RM

EMPLOYMENT TRIBUNALS

Claimant: Mrs Gifty Poku

Respondent: Barts NHS Trust

Heard at: East London Hearing Centre **On:** 28 & 29 January 2021

Before: Employment Judge S Knight

Representation

Claimant: In person, unrepresented

Respondent: Serena Crawshay-Williams (Capsticks LLP)

JUDGMENT

1. **The Respondent unfairly dismissed the Claimant.**

2. **The case will be listed for a hearing to determine remedy on a date not before 15 March 2021 with a time estimate of 3 hours.**

3. **Within 14 days of this Judgment being sent to the Parties, the Claimant is to serve on the Respondent and file with the Tribunal a new Schedule of Loss.**

4. **Within 21 days of this Judgment being sent to the Parties, the Parties are to serve on each other and file with the Tribunal any further evidence relevant to remedy in their possession, including: any witness statements; documents which show the detail of the Claimant's entire income and benefits received since her dismissal; documents which show how the Claimant has mitigated her loss; and documents relevant to reengagement or reinstatement.**

REASONS

Introduction

The parties

1. The Claimant was employed by the Respondent between 5 January 2016 and 12 November 2019 as Deputy Head of Corporate Accounts. The Respondent is a large NHS Trust.

The claims

2. The Claimant claims for unfair dismissal, arising out of her dismissal with pay in lieu of notice on 12 November 2019. The Respondent claims the dismissal was for reasons of misconduct. The alleged misconduct related to the way in which the Claimant had interacted with her colleagues throughout her employment.

3. On 11 December 2019 ACAS was notified under the early conciliation procedure. On 11 January 2020 ACAS issued the early conciliation certificate. On 20 January 2020 the ET1 Claim Form was presented in time. On 19 February 2020 the ET3 Response Form was accepted by the Tribunal.

The issues

4. At a previous hearing, Employment Judge Gardiner set out a list of issues for consideration today. The list of issues was agreed by the parties. It appears at Annex 1 to these Reasons.

Procedure, documents, and evidence heard

Procedure

5. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was "***V**: video whether partly (someone physically in a hearing centre) or fully (all remote)*". A face to face hearing was not held because it was not practicable due to the COVID-19 pandemic and no-one requested the same. The documents that I was referred to are in a bundle, the contents of which I have recorded.

6. All participants attended the hearing through Cloud Video Platform.

7. At the start of the hearing I checked whether any reasonable adjustments were required. Those in attendance confirmed that none were required.

Documents

8. I was provided with an agreed Hearing Bundle comprising 450 pages, although due to the late addition of pages to the middle of the Hearing Bundle, the final page of the Hearing Bundle was numbered 380. I was also provided with a chronology and cast list, most of which were agreed, but parts of which were in

dispute.

9. Witness statements from the Claimant, Mark Brice (the dismissing officer), and William Boa (the appeal officer) were provided separately.

10. Both parties provided written closing submissions.

11. Finally, I was provided with documents related to the remedy that the Claimant sought. However, I determined at the hearing that if I found in favour of the Claimant on liability, a separate hearing would be required to deal with remedy.

Evidence

12. At the hearing I heard evidence under affirmation from Mr Brice, Mr Boa, and the Claimant. Each of the witnesses adopted their witness statements and added to them.

13. The Respondent chose not to adduce any other live witness evidence. In particular, it chose not to adduce evidence from the members of its staff who had made complaints about the Claimant. At the hearing, the Claimant noted that she was limited in how she presented her case as a result of this. Nonetheless, she agreed to proceed with the hearing.

Closing submissions

14. Both the Claimant and the Respondent provided helpful and detailed written closing submissions. Their brief oral closing submissions broadly reflected their written closing submissions.

Relevant law

15. Section 94 of the Employment Rights Act 1996 ("**ERA 1996**") provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.

16. Section 98 of the ERA 1996 provides insofar as is relevant:

> "(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— […]
>
> (b) relates to the conduct of the employee,

(4) 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. […]"

17. In the case of *British Home Stores v Burchell* [1980] I.C.R. 303; 20 July 1978 the Employment Appeal Tribunal set down the test that the Tribunal applies in cases of unfair dismissal by reason of conduct. The burden of proof within the test was later altered by section 6 of the Employment Act 1980. As a result, the test applied by the Tribunal is as follows:

(1) The employer must show that it believed the employee to be guilty of misconduct.

(2) The Tribunal must determine whether the employer had in mind reasonable grounds upon which to sustain that belief.

