EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102157/2020 (V)

Held on 27, 28, 29 and 30 October 2020 by Cloud Video Platform (CVP)

Employment Judge M Robison

Mr D Diplexcito	**Claimant** **In Person**
Greater Glasgow Health Board	**Respondent** **Represented by** **Mr D James** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim for unfair dismissal is not well-founded and is therefore dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 11 April 2020 claiming unfair dismissal. The respondent lodged a response to that claim, arguing that dismissal in the circumstances was fair.

2. Following discussion at a preliminary hearing which took place on 13 July 2020, and in line with the Presidential Guidance on the Covid-19 Pandemic, this hearing took place remotely on the cloud video platform. It had been agreed that evidence set out in witness statements would stand as the evidence in chief of the witnesses, and be taken as read.

3. At the outset of the hearing, the claimant confirmed that he is still seeking re-employment. Mr James had not appreciated that but led evidence on this matter from the witnesses who were to be called.

4. At the hearing, the Tribunal heard first from the claimant, and from three witnesses for the respondent, namely Ms Julie Huntly, investigating officer, Mr John Kennedy, dismissing officer and Ms Marie Farrell, who chaired the appeal.

5. During the hearing, the Tribunal was referred by the parties to a joint file of productions (referred to by page number). Supplementary productions were also lodged.

Findings in Fact

6. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

7. The claimant commenced employment with the respondent on 25 April 2016 and worked until he was dismissed for gross misconduct effective 1 December 2019. He was employed as a Band 5 Registered Nurse at the Royal Alexandra Hospital in Paisley, latterly on Ward 24, which is an acute surgical ward, which often takes patients from the high dependency unit.

8. On 22 July 2018, the claimant was advised by Ms Jackie Smart, General Manager Surgical Specialties, that he was to be suspended pending a formal investigation. This was confirmed by letter dated 26 July 2018 (page 235), and the allegations confirmed as follows:

    1. That on 30 June 2018 and 4 June you fraudulently recorded patient observations and test results in nursing documentation (hereafter the first and second allegation); and

    2. that you claimed you had completed and documented a bladder scan on a patient and the patient stated that it never happened (hereafter the third allegation).

9. This followed concerns raised by SCN Claire McCutcheon to the lead nurse on the ward, Claire Bowater, following complaints by patients.

10. Shortly after the suspension letter was sent, Ms Huntly, lead nurse with the respondent, was appointed as investigating officer by CSM of Surgery Rebecca Reid. She was supplied with the terms of reference; some staff statements and an electronic audit of the BM monitor which measures blood sugar levels.

11. Ms Huntly ascertained the names of the patients on the ward at the time of the allegations and reviewed their documentation, focusing on the NEWS (national early warning score) charts. This documentation charts observations of patients at regular intervals, including temperature, pulse and blood pressure, which allows early recognition of a deteriorating patient. Each observation is scored and the aggregate score used to understand when the patient's observations require to be repeated and if the patient should be escalated to the medical teams for review.

12. Ms Huntly noted that on Ward 24 the senior staff member on duty would be floating between the two sides of the ward. This was unusual because members of staff on duty would usually be subdivided into teams to manage patient care, with a set number of patients to look after. On this ward, the floating role would take on responsibility for a task oriented role, such as checking blood sugar levels or assisting with the administration of intravenous drugs. Ms Huntly noted that it was said that this was a role the claimant preferred. She noted that due to this practice, sometimes the person who provided care for a patient or undertook a patient check was not the member of staff who documented it. This was unusual and not deemed good practice.

13. Ms Huntly made a decision about the most appropriate members of staff to interview, and she interviewed ten members of staff between 17 August 2018 and 2 November 2018, including Clare McCutcheon and Kelly Connery.

14. During the course of the investigation, Ms Huntly reviewed all the NEWS charts associated with the dates and then cross referenced the BM scores recorded manually on those charts with the BM monitor electronic audit results, that is the machine which measured the levels. As a result of that review, a further allegation (hereafter referred to as the fourth allegation) was added, namely

that the claimant had on 7 and 8 May 2018 recorded having taken blood sugar level checks which had not in fact been done.

15. While the investigation was ongoing, the claimant was absent on sick leave from 24 July 2018 until 22 January 2019.

16. Ms Huntly interviewed the claimant on 14 February 2019. As this was the first occasion when the claimant became aware of the fourth allegation, the claimant was offered further investigatory meeting in the event that he wished to discuss the allegations further, but he declined. In any event, a further investigatory meeting took place on 25 July 2019 to revisit the bladder scan allegation.

