EMPLOYMENT TRIBUNALS

Claimant: Dr C Nevradakis

Respondents: Sheffield Health and Social Care NHS Foundation Trust

Heard: Remotely (by video link) **On:** 11, 12 and 13 January 2021

Before: Employment Judge S Shore

Appearances

For the claimant: In Person
For the respondent: Mr J Boyd, Counsel

JUDGMENT ON LIABILITY

1. The claimant's claim of unfair dismissal was not well-founded. The respondent did not unfairly dismiss the claimant.

2. The claimant's claim of breach of contract (failure to pay notice pay) is not well-founded. The respondent did not breach the claimant's contract of employment.

REASONS

Introduction

1. The claimant was employed as a Locum Consultant Psychiatrist by the respondent from 4 November 2013 to 16 July 2019, which was the effective date of termination of his employment on summary dismissal. The claimant started early conciliation with ACAS on 11 October 2019 and obtained a conciliation certificate on the same date. The claimant's ET1 was presented on 4 December 2019. The respondent is an NHS Foundation Trust.

2. The claimant presented claims of:

    2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996), and;

2.2. Breach of contract (failure to pay notice pay) contrary to Article 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

3. The claims were case managed on two occasions. On 14 May 2020, Employment Judge Jones made case management orders and set out the issues in the case. On 10 July 2020, Employment Judge Wedderspoon dealt with an application by the claimant for specific disclosure of documents and also made case management orders.

4. This case was originally listed for a final hearing in person, but was converted to a remote hearing by video because of the restrictions imposed due to the coronavirus pandemic.

Issues

5. The case management order of EJ Jones set out the following issues (questions that the Tribunal has to find answers to):

    1. Was sole or principal reason for dismissal related to the conduct of the claimant?
    2. If so, Did R act reasonably in all the circumstances in treating conduct as sufficient reason to dismiss him?
        2.1. Were there reasonable grounds for that belief?
        2.2. At time belief formed, had the respondent carried out a reasonable investigation?
        2.3. Had the respondent acted in a procedurally fair manner?
        2.4. Was there more favourable treatment of others for similar shortcomings which it is inequitable to disregard?
        2.5. Was dismissal in band of reasonable responses?
    3. What was the claimant's notice period?
    4. Was the claimant guilty of gross misconduct? Did he do something so serious that the R was entitled to dismiss without notice?

6. The list of issues went on to set out the issues that would relate to remedy if the claimant had been successful. As he was not, I have not listed those issues here as I did not need to consider them.

Law

7. For the purposes of the unfair dismissal claim, the relevant sections of the Employment Rights Act 1996 are ss.95(1) and 98.

"Section 95: Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"Section 98 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) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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."*

8. The breach of contract claim is based in the common law of contract.

9. I was referred to a number of precedent cases by counsel, which I have quoted in this decision where appropriate:

    9.1. **British Home Stores Ltd v Burchell;**
    9.2. **Sainsbury's Supermarkets Ltd v Hitt**;
    9.3. **Iceland Frozen Foods Ltd v Jones;**
    9.4. **Polkey v AE Dayton Services Ltd**; **and**
    9.5. **Hadjioannou v Coral Casinos Limited**.

Housekeeping

10. The claimant is a litigant in person. I advised him of the overriding objective of the Employment Tribunal, which is to deal with cases justly and fairly and emphasised that dealing with cases justly and fairly includes ensuring that the parties are on an equal footing. For the claimant, as a litigant in person, that meant that I had to ensure that he understood the process of the hearing and the legal principles involved. The claimant was given every opportunity to ask questions about the procedure and the law.

11. I confirmed with the claimant that he was bringing claims of unfair dismissal and breach of contract (failure to pay notice pay) only. I confirmed the issues with the parties, which are set out in paragraph 5 above. Mr Boyd raised the point that he had read the claimant's witness statement and he did not appear to be raising the issue of inconsistent treatment. The claimant said that the point was "just a side note", but wanted it to remain as an issue, so it remains.

12. I went through the running order of the hearing, which was listed for three days to include remedy. I confirmed with the parties that I would be using the timetable that had been set by Employment Judge Wedderspoon on 10 July 2020.