(3) The Tribunal must determine whether, at the stage at which that belief was formed on those grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

18. This means that the Respondent does not need to have conclusive direct proof of the employee's misconduct: the Respondent only needs to have a genuine and reasonable belief, reasonably tested. Further, there is no requirement to show that the employee was subjectively aware that their conduct would meet with the Respondent's disapproval.

19. In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401; [2017] IRLR 748; 23 May 2017 Lord Justice Underhill stated that the "reason" for a dismissal is the factor or factors operating on the mind of the decision-maker which causes them to take the decision to dismiss or, as it is sometimes put, what "motivates" them to dismiss.

20. In *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94; [2015] IRLR 399; 18 February 2015 Lord Justice Richards noted at ¶ 23:

"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole."

21. In considering the case generally, and in the Tribunal's assessment of whether dismissal was a fair sanction in particular, the Tribunal must not simply substitute its judgment for that of the employer in this case. Different reasonable employers acting reasonably may come to different conclusions about whether to dismiss. As Mr Justice Phillips noted when giving the judgment of the EAT in *Trust Houses Forte Leisure Ltd v Aquilar* [1976] IRLR 251; 1 January 1976:

"It has to be recognised that when the management is confronted with a decision whether or not to dismiss an employee in particular circumstances, there may well be cases where more than one view is possible. There may well be cases where reasonable managements might take either of two decisions: to dismiss, or not to dismiss. It does not necessarily mean, if they decide to dismiss, that they have acted 'unfairly,' because there are plenty of situations in which more than one view is possible."

22. It is therefore not for the Tribunal to ask whether a lesser sanction would have been reasonable in this case. The Tribunal asks itself whether dismissal was reasonable. The question is also not whether the Claimant committed misconduct, but whether the Respondent had a reasonable belief that the Claimant had committed misconduct.

23. Fairness does not mean that similar offences will always call for the same disciplinary action. Each case must be looked at in the context of its particular circumstances, which may include health or domestic problems, provocation, justifiable ignorance of the rule or standard involved, or inconsistent treatment in the past. In *Paul v East Surrey District Health Authority* 1995 IRLR 305; 27 October 1994, the Court of Appeal held as follows:

"Thus an employee who admits that the conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely."

Findings of fact

The Claimant's grievances raised during her employment

24. On multiple occasions throughout her employment, the Claimant had cause to complain about colleagues standing by her desk and talking. This was distracting the Claimant from her work. The Respondent did not take these complaints seriously, and treated the Claimant as being in the wrong when she complained.

25. On 22 June 2018 the Claimant's line manager Ms Babalola referred the Claimant to the Respondent's occupational health services. This referral was agreed to by the Claimant on the basis that it related to environmental health factors arising out of the unsuitable office environment provided by the Respondent. However, Ms Babalola changed the terms of the referral to include references to the Claimant's mental health. There was no justification for this change. The Claimant attended an appointment with the Senior Occupational Health Adviser, Mr Kessaven Jagambrun. However, because there had been a change in the nature of the referral compared to

the referral to which the Claimant had consented, Mr Jagambrun was not able to proceed with the assessment, as he concluded that there was "inappropriate consent". This led to Mr Jagambrun terminating the appointment. The Claimant repeatedly raised with the Respondent the inappropriate nature of the occupational health referral.

26. The Claimant had disagreements with another member of the Respondent's staff, Hanny Alhassan. The Claimant alleged that in May or June 2018 Ms Alhassan had treated her in an aggressive and unfriendly manner. There was insufficient evidence for the Respondent to have taken disciplinary action against Ms Alhassan in response to this allegation.

27. On 27 March 2019 another member of the Respondent's staff, Gita Datta, and the Claimant had a disagreement about whether Ms Datta was making distracting noises. Nothing done by either party amounted to misconduct.

28. During a conversation on 26 April 2019 another member of the Respondent's staff, Tasneema Chowdhury, alleged that the Claimant had mental health issues. There was no legitimate reason for her to have knowledge of any suspicion that the Claimant had mental health issues. In particular, there was no reason she would have known of the occupational health referral completed by Ms Babalola.

The investigation and dismissal process

29. On 12 November 2019 the Claimant was dismissed with pay in lieu of notice. The reason for dismissal was alleged misconduct. The alleged misconduct related to the way in which the Claimant had interacted with her colleagues throughout her employment.