17. Ms Huntly produced a report entitled "management statement of case", which although undated was completed in or around September 2019, in which she set out her findings and conclusions (pages 219-318).

18. While the first allegation relates to two dates in June, that is 4 and 30, as it transpired this allegation related to two different types of observations and this was treated by Ms Huntly (and others involved in the dismissal process) as two separate allegations.

19. With regard to the allegation relating to 4 June (the first allegation), this related to the allegation that the claimant had stated to staff that all patients had scored zero on the NEWS chart that night and therefore no further observations would be required on the shift. Although the claimant denied this had been said, Ms Huntly concluded that there was a case to answer given: how unusual a zero score was; the claimant's need to verbalise to staff that meant no further observations were required overnight; and the timings of the observations documented in the NEWS, some indicating observations had been completed at the same time on different patients.

20. With regard to the second allegation on 30 June, this related to the fact that the claimant's position was that if he had charted blood sugars then he had completed them.

21. Following investigation about the reliability and validity of the BM monitor with the clinical scientists, she stated that the investigation team had established

that patient B's statement that blood sugar checks had not been carried out overnight accorded with the blood sugar monitor download.

22. With regard to the third allegation regarding the bladder scan (stated to have been completed and documented on 18 May), she acknowledged some dispute between Claire McCutcheon and Kelly Connery's accounts, given Ms Connery said that she raised the matter with Ms McCutcheon, who said she did not. Further there was a lack of clarity about dates; the claimant and Ms Connery were both off on 18 May; there was discrepancy in the result verbalised and that written down. However, the patient, who was found to have full capacity, claimed that it had not been carried out, while the "nursing documentation support[ed] the completion of the bladder scan". She recorded that "the patient heard the conversation where Darren had indicated the bladder scan had been completed and was visibly upset and asked 'why would he lie when I am right here'".

23. With regard to the fourth allegation, she ascertained that the claimant's record that blood sugar tests had been undertaken and recorded on NEWS charts did not accord with the blood sugar electronic records. The claimant was unable to provide an explanation for this discrepancy.

24. She recommended that the matter proceed to a formal disciplinary hearing.

25. On 11 September 2019, Ms Huntly e-mailed Andy Kerry, the consultant clinical scientist, as follows: "I spoke with one of your colleagues earlier with regards to the BM audit that is required as part of an investigation. The audit was requested and reviewed last year, the staff member involved has had a long period of absence hence the delay in the case. The investigation case has been very lengthy but is now being heard next week. I am preparing to be interviewed for this investigation and just making sure I have all my facts. This case centres around a patient who identified he was not waken overnight for his BM to be checked. Nurse concerned indicated BM checked and recorded. On the BM monitor itself there was no BM's recorded in the history for that night. On the BM audit record, no BMs record for this patient at the times recorded. BM's recorded prior to and after this event have been captured on the BM audit. The BM audit record identifies activity on the date in question,

therefore no issue with upload. There is no issue with the patients CHI and no issue with the staff members access. Would there be any reason why this would be so. There was no emergency access required to the BM and there was no second monitor in use in the department. Thank you for your advice".

26. On 13 September 2019, Andy Kerry responded as follows, "I've sat with Louise this morning who you will have spoken to earlier this year regarding the data we have provided for you. We agree with the facts you have stated. We can confirm we have captured all the data for the specific meter ID used".

27. On 29 October 2019, following a letter dated 3 September 2019 enclosing a copy of the management statement of case (pages 215 – 216), a disciplinary hearing took place which was chaired by Mr John Kennedy, general manager. The claimant was accompanied by his trade union representative, Barbara Sweeney, RCN official. Ms Huntly presented the management statement of case. Ms Connery and Ms McCutcheon gave evidence. They were questioned by the claimant and his TU rep. The hearing was adjourned thereafter, once the management case was completed, having run out of time.

28. On 11 November 2019, the claimant lodged a grievance concerning aspects of the investigation and disciplinary hearing (pages 350 – 353).

29. Notwithstanding the disciplinary hearing resumed on 14 November 2019 when the claimant's case was presented by his trade union representative.