13. We then looked at the documents. The claimant pointed out an issue with page 900 of the bundle, which was illegible. I had received a replacement copy.

14. I indicated that I would deal with the issue of liability in the first instance, but would also give a judgment on Polkey and contributory conduct if they were relevant issues.

15. I had not finished reading the bundle, so adjourned the hearing for 50 minutes to complete my reading. I managed to read all the documents referred to in the witness statements and advised the parties on the resumption that I may need time to read any documents that were raised in cross-examination that had not been referenced in the witness statements.

16. The respondent produced four witness statements, but only called three witnesses to give evidence because the fourth, Dr Reem Abed, a Consultant Psychiatrist with the respondent who was appointed as Case Investigator to look into the allegations made against the claimant, was unable to attend due to ill health. Neither party requested an adjournment because of Dr Abed's absence. I gave her witness statement dated 23 July 2020 that ran to 35 paragraphs limited weight because she was not available to be cross-examined.

17. Evidence was given in person on behalf of the respondent by:

    17.1. Dr Helen Crimlisk, who is Deputy Medical Director for the respondent and has been a consultant psychiatrist for 15 years. She had appraised the claimant in the past and was appointed as the Case Manager in respect of the investigation into the claimant's conduct. Her witness statement dated 10 August 2020 ran to 62 paragraphs.

    17.2. Dr Mike Hunter, who is Executive Medical Director for the respondent. He appointed Dr Crimlisk to be Case Manager of the investigation into the claimant's conduct and made the decision to dismiss him. He also heard the claimant's grievance. His witness statement dated 14 August 2020 ran to 39 paragraphs.

    17.3. Clive Clarke, who is Deputy Chief Executive of the respondent (but at all material times was Acting Chief Executive). He heard the claimant's appeal against his dismissal. His statement dated 10 August 2020 consisted of 25 paragraphs.

18. Evidence was given in person on behalf of the claimant by:

    18.1. The claimant, who is a Locum Consultant Psychiatrist, whose undated witness statement was 31 pages long gave evidence in support of his claim and adopted a witness statement that ran to 52 paragraphs upon which he was cross-examined.

    18.2. Stephen Day, who is a qualified Mental Health Nurse who was employed by the respondent as Locality CMHT Manager between 2012 and 2018. His evidence in chief was contained in a three-page letter dated 16 April 2019 and a six-page statement dated 9 June 2020.

19. The parties produced an agreed bundle of 1,506 pages. If I refer to pages in the bundle, the page number(s) will be in square brackets. I will not use the names of any individual who was not a witness in these proceedings, other than Dr Bowie, who was the claimant's medical director.

20. At the end of the evidence, I heard closing submissions from Dr Nevradakis and Mr Boyd. I considered my decision and gave an oral judgment and reasons. The

claimant requested written reasons. As I did not have the facility to record my oral judgment, this judgment and reasons is made from my notes and may differ in some respects to the oral judgment and reasons given at the hearing.

21. The hearing was conducted by video on the CVP application and mostly ran smoothly, with some technical issues. I am grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches.

Findings of Fact

22. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. I make the following findings.

23. It was never disputed by the respondent that the claimant qualified as a consultant psychiatrist in 2002, but could only take locum positions because he was not on the register. I find that he is an experienced psychiatrist who could be expected to know and understand the professional obligations placed on him, not least because he said as much in his evidence.

24. The respondent is a Foundation NHS Trust providing a range of general and specialist mental health, substance abuse and learning disability services in Sheffield. The claimant was employed as a locum consultant psychiatrist by the respondent from 4 November 2013 to 16 July 2019. It was not disputed that he was initially employed on a six-month fixed term as a locum consultant psychiatrist, contract in the Access Team of the Sheffield West Locality Service. He then moved the North Sheffield Locality Service based at the Northlands Community Health Centre as consultant locum psychiatrist in the Recovery Team.

25. The respondent undertook a review of its services in 2017 that resulted in major changes to the service in January 2018. The respondent consolidated four previous parts of its service into a Single Point of Access (SPA)/Emotional Wellbeing Team. The claimant moved from Northlands to the SPA, where he remained until his dismissal.