30. Before the matters which led to her dismissal, the Claimant had one previous disciplinary matter. The Respondent's investigation of that disciplinary matter ("**the First Investigation**") considered the following allegations:

(1) That the Claimant had regularly and unreasonably accused her colleagues of breathing on her;

(2) That the Claimant has regularly and unreasonably accused her colleagues of giving off negative energy;

(3) That the Claimant has on a number of occasions used her mouth to blow air towards her colleagues;

(4) That the Claimant has used inappropriate language towards her colleagues for example calling a colleague a "bush girl"; and

(5) That the working relationship between the Claimant and members of her team has broken down.

31. Following complaints by members of staff, on 24 August 2018 the First Investigation was commenced. As part of the First Investigation, between 6 September 2018 and 18 September 2018 the complainants were interviewed individually. On 14 September 2018 the Claimant was interviewed. In addition to the

complainants, independent witnesses were interviewed.

32. In October 2018 the First Investigation concluded and found a case to answer in respect of allegations 1, 3, 4, and 5. In respect of allegation 2 the Investigating Officer was unable to find evidence to support or disprove this allegation. As such, it was not taken forward.

33. The Respondent has a policy which allows for "plea bargains" in its disciplinary processes. The policy states in relevant part as follows:

"Where there is consensus between the parties that an agreed outcome is an acceptable way forward for resolving the disciplinary issue the following principles should be followed:

- Both parties must be in agreement to proceed in this way. This decision is final and there should not be a later referral to a disciplinary hearing or appeal on this issue.
- Agreed outcomes should usually be considered at the following stages of the disciplinary process: once the employee is notified of the alleged misconduct; when the employee receives written confirmation that an investigation will be commissioned or at the end of the employee's investigation meeting. Requests for plea bargaining outside of these stages may be considered.
- Agreed outcomes are inappropriate in cases of gross misconduct. Agreed outcomes can only be considered for cases where final written warning or dismissal is not a likely outcome. More serious allegations must be investigated."

34. In order to bring an end to the first disciplinary matter, by way of a plea bargain the Claimant agreed to accept a written warning, which would remain live for 6 months, and end on 16 May 2019. The Respondent warned the Claimant that if the Claimant failed to demonstrate improvement in her behaviour during the duration of the warning then it may result in further disciplinary action and ultimately dismissal. On 16 November 2018 the Claimant accepted this sanction at a meeting and signed the outcome letter.

35. When agreeing to the plea bargain, the Claimant explicitly stated that she was not admitting everything alleged against her. She also agreed to the plea bargain on the condition that the Respondent offer mediation to the Claimant and those with whom she worked, in an attempt to prevent future issues. The Respondent failed to inform the Claimant that it did not view mediation as something it could compel its employees to undertake. Although the fact that mediation was considered voluntary was contained within some of the Respondent's policies, these policies were lengthy, were not brought to the Claimant's attention at the time of the commitment to provide mediation, and would not be committed to memory by any reasonable employee. As such: (i) no reasonable employer would have expected the Claimant to be aware that the mediation was voluntary; (ii) the Respondent did not believe the Claimant to be aware of this; and (iii) the Claimant was not aware of this.

36. The Respondent received further complaints regarding the Claimant's alleged inappropriate behaviour. On 9 May 2019 a further plea bargain was offered. If it had been accepted, the plea bargain would have added a further written warning to the Claimant's record. On 17 May 2019 the Claimant declined the plea bargain.

37. On 20 May 2019 the Claimant raised a grievance regarding an allegation that Ms Babalola and a more senior manager, Ms Lee, mishandled an incident on 27 March 2019 when the Claimant had to be asked twice by Ms Lee to enter Ms Lee's office, while the Claimant was talking to Ms Babalola.

38. On 27 July 2019 Mr Brice informed the Claimant that mediation had not been agreed to by all parties, and that a **Second Investigation** against the Claimant would commence. The Second Investigation started on 1 August 2019. It was also to consider grievances raised by the Claimant. It considered the following allegations, the last of which was added on 6 August 2019, following an interview on 5 August 2019 with Ms Babalola:

(1) That the Claimant had used inappropriate language to a colleague by calling her a liar or accusing her of lying;

(2) That the Claimant had failed to follow management instructions on various occasions;

(3) That the Claimant had behaved inappropriately towards a junior member of staff (Tasneema Chowdhury) in a meeting on 26 April 2019; and

(4) That the Claimant told Bosede Babalola that the Claimant had never had a problem with her previous managers that were white and that she had a problem with Bosede as she was black.