30. By letter dated 28 November 2019, the claimant was advised of the outcome of the disciplinary hearing (pages 354 – 358). After summarising the key points from the management statement of case, Mr Kennedy "conclude[d] that the case warrants summary dismissal on 3 counts of Gross Professional Misconduct. I did consider whether there could be any alternatives to dismissal; however I did not feel that this would be appropriate in this instance due to your obvious lack of veracity and the nature of the offences which caused me extremely serious concern about your probity and trustworthiness".

31. The letter continued, "in respect of allegation 1 that you fraudulently documented observations on 4 June 2018 I have decided somewhat reluctantly that the evidence is not sufficiently clear to come to a reasonable

conclusion that your recordings were fraudulently made although I do find them suspect and certainly merited investigation. What I do find concerning in your responses to this and other allegations is your apparent lack of leadership for junior staff nurses in a high acuity busy surgical ward during your shift as Nurse in Charge. Whilst this was not an allegation that you were required to answer, I nonetheless feel it is incumbent on me to make you aware of my view on this. It is my decision therefore not to issue you with a disciplinary sanction in this regard".

32. Mr Kennedy therefore did not uphold the first allegation, decided that he could not make a decision on the basis of the evidence presented.

33. He did however have misgivings, because he was of the view that the circumstances were suspicious and had merited investigation, because he was concerned about the zero score, and the patient who had expressed concerns about the care he had received was subsequently transferred to a high dependency unit. He also wanted to highlight concerns about the claimant's approach, because he got the impression that the seniority aspects of the role seemed to be more important to him than patient care and safety.

34. The letter continued, "In respect of the allegation that your fraudulently documented observation on 30th June 2018 in that you recorded blood sugar checks for Patient B that could not be verified through the monitor audit tool is well founded and no possible explanation could be made other than you documented observations which had not in fact been undertaken. This can only be regarded as Gross Professional Misconduct meriting summary dismissal. Your continued insistence on having done the checks in the face of all reasonable evidence that you could not have done so, seriously calls into question your credibility and trustworthiness".

35. This decision was based on confirmation from the clinical scientist regarding the accuracy and validity of the BM monitor tool; and in particular the patient, who had full capacity, who had expressed concern that the observations had not been undertaken. He considered this to be gross professional misconduct because it posed unacceptable risks to patients and raised serious concerns about the conduct and professionalism of the registered nurse.

36. The letter continued, "In relation to the allegation that you completed and documented a bladder scan on a patient who has stated that you had not done so, I considered very carefully the evidence presented by SN Connery. She stated that the patient had been clear with her that the scan had not been undertaken by you as you had stated to the Consultant. She was also very clear when describing the level of upset experienced by the patient and I have considered the evidence presented that the patient had full capacity to make the statement. Your evidence in response was not clear or credible. It is my decision therefore that you did fraudulently record a bladder scan for this patient which is Gross Professional Misconduct meriting summary dismissal".

37. This related to a bladder scan which had not been carried out by the claimant on 18 May 2018. Although Mr Kennedy now accepts that there was dubiety about the date, given the claimant was not at work that day, he did not focus on dates but he relied on the evidence of Ms Connery who described the level of upset experienced by the patient who said that the claimant had not carried out the scan, and who was wanting to self-discharge.

38. In relation to the fourth allegation, he concluded that this was gross professional misconduct because of concerns about probity and patient safety meriting summary dismissal since the observations could not be verified though the monitor audit tool. Although there was no patient feedback, there was no possible explanation other than the observations had not in fact been undertaken.

39. The claimant was advised that the NMC may informed, that a conduct hearing may take place and that may include being removed from the professional register.

Appeal

40. By letter dated 4 December 2019, the claimant lodged an appeal, on the basis that the decision was "unduly harsh under the circumstances and additionally full consideration has not been given by the panel to the inaccuracies identified by myself and my trade union representative during the Disciplinary Hearing in regards to evidence presented by the Investigatory Team" (page 359).

41. An appeal hearing took place on 10 March 2020. The panel consisted of Marie Farrell, director (chair), Evelyn Frame, chief midwife, Donald Lyons, non-executive director and Allan MacLeod, non-executive director. Hearing notes were taken (pages 413-432). The management statement of case was presented by John Kennedy (page 369). Ms Huntly gave evidence. Ms Sweeney asked her questions. At the end of the hearing, Ms Farrell advised that they would obtain more information in relation to the blood sugar monitoring reports before making a decision.