26. It was broadly agreed that the SPA was under pressure from its inception because of a large waiting list of patients (about 1000), which it knew about, and a higher number of referrals of new patients than it was expecting.

27. The claimant said that within a month, he was unable to keep up with the requirement to keep notes of patient contacts and/or correspond with GPs. It was not disputed by the claimant that he failed to bring this to the attention of the clinical director, Dr Bowie, until disciplinary investigation had started, but suggested that he had raised it through the appraisal/CBD process in May 2018, which I will return to below.

28. I regard it as an obvious finding that any psychiatrist deals with patients who are vulnerable and at risk of potential harm because of their medical condition.

29. The claimant was subject to GMC provisions regarding record keeping (see paragraph 19 [405]), which state:

> *Documents you make (including clinical records) to formally record your work must be clear, accurate and legible. You should make records at the same time as the events that you are recording or as soon as possible afterwards.*

30. I find that the lengthy discussion that took place in the hearing about the meaning of contemporaneous is otiose, as the GMC definition is "at the same time as the events that you are recording or as soon as possible afterwards". The claimant cannot possibly claim not to have understood that.

31. The claimant was also subject to the respondent's policy of record keeping, which starts at page 441 of the bundle. He said he may not have read it, but was aware of similar polices. I find he was bound by the policy because he never suggested otherwise.

32. I find that the claimant was obligated by the respondent's policies to enter a note of patient contacts (i.e. meetings with patients) at the time of the contact or as soon as possible afterwards on the respondent's Insight system (a database that was shared and available to professional colleagues). I find that the claimant never disputed that he was subject to this obligation. I also find that it is obvious that a failure to record the details of meetings with patients where risk factors may be discussed and medication is prescribed may have a potentially harmful effect on those patients.

33. It was accepted by the claimant at various stages of the disciplinary process and in these proceedings that note keeping was important. It appears to me to be so obviously important and to have been accepted as such by every witness who appeared in this Tribunal that I hardly have to make a finding that it was a vital part of the claimant's role. I find that it was a vital part of his role that he kept records up to date so that colleagues who accessed a patient's records could be aware and up to date as to the patient's clinical status and what medication had been prescribed.

34. I also find that it was a vital part of the claimant's role to correspond with the GPs of the patients who were referred to him and other professional colleagues in a timely and effective manner in order to keep them up to date and fully informed of the progress in a patient's case and their medication history.

35. Dr Hunter gave an example of a patient who may attend a hospital Emergency department late at night in a distressed state to seek help. If there was no note on their records of contact with their consultant psychiatrist, the patient could be placed in potential jeopardy either because of a lack of information about risk factors or because medication that was prescribed in the Emergency department may have an adverse interaction with medication that had been prescribed by the psychiatrist. If there was no record of the psychiatrist's prescription, the Emergency department would be unaware of the potential risk of the medication it intended to prescribe.

36. The claimant suggested that the physician at the Emergency department could or would be expected to take a full history from the patient. I agree with his submission that a history should be taken, but reject the implication of the submission, which was to put the burden on the Emergency department physician and/or the patient. I make that finding because;

    36.1. There is no guarantee that the Emergency department physician would have any specialism in psychiatry;

    36.2. It seems obvious to me that a full note of the meetings that the patient had had with their consultant psychiatrist and a note of their current medication regime would be much more effective than having to rely on the Emergency department phyusician's attempt to glean that information from the patient;

    36.3. A patient attending the Emergency department is likely to be in a distressed or confused state;

    36.4. There is no guarantee that the patient will be able to remember their history accurately; and

    36.5. There is no guarantee that the patient will be able to accurately recall what medication they have been prescribed.

37. I find that Dr Hunter's example was entirely possible. The claimant accepted as much by saying that he had had such an experience in his professional life. I therefore find it disingenuous of him to give oral evidence that in circumstances such as those envisaged by Dr Hunter, he would take a history for the patient and then act, as if there were no potential problem. I also find his comment that the Emergency clinician and the patient themselves had to take responsibility to be unreasonable for the reasons I have set out in the preceding paragraph. To me, that was an example which was repeated on numerous occasions of the claimant minimising the potential effect of his actions. I find that he often sought to defend his failure to do something by stating that no harm had come to the patient as a result. There was a debate about what I should regard the word "harm" to mean in this context, which I will return to.