39. On 30 August 2019 Ms Lee sent to the Claimant a job advert in the Royal London Financial Management team for a Band 8b Finance Manager.

40. The disciplinary process in the Second Investigation was delayed in part because Mr Brice went on annual leave on 14 June 2019, 12 July 2019, and 15 to 19 July 2019 inclusive. Mr Brice delayed until 1 August 2019 the actual commissioning of the Second Investigation, which was carried out by Ms Cooper-James. The delay in starting the Second Investigation meant that the Respondent did not take statements from witnesses when incidents were fresh in their minds. It also meant that the Claimant could not take statements from witnesses when incidents were fresh in their minds. However, this would not have affected the Claimant's defence, as she would not have taken statements from defence witnesses anyway, as she felt they had conflicts of interest.

41. On 25 October 2019 the Second Investigation was completed. The Respondent concluded that the Claimant had a case to answer. The Claimant's grievances were not upheld.

42. On 12 November 2019 a disciplinary and grievance hearing was held. It was chaired by Mr Brice. Dr Delordson Kallon (Head of Clinical Transplantation Laboratory) and Paula Moriarty (HR Business Partner Estates and Facilities) were

panel members. Neither the Claimant nor management called any witnesses. The Claimant was accompanied by a colleague. The panel found all of the allegations from the Second Investigation proved on the balance of probabilities. In particular, the disciplinary panel found:

(1) Allegation (1) was proved because calling a lie "a lie" was in breach of the Trust's standards: she should have said "it's a false statement".

(2) Allegation (2) was proved (i) because the Claimant could not provide sufficient support to her subordinates other than by performing 1-to-1 meetings on the schedule she was instructed to use, and in particular the ad hoc meetings she did carry out were insufficient; and (ii) because waiting more than 2 seconds to comply with a management instruction to enter an office was insubordination.

(3) Allegation (3) was proved (i) because Tasneema Chowdhury was a vulnerable adult by virtue of being a subordinate, a young adult, and on training; and (ii) because the Claimant had said that Ms Chowdhury is not a priority and not on her job description and subsequently, that the Claimant thought racial beliefs were a barrier to Ms Chowdhury.

(4) Allegation (4) was proved because, although the Disciplinary Panel was willing to accept the Claimant's case about what she said to Ms Babalola (that she never had problems with her being her first black manager, but that she thought people from her background would understand her better), this was misconduct because "references to another person's racial background is absolutely inappropriate".

(5) The cumulative effect of the findings from the First Investigation and the Second Investigation was that the working relationships between the Claimant and her colleagues and management had irretrievably broken down.

43. At the conclusion of the disciplinary hearing, the Claimant was informed that she was being dismissed because of misconduct with immediate effect and would be paid her contractual notice period in lieu.

44. On 26 November 2019 the Claimant appealed the decision to dismiss her.

45. On 12 February 2020, after Employment Tribunal proceedings had already begun, the appeal hearing was held. It was chaired by William Boa. Oyebanji Adewumi (Assistant Director of Inclusion) and Felicity Found (Assistant Director of People) were panel members. On 27 February 2020 the appeal panel met for 2 hours to discuss the case. On 5 March 2020 the Claimant was informed that the decision to dismiss her had been upheld.

46. Throughout the disciplinary and appeal processes, the Claimant put forward her defence. That defence was not materially different to the way she put her case in this Tribunal claim.

47. After the dismissal of the Claimant, the team in which she had worked was

restructured. This occurred independent of the events of and reasons for the Claimant's dismissal. However, the recruitment of a post within her team at grade 8B (Head of Transactional Services), which included part of her previous job role, was made necessary by her dismissal.

What in fact occurred in the incidents which the Respondent treated as misconduct

48. I now turn to consider what in fact occurred in the incidents which the Respondent treated as misconduct. I do so not to substitute myself for the Respondent's disciplinary panel or appeal panel, but because certain questions in the list of issues require determination of what in fact occurred.

49. In relation to the First Investigation, my findings are as follows.

50. In relation to allegation (1), the Claimant had regularly accused her colleagues of breathing on her. This was unreasonable. However, this was not done with malice on the Claimant's part. Rather, dissatisfaction between her and her colleagues had spiralled out of control such that the Claimant believed that the colleagues were acting unreasonably towards her.

51. In relation to allegation (2), the Claimant did not accuse her colleagues of "giving off negative energy". This was an example of miscommunication. When the Respondent investigated it, it was not substantiated by any independent witness.