42. After the hearing, Ms Farrell obtained another blood sugar monitoring report for 7 and 8 May, covering all readings taken by all members of staff over those two days (page 433). This was because the monitoring report that was included in the investigation report only recorded readings taken by the claimant. This was because of evidence at the hearing that one member of staff may do a procedure, which may be recorded by another, and to check whether another member of staff had carried out the test and that the claimant had recorded it on the chart.

43. Ms Farrell also sought to check with the clinical scientist that even if the BM monitor machine was in another ward or used by another member of staff to take the reading, it would still be recorded on the audit. By letter dated 27 March, Andy Kerry, responded to that enquiry as follows (page 434):

"I can confirm we have produced a complete report of all POCT blood glucose results from the Abbott Precision Pro glucose meter in ward 24 for the time period from 02.01.2018 and 03.07.2018. I confirm all results on the report pertain to the glucose meter….used in ward 24 during the time period in question and that the report contains a full audit of results produced. The glucose meter is set to an assigned ward location in UNIPOC (the laboratory software provided by the manufacturer), holding a database which records all patient and quality control results including patient ID (CHI number), user ID of who performed the test, meter serial number and time and date of analysis. This information is transmitted wirelessly or uploaded when a meter is docked and is also available on the meter which can store up to 2500 patient results at a time. All of the results recorded for the meter concerned….would be captured

regardless of whether the meter was docked in a different location. I am not aware of any previous recorded error with this, or any other glucose meter."

44. The claimant was advised of the outcome of the appeal hearing by letter dated 1 April 2020 (page 435). After summarising the management case, and the points made by the claimant and his trade union representative, Ms Farrell advised of the panel's decision to partially uphold the appeal, but notwithstanding the termination on the grounds of gross misconduct remained effective.

45. The panel's justification for the decision was set out as follows:

"within your appeal statement of case you note that you have been working in ward 24 since 3rd October 2017 and during the investigation you stated that bladder scans are not frequently requested. The panel therefore considered it reasonable that you would be able to recall the number of bladder scans you had undertaken in the eight months you were in ward 24. The panel do acknowledge that occasionally a patient may be confused over procedures and examinations they have received however, your entry in patient C's nursing notes refers to a secondary scan and the entry has been counter signed by another member of staff. As this is not a requirement for registered nurses and is at odds with your assertion that you document only the observations and care carried out by yourself, the panel have difficulty accepting your position that you carried out the bladder scan on patient C.

Whilst SN Connery provided a statement advising that she had scanned patient C there is no record of this in the nursing notes. The panel are therefore not comfortable that the evidence provided supports the original decision that this matter was gross professional misconduct. The original determination of summary dismissal has therefore been reduced to first/final written warning on the grounds of failure to adhere to documentation standards require of staff nurse and loss of trust.

Ward 24 RAH has only one blood sugar monitor which following concerns over the audit download was assessed by an appropriately qualified clinical scientist who was unable to identify any faults with the equipment

As the blood sugar monitor audit had recorded blood sugar testing undertaken by your night shifts on the 7th and 8th of May 2018 no explanation (s) have been put forward by any party that would explain why the equipment did not record four tests on these dates. The appeal panel therefore conclude that these tests could not have been undertaken and the results recorded in the patients NEWS charts by you to be fraudulent.

The appeal panel are of the view that the blood sugar results recorded by yourself for patient B within their NEWS chart for the 30th of June at 0030 and 0430 hours to be fraudulent as no explanation(s) have been put forward by any party that would explain why the equipment did not record these tests.

Since the panel considered your actions above to be fraudulent, the decision to summarily dismiss you remains".

Respondent's submissions

46. Mr James provided written submissions, which he supplemented with brief oral submissions. In his written submissions, he submitted that the evidence of the respondent should be preferred and on that basis set out proposed findings in fact. He set out the relevant law, including the standard tests by reference in particular to *BHS v Burchell* 1978 IRLR 379, *Iceland Frozen Foods v Jones* 1982 IRLR 439, and *Sainsburys Supermarket v Hitt* 2003 IRLR 23.