38. The claimant was regularly appraised as part of the respondent's policies. Dr Crimlisk gave unchallenged evidence that she appraised the claimant in 2016, 2017 and 2018. She gave unchallenged evidence that consultants are required to engage in a Case Based Discussion (CBD) in which they consider the clinical management of cases with colleagues in a peer group. The claimant did not challenge Dr Crimlisk's evidence that her appraisals of the claimant in 2016 and 2017 had identified issues around his attendance at peer groups and his understanding of what was required at appraisal.

39. I find that during her 2018 appraisal of the claimant (which took place on 3 May 2018), Dr Crimlisk found that he had not attended peer groups in the preceding year, as had been identified in his personal development plan. He had, however, submitted a CBD with a colleague, Dr K, outside the peer group. Dr K raised the issue of the claimant's record keeping in the CBD and the claimant had spoken

about his difficulties in keeping up with clinical administration since he had started his new role a few months earlier. This evidence was not challenged by the claimant.

40. Dr Crimlisk agreed a new personal development plan (PDP) with the claimant for 2018/2019 and was asked to speak to his clinical director about any support he needed with clinical administration.

41. The unchallenged evidence of Dr Crimlisk was that she had no clinical concerns about the claimant at the time of his appraisal in 2018. The respondent's Responsible Officer, Dr Girgis discussed the issue of the claimant's poor engagement with the process of appraisal with the regional GMC representative, but it was not thought significant enough to warrant the action of the GMC.

42. Dr Girgis did however raise the following concerns with the claimant in an email dated 7 July 2018 [199 (38)]:

    42.1. Late submission of appraisals and instructions on arranging and preparing for future appraisals;

    42.2. Compliance with the GMC's Good Medical Practice, including concerns regarding online representation, disclosing of information about private practice, indemnity cover and clinical administration;

    42.3. Correctly identifying PDP objectives; and

    42.4. Issues arising from his current appraisal, including limited personal reflections, PDP objectives, improvement of clinical administration.

43. I therefore find that appraisals in 2016 and 2017 had identified issues around Dr Nevradakis's attendance at peer groups as well as his organisation and understanding of what was required at appraisal. Personal development plans had been agreed to address this, including prioritising regular attendance at peer groups and undertaking training regards clinical governance and the GMC standards "Good Medical Practice". I also find that his issues with inadequate record keeping had been addressed at previous appraisals [167-169] (para 9 of Dr Crimlisk's witness statement).

44. The claimant's evidence was that Dr Crimlisk should have taken the note of the discussion with Dr K in the CBD as notification that he was having real issues in completing his work. I do not accept that evidence because I find that the appraisal and CBD systems were forums for personal development and peer review. I find Dr Crimlisk's evidence that she told the claimant to report concerns about his clinical administrative workload to his medical director to be credible and logical. If the claimant had been unable to cope since January 2018 (which was his evidence), his duty to report this to the Clinical Director arose at that point and could not be discharged via a CBD in May 2018.

45. The claimant's evidence was that by May 2018, he was overwhelmed with work. I find that he made no such representations to Dr Crimlisk during his appraisal and that there can be no reasonable expectation that she would regard the CBD on one file as indicative of the increasing failure of the claimant to maintain his workload.

46. A colleague of the claimant's, JH, had concerns about him. She raised these and independently of the appraisal programme, with Dr Bowie, the claimant's clinical director, in June or early July 2018. This evidence was in Dr Hunter's witness statement and oral evidence and I find that the exact date of disclosure had no material impact on the fairness of the dismissal.

47. In assessing the reasonableness of the respondent's actions in this case, I have used the guidance in **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23. If a step taken by an employer in disciplinary proceedings was one that was open to a reasonable employer acting reasonably, that will suffice.

48. Dr Bowie undertook an audit of all the claimant's files. He found that the claimant had engaged in 38 patient interactions between January 2018 and May 2018. I find that claimant has been very inconsistent on the accuracy of this number. At this hearing, he said it was correct. Given the claimant's inconsistent and contradictory approach to the numbers of patients he had seen, I find the conclusion of Dr Hunter - that he could not be sure how many patients the claimant had seen, as he could not know what he did not know, to be reasonable.