52. In relation to allegation (3), the Claimant did give her colleagues the impression that she was blowing air at them. This was in the context of the Claimant reacting to believing that she was being breathed on.

53. In relation to allegation (4), the Claimant did not call a colleague a "bush girl". She described the behaviour of the colleague, and of herself, as "bush behaviour". This is in the context of the Claimant being of black African heritage, and using a colloquial phrase which was familiar to her, but may not have been familiar to her colleagues. The phrase "bush behaviour" meant inappropriate behaviour. It would not have appeared to the Claimant to be an inappropriate comment. It was not racially motivated.

54. In relation to allegation (5), the working relationship between the Claimant and some members of her team had indeed broken down. However, this was attributable to a clash of personalities. Fault could not be attributed to the Claimant.

55. In relation to the Second Investigation, my findings are as follows.

56. In relation to allegation (1), the Claimant did make an accusation that a colleague had lied. The Respondent did not seek to advance the case that the Claimant committed misconduct by making a *false* allegation of lying. Therefore, I make no finding on whether or not the allegation made by the Claimant was factually correct.

57. In relation to allegation (2), the Claimant's "failure to follow management instructions" amounted to three matters.

(1) The first matter was a delay of a few seconds in entering Ms Lee's office. The delay occurred because the Claimant was involved in a conversation with Ms Babalola, another of her managers. The request to enter Ms Lee's office was repeated once (and so was made twice in total).

(2) The second matter was that the Claimant chose to sit at a desk at which Ms Babalola did not want her to sit. This part of the allegation was not a material consideration in the disciplinary outcome.

(3) The third matter was that the Claimant did not carry out documented monthly one-to-one reviews with her subordinates. This was a new requirement placed on the Claimant by Ms Babalola.

58. In respect of the second and third matters, the Claimant thought it would be acceptable to continue the arrangements she had with her previous line manager which permitted her to as she wanted in these regards. She also did not see the rational bases for Ms Babalola's instructions, as she was able to work better at the desk she wanted to sit at, and she regularly carried out reviews with her subordinates, even if not on a formalised and documented monthly basis.

59. In relation to allegation (3), the Claimant had been concerned about the working relationship between her and Tasneema Chowdhury. In a meeting on 26 April 2019, the Claimant did say that Ms Chowdhury was not her responsibility. Further, the Claimant was concerned that the problems in her working relationship with Ms Chowdhury could result from the difficulties inherent in intercultural communication. This concern on the part of the Claimant was not a criticism of Ms Chowdhury, but rather an understanding that both speakers in any conversation are engaged in a collaborative effort to communicate, and that this effort is rendered more difficult by lack of shared cultural reference points. The Claimant expressed these concerns, as tactfully as she could. However, Ms Chowdhury misunderstood the Claimant's meaning. The Respondent had failed to provide to its staff any training on the difficulties inherent in intercultural communication, and how to overcome them tactfully.

60. The Respondent's assertion that Ms Chowdhury is a vulnerable adult is false. The Respondent asserted that Ms Chowdhury is a vulnerable adult because she was a junior member of the workforce subordinate to the Claimant, who was undertaking training. The Respondent has always known that this is not sufficient to make someone a vulnerable adult.

61. Ms Chowdhury did cry as a result of the conversation with the Claimant. However, this was as a result of the misunderstanding that occurred, not because of any fault on the part of the Claimant, and not because of any vulnerability on the part of Ms Chowdhury.

62. In relation to allegation (4), the Claimant did not tell Ms Babalola that she had a problem with her because she is black. The Claimant is, herself, black. It would be absurd to suggest that the Claimant has a problem with people because they are black, and the Respondent has always known this to be the case. The Claimant expressed to Ms Babalola that she had hoped to get on well with Ms Babalola, and that she was disappointed that she did not. That disappointment stemmed in part

from the fact that Ms Babalola was black, and the Claimant had previously had white managers: Ms Babalola had not become the role model that the Claimant would have wanted. The Claimant's statement about this was not made with a discriminatory intent.

63. It is not discriminatory for a person in a traditionally unrepresented group to say that they would like someone from the same group to whom they can look up. Nor is it discriminatory for them to be disappointed when a person they would like to be able to look up to for this reason does not live up to their expectations. The Respondent operates staff forums for employees from ethnic minorities. Mr Brice was aware of the existence of these staff forums. As such, it is plain that the Respondent, and Mr Brice in particular, understand that it is important for employees from minoritised or underrepresented groups to be able to form bonds in the workplace with other members of the same groups, and find mentors, or others to whom they can look up, from such groups.

