulty for the Claimant was that she was seeking evidence to extradite her from what she had said in the fact-finding meeting.

274. It did seem to me that it would have been better to have provided her with the recording of her fact-finding meeting, but I see nothing untoward in the Respondent's approach to this and moreover it offered a compromise.

275. I can see the significance of looking at the care plans of the other patients to potentially mitigate or remove the effect of the admission as to not reading care plans (although her notes on other patients' care plans would not completely prove that she did read the care plans of other patients unless she was not the named nurse), but again the Respondent offered a compromise and I see nothing unreasonable or untoward in the approach taken.

276. The difficulty with the Claimant's approach to seeking to pin down the allegations and any evidence in support even if this was required was that her approach was overly legalistic in the context of a disciplinary process.

An allegation of negligence against the Claimant without reasonable belief

277. I do not accept on an objective analysis that this amounts to a breach or that the Respondent it acted in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence.

278. There was obvious cause for concern arising from the admissions made in the fact-finding interview that the Claimant was acting negligently. This was an overarching charge arising from a reasonable belief and it was further clarified in correspondence in terms of the specifics (R2 503).

Acting unfairly against the Claimant from April to August 2018 including threatening dismissal without proper cause

279. The Claimant conceded that this period did not include the issues that arose in April 2018 or indeed for that matter the warning that had been given in September 2012.

280. The Claimant also conceded that the mention of the possible outcome of dismissal within the disciplinary invite letter was not a threat in itself.

281. However, I do not accept the submissions made on her behalf as to the impact of this mention of dismissal on an objective analysis gives rise to a breach.

282. Further I do not accept on an objective analysis that the Respondent acted unfairly towards the Claimant from the outset of the incident involving SS, the investigatory stage or the disciplinary stage.

283. The investigatory meeting was conducted fairly and there is nothing to suggest from the minutes of the meeting that there was anything untoward or any misconduct of that meeting.

284. The Claimant along with all of the nurses involved in providing care to SS were interviewed, they were all asked the same questions although understandably further questions arose from the Claimant's answers.

285. The contact with the Claimant throughout the period following the investigatory meeting was in correspondence which is clear for all to see.

286. The correspondence from the Respondent was in no way untoward and was respectful in tone even though the Claimant's letters became increasingly intemperate and demanding.

287. It was only when it was clear to Mr Bosshardt that the correspondence was inappropriate that he indicated that it was at an end. And, of course, the way of progressing the matter was at the disciplinary hearing.

Making a false allegation that the patient had made a complaint

288. Mr Adamou indicated that the Claimant was not pursuing this allegation further.

Misinterpreting the interview of 16 July 2018

289. On an objective analysis I do not accept that this was a breach or that the Respondent or that it acted in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence.

290. My findings of fact set out at length what occurred at the meeting which I have taken from the contemporaneous minutes of the meeting, the letters from SS's medical advisers and from the written and oral testimony.

291. It seems clear to me that the Claimant made a series of admissions in respect of matters that collectively gave rise to a concern as to negligence towards patients which were then specifically identified in correspondence.

292. It does not appear to me these matters were taken out of context or that the Claimant was prevented from responding to questions or speaking or indeed failed to speak. These were not concerns raised at the time or in the correspondence in any event.

293. The forum at which to state her case if she believed these allegations to be based on misinterpretation or mistake as to what she said or matters taken out of context was at the disciplinary hearing or if, she wished to conduct the matter on paper, by providing a commentary to those matters recorded in the minutes.

294. Moreover, she could have gone to Pembroke House and listened to the tape to confirm any concerns that she had as to the accuracy of the minutes or matters as to tone and pace.

Telling the Claimant that she could not trust her colleagues or the paperwork

295. I do not accept on an objective analysis that this amounted to a breach or that the Respondent or that it acted in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence.

296. As I have already indicated in my findings of fact, the words spoken by Mrs Leacock at the top of R1 347 of the minutes of the fact-finding meeting have to be taken in context. I accept Ms Levene's submission in this regard. On an objective analysis I do not accept that this amounts to a breach as alleged by the Claimant. In any event, there is nothing unreasonable in expecting nurses to confirm the veracity of matters contained within patient records.

Having no safe system of working place due to the above and the loss of nursing staff

297. I do not accept that on an objective analysis this amounts to a breach or that the Respondent or that it acted in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence.

298. The only loss of nursing staff relied upon was that of those nurses who left or were dismissed as a result of disciplinary proceedings arising from the incident involving SS. They were in turn replaced by agency nurses. The Claimant did not give any evidence as to any specifics with regard to the lack of a safe system of working and it appears only to arise at the time of these events.

299. In any event the Claimant was not at work beyond 17 July 2018 onwards.

300. While she made allegations about the operation of the I-Care system, this can only relate to its operation whilst she was working and indeed I am not sure she would have any knowledge of how it was operating after 17 July 2018 and she has not provided any evidence as to this.

301. The I-Care system was relatively new, not all of the paper documentation had been scanned onto it, however there were backup paper files for each patient, it clearly had teething problems like any new electronic system, but there is nothing to suggest that any failings alleged or otherwise rendered the workplace unsafe, either because of any of the other matters that the Claimant has raised or the specific reference to the loss of nursing staff.

302. I have also taken into account that the Respondent had received a good rating from the CQC in respect of Pembroke House (at R1 280).

303. Although there was some reference made to ICE, in the end this was not pursued by Mr Adamou beyond indicated in my findings above.

Failure to implement the I-Care electronic system safely, with a lack of supervision, testing and training on I-Care

304. I do not accept on an objective analysis that this amounts to a breach or that the Respondent or that it acted in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence.

305. From the evidence it appeared to me that the Respondent had embarked upon introducing an electronic care system given past concerns about the provision of medication to patients. This had been brought about in consultation with the staff. The Respondent had adopted a training methodology, which whilst the Claimant might disagree with, does not mean that there is anything unreasonable about the approach taken. The Claimant was provided with training, she was offered support by her trainer. If she had any concerns about the system, she did not raise these with her trainer.

306. As I have indicated above the system had issues but there is nothing to suggest that this goes as far as the Claimant alleges or is anything more than the transitional issues arising from moving from paper systems to electronic systems and the usual outage problems arising in using electronic systems.

307. The evidence from Mrs Harrison did not support a view that there was a failure to implement the system safely with a lack of supervision, testing and training.

In closing

308. I do not accept that the Respondent acted in repudiatory breach of contract either as a singular breach or a cumulative breach.

309. In particular, the Respondent did not act in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence with the Claimant. Further, if this was a last straw case, I could not identify what was the final breach of the nature that required.

310. I do not believe there is any need for me to go on and consider whether there was any waiver or delay by the Claimant in responding to the alleged breach or breaches. Further, I do not believe there is any need for me to consider whether the Claimant resigned in response to that breach or partly in response to that breach. However I would comment, that I saw no reason to suppose that the Claimant's admission that she was looking for work from April 2018 onwards was in any way fatal to her argued position ,had I found that the Respondent acted in repudiatory breach.

311. I also would observe that the Claimant was in many ways trapped by what she had said at the fact finding meeting and that in correspondence she appeared to be seeking a way back from this which became increasingly inappropriate when what she really needed to do was to engage in the disciplinary process and focus on the clear allegations raised and put forward her defence to those matters.

312. I therefore find that the Claimant was not dismissed in accordance with section 95(1)(c) ERA and so her claim of unfair dismissal cannot succeed. Her claim is therefore dismissed

Employment Judge Tsamados
Date: 23 April 2020