49. I find the number of 38 patient interactions in a five-month period to be extraordinarily low in the context of what the claimant says was an overstretched and under resourced service. I find that in the light of such low numbers of patent contacts, there was hardly any possibility of his having a reasonable excuse for failing to keep notes of contacts and keeping up to date with GPs.

50. I also find it was a major failing by the claimant to not have raised his ongoing issues with documentation with his clinical director. I find that no reasonable consultant psychiatrist would have made the decision to keep the matter to themselves in the hope that things would improve, which was the claimant's evidence.

51. I should mention the evidence of Mr Day at this point. He never worked within the SPA, so cannot help with the evidence of what happened during that time. He did, however, comment in his own evidence that there was general acknowledgement that, when busy, the claimant would often struggle to keep up with paperwork and writing of notes and letters following patient contact. I find that the claimant tried different strategies to manage this; such as scanning copies of written notes/letters into the Insight computerised medical record system, but which were not viewed as satisfactory by his senior medical peers. I find that it was not unreasonable for the claimant's seniors to take this position, as it was not outside the band of reasonable responses.

52. I am also mindful of the findings of the audit undertaken into the claimant's work at Northside by Dr Bowie that the claimant had failed to keep proper records there, which not only went unchallenged, but was admitted by the claimant in cross-examination. Those audit findings formed no part of the subsequent disciplinary procedure. Dr Bowie reported his findings to Dr Hunter after he met the claimant on 24 July 2018.

53. On 25 July 2018, Dr Hunter appointed Dr Crimlisk as the Case Manager in respect of an investigation into the claimant's alleged misconduct, in accordance with the

Trust's Disciplinary, Capability, Ill-Health and Appeals for Medical Practitioners policy ("the Policy") [111]. Dr Hunter met with the claimant on 25 July 2018 to inform him that a formal investigation would be conducted into the concerns that had been raised about his record-keeping and that Dr Crimlisk would be Case Manager [201].

54. Dr Crimlisk sent an email to Dr Abed on 30 July 2018 [206], setting out initial information and requirements in respect of the investigation and received an email in response from Dr Abed on 8 August 2018 [206], confirming that she was happy to act as Case Investigator.

55. Dr Crimlisk wrote to Dr Abed on 17 August 2018 setting out the Terms of Reference for the investigation [220 - 221]:

    55.1. Establish whether the claimant's practice around record keeping is of a sufficient standard to maintain patient safety; and
    55.2. Did the claimant's practice around record keeping meet GMC guidance on Good Medical Practice and meet the Trust's own policies on clinical record keeping.

56. The investigation took some time, but I do not find that there was unreasonable delay that wold make the subsequent dismissal unfair. These were serious matters that were alleged and careful investigation was required.

57. The respondent decided that it had not been deemed necessary to exclude the claimant from work during the investigation and instead, it was decided that he should work in a more closely supervised environment.

58. On 11 September 2018, Dr Crimlisk wrote to the claimant [265], explaining that she still considered the restrictions in place to be relevant in order to protect patient safety.

59. Dr Abed's submitted her investigation report on 5 November 2018 [302]. The report noted that the claimant had confirmed his understanding of the standard of practice expected under the Trust's Record Management Policy [370 – 414] and GMC Good Medical Practice [330 – 369]. He had accepted that he could have operated differently in terms of his record keeping. He had gone on to accept that he didn't meet those standard during the period considered.

60. The respondent was in communication with the Employment Liaison Adviser for the General Medical Council (GMC). It was agreed that the respondent would finalise its internal procedures before any consideration was given to making a referral to the GMC [326].

61. On 9 November 2018, Dr Crimlisk wrote to the claimant regarding a review of the restriction to his duties. She and a colleague met with the claimant on 14 November 2018 to discuss the restrictions on his practice, following receipt of the investigation report. She told the claimant he would be provided with a copy of the investigation report and would be given 10 working days to provide any comments or factual inaccuracies. The report was sent to the claimant on 22 November 2018 [342]. The claimant responded on 14 December 2018 [698] with his written response [667-673].