64. At no stage, in relation to any matter that is before this Tribunal, did the Claimant make any comment which was racially discriminatory in nature.

Conclusions

Liability

65. The Claimant accepts that her dismissal took place in circumstances where the Respondent believed that she was guilty of further misconduct in circumstances where she already had a live disciplinary warning at the time of the alleged misconduct.

66. I have no reason to doubt Mr Brice's report of what he believed to be the case when he took the decision to dismiss the Claimant. I conclude that Mr Brice and his panel, and by extension the Respondent, did believe that the Claimant was guilty of misconduct when they made the decision to dismiss. I further conclude that Mr Boa and his panel shared this belief when they rejected the Claimant's appeal.

67. As such, it is clear that the reason for dismissal was a genuinely held belief that the Claimant had committed misconduct.

68. I have therefore considered whether this belief that misconduct had been committed was arrived at on reasonable grounds. I have concluded that it was not, for the following reasons.

69. Stepping back from the detail of the claim for a moment, the assessment of the case requires consideration of the size, resources, and nature of the employer, and of its corporate culture.

70. Different employers will necessarily foster different corporate cultures in their workplaces. There is no archetypal "right" workplace culture. An office environment will have a different culture to a production line in a busy factory, or a bar in a rowdy pub: a greater degree of formality and of sensitivity to others may be expected in an office environment compared to other work environments.

71. The Respondent's corporate culture (or at least, that which the Respondent's Disciplinary Panel and Appeal Panel expected to exist, and against which they judged the Claimant) requires the policing of language. Criticisms of others, even when justified, have to be couched in terms which limit their impact. This culture involves a suffocating prohibition on being able to speak plainly. Talking frankly in negative terms is discouraged, for fear of hurting others' feelings. Everything has to be clothed in euphemism. A "lie" has to be referred to as an "untruth". A conversation with a "subordinate" becomes a conversation with a "vulnerable adult".

72. Although failure to live up to the standards expected of a corporate culture may amount to misconduct, if the corporate culture is itself unreasonable, then (depending on the circumstances) it might not be reasonable to dismiss an employee for failing to live up to those standards.

73. With that preface, I now turn to consider the details of the alleged misconduct, and whether the Respondent had reasonable grounds to sustain its belief in them.

74. In relation to allegation (1), that the Claimant had used inappropriate language to a colleague by calling her a liar or accusing her of lying, there was a reasonable basis for the factual finding, as it was admitted. However, no reasonable employer could conclude that the factual finding provided reasonable grounds to conclude that misconduct had taken place. If the allegation had been that the Claimant was making false allegations of lying, this would be a different matter. However, that was not the Respondent's case: the Respondent's case was put clearly on the basis that the allegation of lying itself was misconduct. There were no reasonable grounds to conclude misconduct took place in relation to this allegation.

75. In relation to allegation (2), that the Claimant had failed to follow management instructions on various occasions, there was no reasonable basis on which to conclude that the actions of the Claimant were misconduct. The standard set by Mr Brice and used by his panel, that waiting 2 seconds to follow a management instruction to enter a room is insubordination, is nonsense. Indeed, it would still be nonsense to treat it as insubordination if more than 2 seconds were taken, in the context of this case where the Claimant was engaged in a discussion with another of her managers at the time.

76. Equally, there were no reasonable grounds to conclude that not carrying out scheduled and documented one-to-one interviews (and the Claimant instead carrying out constant discussions with her subordinates) was insubordination. This was a matter for ongoing discussions between the Respondent and the Claimant as to the best way to carry out supervision. There was no evidence before the Disciplinary Panel (or the Appeal Panel) that would allow the Respondent to conclude that the Claimant was failing to provide adequate support to her subordinates in order to allow them to carry out their work. The Disciplinary Panel (and the Appeal Panel) mischaracterised a difference in managerial style as insubordination. There were no reasonable grounds to conclude misconduct took place in relation to this allegation.

77. In relation to allegation (3), that the Claimant had behaved inappropriately towards a junior member of staff (Tasneema Chowdhury) in a meeting on 26 April 2019, there was again no reasonable ground on which the Respondent could conclude that misconduct was committed. In particular, any reasonable employer

would have appreciated that the Claimant was trying to overcome difficulties regarding intercultural communication. The misunderstanding by the Disciplinary Panel (and the Appeal Panel) resulted from the failure of the Respondent to provide to its staff any training on intercultural communication. Further, saying that Ms Chowdhury was not the Claimant's responsibility could not reasonably have been viewed as misconduct.