47. He also submitted that:

a) it is not necessary for an employer to extensively investigate each line of defence advanced by an employee, and the degree of investigation required very much depends on the circumstances, including the seriousness of the allegations (*Shreshta v Genesis Housing Association Ltd* 2015 EWCA Civ 94);

b) The overarching consideration is the impact of any procedural defect upon the substance of the fairness of process and decision reached; a defect can be cured on appeal (*Taylor v OCS Group* 2006 IRLR 613);

c) Procedural issues should be considered with the reason for dismissal to assess if it is sufficient; it is almost inevitable that a claimant will be able to identify a flaw in the process; but it may not be so significant as

to mount to unfairness (*Sharkey v Lloyds Bank plc* 2015 UKEAT/005/15);

d) Reasonableness should be considered in the context of the employer's decision to dismiss, and only faults which have an impact on the employer's decision to dismiss are likely to affect the reasonableness of procedure (see especially para 26 *City and County of Swansea v Gayle* UKEAT/0501/12);

e) The Tribunal should not focus on the employee's guilt or innocence but should confine itself to reviewing the reasonableness of the employer's actions (*London Ambulance Service NHS Trust v Small* 2009 IRLR 563).

48. He then went on to apply the law to the facts of this case and submitted that:

a) The *Burchell* test has been met in this case; and a full and thorough investigation was carried out; further the relevant limb of the *Burchell* test does not require the investigation to be flawless.

b) In any event, none of the alleged inaccuracies in the investigation or allegedly dubious evidence identified by the claimant relate to the allegations against him which were upheld after the appeal hearing. The claimant has been unable to find any fault in the investigation or the evidence relating to the blood sugar allegations. Even if the criticisms are justified, the alleged inaccuracies are fundamentally irrelevant to the question of whether the claimant's dismissal was fair.

c) the disciplinary process, regarded as a whole, was entirely fair to the claimant. The allegations which were upheld were based on clear, documented evidence, which the claimant has been unable to dispute. Both Mr Kennedy and Ms Farrell applied their minds to the evidence before them, and were willing to cast a critical eye on the case presented by management.

d) Both Mr Kennedy and Ms Farrell had reasonable grounds for the belief that the claimant had falsified records, given that the written records do not marry up with the electronic records; the electronic records were confirmed on more than one occasion as being sound; efforts were made to ensure that the claimant was not recording observations on

the written charts which had in fact been carried out by another member of staff; and a patient stated that the observations had not been carried out. The claimant was unable to provide any alternative explanation to having recorded observations which he had not carried out even at this Tribunal, only that he was consistent in his account.

e) Mr Kennedy and Ms Farrell both considered the consequences of dismissal and considered whether alternatives to dismissal might be appropriate. Deliberate falsification of records is identified in the respondent's policy as an example of gross misconduct. The respondent had a reasonable basis to believe that the claimant had falsified medical records, for patients who needed a high degree of care and for whom accurate observations would be particularly critical, giving rise to significant patient safety concerns. The respondent had a reasonable basis to believe that the claimant then failed to give an honest account of what had occurred throughout an investigation and disciplinary process.

f) The claimant has suggested that dismissal was unduly harsh. He has not provided any basis for this assertion. He has not presented any reason in relation to the blood sugar allegations which would justify a lesser sanction.

49. Mr James then set out submissions on remedy.

Claimant's submissions

50. Mr Diplexcito made oral submissions, in which he focussed on the evidence heard, conceding that he was not au fait with the relevant law.

51. He made the following points about the evidence:

a) While the respondent had focussed on the blood sugar measurements, and the Tribunal had heard evidence that these were missing for two separate patients, which the claimant accepts, there was evidence of the measurements for other patients taken by the claimant on those dates.

b) While the claimant acknowledges the concerns raised by Mr Kennedy and Ms Farrell regarding patient safety, he questions the extent of the risk to patient safety given the lapse of time from the date dates of the incidents and the claimant's suspension. Further, neither the SCN nor Nurse Rankin has any concerns about the claimant from that perspective.

c) With regard to the concerns expressed about disruptive behaviour on the ward by night shift staff, the claimant was identified as the main source, but there is evidence that this continued after he was suspended.

d) With regard to the request for further information about the patient who was transferred to the high dependency unit, it was established that the claimant was the nurse in charge but was not the named nurse responsible for the patient's care; and it was acknowledged that there was evidence that staff did have contact with the patient through the night and the time lapse was explained. It was established that each thought the other had undertaken the necessary checks. Further Ms McCutheon confirmed that although the patient had a relapse he had recovered.

e) It was acknowledged by Ms Huntly, Mr Kennedy and Ms Farrell that the working practices on the ward were not the norm, specifically in regard to the practice of another nurse documenting a procedure carried out by a colleague. However, the claimant was clear that was not his practice, and it was his practice always to acknowledge his own acts and omissions by ensuring that he documented any interactions which he conducted.