62. On 19 February 2019, the claimant was invited to a disciplinary hearing on 23 April 2019 to consider an allegation of gross misconduct that he:

> **"did not keep contemporaneous notes on patients whilst working in SHSC and this constituted negligent and/or reckless acts, or omissions which endangered the safety of patients.'**

63. The disciplinary meeting was rearranged and eventually took place on 16 July 2019, when minutes were kept [745-760]. Dr Hunter chaired the meeting and made the decision to dismiss. I do not find any step taken by the respondent in the process of the meeting to be outside the band of reasonable responses. I find that the minutes of the meeting demonstrate that a fair procedure was used and that Dr Hunter engaged in a genuine and reasonable enquiry into the case for the respondent put by Dr Crimlisk and the claimant's defence. The claimant was represented by the MDU. Dr Hunter advised the claimant that the disciplinary offence had been proven against him and that he was to be dismissed for gross misconduct.

64. Dr Hunter confirmed the disciplinary decision in a letter dated 23 July 2019 [761] in which he set out his reasons for making his decision as follows:

    64.1. The investigation found that the claimant did not keep contemporaneous clinical notes on the electronic patient record and had admitted as much in the hearing.
    64.2. The claimant did not communicate in a timely manner with GPs about assessment, treatment and medication prescribed.
    64.3. The claimant had confirmed that his practise was not to update GPs until eventual discharge from clinic.
    64.4. Dr Hunter did not believe that the claimant had considered the potential implications of not ensuring other medical professionals involved in a patient's care were fully informed of the medication prescribed.
    64.5. Dr Hunter had considered the impact of the lack of patient records on the team and patients, and the claimant's failure to recognise this impact.
    64.6. He found that the claimant's practise did not comply with the respondent's local policy and procedures regarding record keeping and was non-compliant with the 'Good Medical Practice' guidance.
    64.7. Whilst the claimant had highlighted that he had raised the issue of record keeping with his peers and in his appraisal, there was no evidence that he had taken any substantive action to resolve the issue.

65. The claimant appealed against the decision to dismiss him by a letter dated 30 July 2019 [764]. A letter was sent to the claimant on 19 September 2019 [767], inviting him to attend the Appeal Hearing on 1 October 2019 to be heard by the respondent's Acting Chief Executive, Clive Clarke.

66. In advance of the Appeal Hearing, Mr Clarke was provided with a bundle of documents, consisting of the following:

    66.1. Management Statement of Case and appendices [512];

66.2. Claimant's response to the investigation report and appendices [710];
66.3. Disciplinary Hearing minutes [745];
66.4. Disciplinary Hearing outcome letter [761];
66.5. Claimant's letter of appeal [764]; and
66.6. Dr Hunter's response to Claimant's grounds of appeal [769].

67. The claimant's grounds of appeal were:

67.1. That mitigating factors, including his unreasonable workload, the pressure of the service and staffing issues were not considered by the disciplinary panel in reaching their outcome;
67.2. The Clinical Director had suggested that the claimant should consider resigning on 24 July 2018 as it would be 'preferable to dismissal';
67.3. There was no regard to the steps taken by the claimant to complete outstanding gaps in his record keeping and correspondence with GPs whilst under restricted duties;
67.4. There was no instruction to the claimant's allocated supervisor to provide a report of his administrative performance prior to his practice being further restricted in November 2018; and
67.5. That evidence was not considered which demonstrated that the claimant had taken substantial steps to resolve the problems prior to 25 July 2018.

68. The appeal hearing took place on 1 October 2019, where the claimant was represented by the MDU and the respondent's case was put by Dr Hunter [777-799].

69. The claimant accepted during the hearing that his record keeping was not acceptable [786] but did not accept that any patients were harmed as a result of his practice. He stated that his contemporaneous notes were in his office and that he was able to respond to any questions about patients under his care. The claimant admitted that he had only seen a low number of clinical patients as his time was focused on other matters.