78. In relation to allegation (4), that the Claimant told Bosede Babalola that the Claimant had never had a problem with her previous managers that were white and that she had a problem with Bosede as she was black, there was again no reasonable ground on which the Respondent could have concluded that misconduct had taken place. In particular, the Respondent had proceeded on the factual assumption that the Claimant's account of what was in fact said was true. Having accepted this factual premise, there was no basis on which to conclude that the Claimant was making a racially inappropriate comment. Mr Brice is objectively wrong when he says that making "any references to another person's racial background is absolutely inappropriate". Pretending not to see race is the surest way to leave internalised racially discriminatory assumptions unexamined. Whether references to a person's racial background are appropriate depends on the specific circumstances of the references. The Respondent itself accepts this by its provision of staff forums for members of staff from ethnic minorities.

79. As I have concluded that the Respondent did not have reasonable grounds to sustain its belief that the Claimant had committed misconduct, the Claimant was unfairly dismissed.

80. I have nonetheless gone on to consider whether, if I am wrong that there were no reasonable grounds to conclude that misconduct had taken place, the Respondent nonetheless acted within the band of reasonable responses when it dismissed the Claimant.

81. In determining whether the Respondent has acted within the band of reasonable responses, I have been careful not to adopt a "substitution mindset". I have borne in mind the relevant authorities on the point, as summarised earlier, and the Respondent's clear submission on this point.

82. I have concluded that, even if the Respondent had reasonable grounds to sustain a belief that the Claimant had committed misconduct, formed on the basis of a reasonable investigation, dismissing the Claimant would not have been within the band of reasonable responses. I have come to this conclusion for the following reasons.

83. In relation to allegation (1), that the Claimant had used inappropriate language to a colleague by calling her a liar or accusing her of lying, at most this was something which a reasonable employer would speak to the Claimant about, asking her to moderate her language.

84. In relation to allegation (2), that the Claimant had failed to follow management instructions on various occasions, no reasonable employer would have taken any action in response to the delay in entering Ms Lee's office. Further, no reasonable employer would have done more than speak to the Claimant about conducting

regular and documented one-to-one meetings with her subordinates, and monitor her compliance with this.

85. In relation to allegation (3), that the Claimant had behaved inappropriately towards a junior member of staff (Tasneema Chowdhury) in a meeting on 26 April 2019, no reasonable employer would have dismissed for this, even against the background of the "bush behaviour" comment referred to in the First Investigation. Rather, a reasonable employer would at most have offered appropriate training (to all its staff) on the most tactful ways to approach intercultural communication.

86. In relation to allegation (4), that the Claimant told Bosede Babalola that the Claimant had never had a problem with her previous managers that were white and that she had a problem with Bosede as she was black, no reasonable employer would have dismissed for this, even against the background of the "bush behaviour" comment referred to in the First Investigation. Rather, a reasonable employer, having made the factual findings that the Respondent made would have taken steps to improve the relationships between the Claimant and her colleagues, and referred the Claimant to the appropriate staff forum for staff from her ethnic background, where she may have been able to find mentoring and support which she felt was lacking from her relationship with Ms Babalola.

87. Even taking all of these matters together, and against the background of the previous written warning, no reasonable employer would conclude that dismissal was a reasonable sanction. Any sanction more serious than a final written warning was outside the band of reasonable responses. My reasons for this conclusion are, in particular, that:

(1) Each of the acts of misconduct alleged was minor;

(2) No gross misconduct was alleged;

(3) The Claimant had sought to have mediation, which could have resolved the issues with the Claimant's colleagues, but her colleagues and the Respondent were responsible for that mediation not taking place;

(4) Through the request for mediation, the Claimant had shown the existence of insight into the need to resolve the issues with the Claimant's colleagues;

(5) The Respondent took no useful, meaningful, and concerted steps to improve the relationships between the Claimant and her colleagues between the time of the first ever complaints and the date of the Claimant's dismissal, but rather defaulted to a disciplinary process;

(6) The Claimant had lengthy blemish-free service with previous NHS employers, as well as significant blemish-free service with the Respondent before the First Investigation;

(7) There was delay in dealing with the disciplinary matters, caused by the Respondent, meaning that many of the allegations were stale by the time of the Disciplinary Hearing;

(8) The First Investigation only generated a simple written warning, not a final written warning; and

(9) The Respondent had accepted that the alleged misconduct could be dealt with by a written warning (although it did not concede by this alone that the misconduct alleged could not be sufficient to justify dismissal).