70. Mr Clarke wrote to the claimant on 7 October 2019 [800] to confirm the outcome of the appeal hearing, upholding the decision to dismiss him on grounds of misconduct and advised that he would follow with a letter setting out his reasoning within 5 working days in accordance with Paragraph 6.24.7 of the Trust's Disciplinary Policy [79].

71. The reasoning for Mr Clarke's decision was set out in a letter to the claimant dated 14 October 2019 [801]. Mr Clarke concluded that there was no room for compromise in respect of record keeping. This was such a fundamental aspect of the service but of a clinician's role, so there was no acceptable reason why this should not have been completed or addressed within a timely manner.

72. It was acknowledged that the claimant had taken steps to complete his outstanding record keeping since the commencement of the investigation, but this was not considered as part of the disciplinary hearing as it was outside of the terms of reference. Mr Clarke found that there was no question regarding the claimant's capability to carry out his clinical activities and administrative duties, but there had

been a failure to recognise the importance of doing so in a timely manner and the impact that this had upon patient safety.

73. Mr Clarke found that the claimant had failed to take any steps to rectify the issue and that administrative support was available to him. He had accepted that he could have operated in a different manner. Mr Clarke concluded on balance to uphold the Disciplinary Panel's decision to dismiss the claimant.

74. I find that, on the balance of probabilities, the respondent has shown that the claimant habitually failed to keep adequate notes of patient contact and correspondence with GPs during his time at Northside and the SPA.

75. I find that the investigation of Dr Abed was within the band of reasonable responses. She could have interviewed Dr K, but her decision not to is not outside the band of reasonable responses. I cannot find that no reasonable employer would have failed to interview him because the interaction between the claimant and Dr K was the subject of a documented record in the CBD.

76. I find that the decision not to interview the claimant's former colleagues at Northside was not outside the band of reasonable responses, as the scope of the disciplinary investigation was limited to the claimant's practices at SPA. Such interviews would merely be character references that the claimant could have brought along to the disciplinary hearing himself.

77. I also find that the decision not to interview affected patients was not outside the band of reasonable responses because of the nature of the disciplinary charge that the claimant faced. He was not accused of any misconduct that involved the nature of his direct contact with patients. He was charged with failing to keep proper notes of his meetings with them and failing to advise their GPs in a timely manner.

78. I find no unfairness in Dr Abed using the term "distress" about affected patients and Dr Crimlisk using the term "harm". I agree with Dr Hunter, who said that we were talking about psychiatry and patients who are distressed are harmed. I find that the word "harm" in the context of patients with mental illness is anything that can adversely impact on their wellbeing or state of mind. I do not find that "harm" requires a patient to suffer some physical injury.

79. I find that it was appropriate for the respondent to treat the claimant's actions as disciplinary on the basis of conduct, rather than of capability. I make this finding because of the claimant obviously knew what he should be doing and said that he brought everything up to date within 5 sessions of being moved to a more supervised environment. That admission rather undermines his argument that it was a case that should have been dealt with by the respondent as capability (where he couldn't do the work), rather than conduct (where he wouldn't do the work).

80. I cannot agree with the claimant's criticism of Dr Hunter for doubting the claimant's good faith in circumstances where he found that he could do what was expected of him, but had chosen not to do so.

81. I do not find C's submissions about making Sophie's Choice in respect of which part of his practice to do and not do to be credible or sustainable. He asked which part of his practice he should have dropped in order to do the paperwork. The correct answer was given by Dr Crimlisk, who said "neither".

82. The claimant made a number of admissions:

    82.1. He said admin was not his strong point – verification meeting [382];
    82.2. He did not inform anyone about the difficulties he was having in keeping up to date with his clinical administration before May 2018 verification meeting [382];
    82.3. He said he had "serious problems keeping up with documentation" [648] in his investigation meeting;
    82.4. He said that it was the "lesser of two evils" [not to keep up to date notes etc.] [649] in his investigation meeting investigation meeting;
    82.5. He said he was "relying a lot on personal [team] communication" [as substitute for keeping notes] [651] in his investigation meeting;
    82.6. He said "what was missing was the diagnosis, the plan, the rationale. I understand this can potentially become a problem if I am away, absent, off sick" [652] in his investigation meeting;
    82.7. He demonstrated knowledge of the standards required of him - "It's more than obvious I didn't meet them during the period" [652] / [653] C investigation meeting;
    82.8. He said "I could have been wiser and devised a plan instead of keeping my notes the way I was …" [652] investigation meeting;
    82.9. He said "I was hoping things would change and holding on to that hope a bit too long, perhaps" [653] C investigation meeting;
    82.10. He said "I am not saying in retrospect that, if I think of it, that I could not have dealt with the problem in a better way" [656] C investigation meeting;
    82.11. He said "I was aware that there were people contacting me [about issues re: record keeping etc]" [746] Disciplinary meeting; and
    82.12. He said "[JH] spoke to me on 2 occasions on an ad hoc basis. She did not say "Cornelius we have a big problem with you not doing this" [747] disciplinary meeting.

83. I find the process used in the disciplinary was fair and within the band of reasonable responses.

84. I find the appeal process to be fair and within the band of reasonable responses. I do not find Mr Clarke's confirmation letter to contain anything that undermines his decision. His evidence of his decision making was not really challenged, and nor can it be.

85. I note that the GMC did not take any action against the claimant arising out of the matters for which he was dismissed, but do not find that the decision has any impact on the question as to whether the claimant was unfairly dismissed as the tests and issues in the two hearings are markedly different.

Applying the Findings of Fact to the Law and Issues

Unfair dismissal

86. I find that the sole reason for dismissal related to the conduct of the claimant.

87. I find that the respondent acted reasonably in all the circumstances in treating conduct as sufficient reason to dismiss the claimant.

88. I find that there were reasonable grounds for that belief.

89. I find that at the time the belief formed, the respondent had carried out a reasonable investigation.

90. I find that the respondent acted in a procedurally fair manner.

91. I find that there was no more favourable treatment of others for similar shortcomings which it is inequitable to disregard.

92. I find that dismissal was in band of reasonable responses.

93. I considered the case of **Hadjioannou v Coral Casinos** in which there had been alleged differential treatment of an employee in relation to a similar offence on a different occasion. The EAT set out three possible ways where decisions made by an employer in truly parallel circumstances in relation to a different employee may be relevant:

    93.1. Employees may be led by an employer to believe that certain categories of conduct will be overlooked or will be more mercifully treated in the light of the way that other employees have been dealt with in the past.
    93.2. It may show that the dismissal in the instant case is not for the reason put forward, i.e. that the asserted reason for dismissal is not the real or genuine reason.
    93.3. Evidence as to decisions made by an employer in two truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances.

94. In this case, the claimant's evidence of inconsistency was slight and obtuse. The claimant was not comparing like with like at all.

95. I find that the respondent had actual and genuine belief of guilt of misconduct because of:

    95.1. GMC provisions regarding record keeping [405];
    95.2. Respondent's policy regarding record keeping [441];
    95.3. My finding of the obvious potential seriousness of failing to keep timely electronic records on Insight system; and

95.4. My finding of the obvious potential seriousness of failing to communicate in timely manner with GPs.

96. I find that the question of whether the claimant was 'overwhelmed' with work is irrelevant. If he was, he should have raised it earlier. On his own account, it was 5 months between the pressure starting in January 2018 and raising it in the CBD in May 2018. The claimant raised reasons including feeling embarrassed to approach Dr Bowie, which I find not to be reasonable. Alternatively, if he wasn't overwhelmed his working method was to prioritise work to the detriment of critical administrative tasks.

97. I find that the respondent had reasonable grounds on which to base belief mainly because of:

97.1. Dr Bowie's audits [380];
97.2. Mr Day's evidence of the claimant's working practices (which was accepted by the claimant);
97.3. Dr Abed's audit [383];
97.4. JH's investigation minutes [491]; and
97.5. The admissions made by the claimant.

98. I find that the respondent carried out as much investigation as was reasonable in the circumstances because I have found that each part of the investigation and disciplinary procedure meets the test in **Sainsbury's Supermarkets Limited v Hitt**.

99. I find that dismissal was in the band of reasonable responses.

Breach of Contract

100. I find that the claimant was guilty of gross misconduct. He did something so serious that the respondent was entitled to dismiss without notice.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
15 February 2021