88. In this light, no reasonable employer would have taken the decision to dismiss.

89. Given the findings I have already made, in considering the band of reasonable responses, I have not found it necessary to consider the Claimant's claim that she was treated inconsistently to other employees of the Respondent.

90. Further, as I have found that the dismissal of the Claimant was substantively unfair, I have also not found it necessary to consider whether the dismissal of the Claimant was procedurally fair.

Remedy

91. At the hearing I did not hear detailed submissions on remedy.

92. The Respondent urged me to hold a further hearing to consider remedy, if I found in favour of the Claimant on liability. The Respondent said that more disclosure was necessary, and that it would be necessary to cross-examine the Claimant. The Claimant did not object to this approach.

93. The Claimant seeks reinstatement or reengagement, as well as compensation, from the Respondent. This is a remedy which the Tribunal can award. However, the Respondent resists this remedy.

94. I conclude that it will be necessary to list this case for a hearing to deal with remedy.

Employment Judge Knight

15 February 2021

ANNEX 1: LIST OF ISSUES

Liability

1. The Claimant accepts that her dismissal took place in circumstances where the Respondent believed that she was guilty of further misconduct in circumstances where she already had a live disciplinary warning at the time of the alleged misconduct.

2. However, the Claimant contends that the conclusion that she was guilty of sufficient misconduct to warrant dismissal was not a reasonable belief reached after a reasonable investigation:

   (1) The Claimant considers that the disciplinary investigation into the matters that led to her dismissal was instigated in circumstances where she had previously complained about her line manager (Bosede Babalola) and in order to cover her own misconduct, Ms Babalola chose to raise disciplinary matters against the Claimant that had occurred at an earlier stage;

   (2) The Claimant's case is that the Respondent should have looked again at whether the previous disciplinary warning was appropriately issued, given the points made by the Claimant during the course of the disciplinary investigation. Her case is that it was wrongly issued to her and so should not have been taken into account in relation to her dismissal;

3. The Claimant considers that her dismissal was procedurally unfair in that her line manager:

   (1) Delayed in investigating the incidents that took place on 29 January 2019 and 27 March 2019, by failing to take statements at the earliest opportunity from those involved in those incidents;

   (2) As a result of the delay, the Respondent did not have an effective opportunity to obtain witness evidence to support her position at the disciplinary hearing as to what took place on 29 January 2019 and 27

March 2019. Potentially relevant witnesses had forgotten details of what took place on both occasions, given the passage of time.

4. The Claimant contends that the decision to dismiss her for misconduct was outside the band of reasonable responses in that it was inconsistent with the way that the Respondent treated other employees:

   (1) There ought to have been a disciplinary investigation into the way that Hanny Alhassan had treated the Claimant in an aggressive and unfriendly manner, as reported by the Claimant in May/June 2018;

   (2) The Claimant's line manager, Bosede Babalola, should have been the subject of a disciplinary investigation for changing the content of the occupational health referral in July/August 2018 to suggest that the Claimant had mental health issues;

   (3) A disciplinary investigation should have been instigated against Gita Datta for making distracting noises in the office on 27 March 2019;

   (4) Disciplinary action should have been initiated against Tasneema Chowdhury for alleging during a conversation on 26 April 2019 and in a subsequent witness statement that the Claimant had mental health issues.

5. The Claimant contends that the Respondent failed to consider the alternative sanction of issuing her with a final written warning.

Remedy

6. If the Claimant is found to have been unfairly dismissed, should a reinstatement order or re-engagement order be made?

7. What if any basic award is the Claimant entitled to if successful in her claim?

8. If the Claimant is entitled to a basic award, should any reduction be made to reflect contributory fault on the part of the Claimant?

9. What if any level of compensatory award would it be just and equitable for the Tribunal to award? In respect of any compensatory award made, should any

reduction be made to reflect the following:

(1) Whether the Claimant complied with her duty to mitigate her loss under section 123(4) of the Employment Rights Act 1996?

(2) To the extent that there was any procedural unfairness, whether the outcome would have been the same (ie the Claimant would have been dismissed) in any event, Polkey v A E Dayton Services Limited [1987] ICR 142 applied, and if so, by what percentage should the Tribunal reduce the compensatory award?

(3) Whether the Claimant's conduct contributed to her dismissal, and if so, by what percentage should the Tribunal reduce the compensatory award?; and

(4) The application of the statutory cap (if applicable)?