52. Mr Diplexcito highlighted the following flaws in the investigation, and submitted that Ms Huntly:

a) acknowledged that this was a complex multi-layered case which warranted thorough investigation. Yet only a select group of staff were interviewed, which meant that not all avenues were explored and the opportunity to gather further information for example from health care assistants was not taken, which may have brought up new evidence.

b) agreed that all documents should be available, but it was only after further information was requested that the allegation about the NEWS score was not upheld.

c) accepted that Ms Reid had lied in her evidence.

d) confirmed that there were inaccuracies in the time line regarding the further meetings with the claimant, which she accepted could be misleading.

e) acknowledged that there should have been further exploration regarding the inconsistencies in the statements of Ms Connery and Ms McCutcheon regarding the bladder scan allegation.

f) acknowledged that there were transcription errors in the management statement of case regarding the whereabouts of the claimant in regard to the conversation about the bladder scan.

g) acknowledged that the claimant was steadfast and consistent throughout in his response to the allegations on 7 and 8 May and 30 June; that the claimant had acknowledged that it was a serious allegation but it was accepted that he had had training on the monitoring system and knew how it worked including the audit trail.

h) accepted that she had breached confidentiality, in respect of an area covered by the NMC code of conduct; and on reflection she apologised.

i) acknowledged that while she said that she had no further opportunity to interview Ms Connery again because she was on long term sick leave, her rotas show that she was at work during the months of August, September and October 2019. She accepted that there were further areas which could have been explored.

j) acknowledged that there was an entry for the blood scan which he had signed.

k) acknowledged in hindsight that there were aspects of the investigation which could have been done more thoroughly.

53. With regard to the disciplinary hearing, Mr Diplexcito submitted that Mr Kennedy:

a) acknowledged that the case was multilayed and complex. He referenced his use of the word “reluctantly” but said that it was only in

regard to allegation 1, and that it was considered in isolation and collectively with allegations 2, 3 and 4.

b) recalled that Ms Glen had called the claimant “paranoid” during the disciplinary hearing, but he said that he could not recall the details of the disciplinary hearing, which he would have been expected.

c) referenced the significant risks to patients, and yet the claimant continued to practice until his suspension.

d) referenced concerns that the element of trust had been lost; but the claimant had provided reflective accounts to demonstrate remediation and further understanding of the respondent’s concerns.

e) erred in suggesting the investigation had begun in September 2019, whereas Ms Huntly said that it had begun in August.

f) admitted that the tone and language used in the outcome letter was harsh; accepted that some of the wording and terminology in the outcome letter was not clear; agreed that the allegations could have been clearer and split into four rather than three;

g) accepted that the evidence around the dates was messy; and that there was no correlation with the rota.

h) agreed that the claimant’s grievance should not have been passed to him; and that he had discussed it with the head of HR.

i) acknowledged that there should have been nursing notes of the conversation between the nurse and the patient regarding the bladder scan.

j) acknowledged that he was aware of the detail of the previous NMC process.

k) acknowledged that the patient who was transferred to HDU had had nursing intervention.

l) acknowledged that he was aware that the claimant had mental health issues; and that it would have been difficult for him to talk about them.

54. With regard to the appeal, the claimant submitted that:

a) Ms Farrell highlighted concerns about patient safety but agreed that there was no previous disciplinary concerns;.

b) she accepted that he had said that he would document any procedure he carried out himself with accuracy.

c) where the panel reference the fact that the bladder scan entry was countersigned, Ms Farrell in evidence accepted that this was not in fact the case.

d) since the review of the evidence contained errors, their justification was incorrect. This was despite the fact that Ms Farrell stated that Dr Lyons was thorough and meticulous, so this cast doubt on the decision-making overall.

55. Mr Diplexcito relied on all of these flaws and errors to question the thoroughness of the investigation, and the decision to dismiss which he said cast doubt on the fairness of the outcome.

56. The claimant explained that he has suffered and still suffers anxiety and depression as a result of this incident, although he has had support from family and friends, but misses his nursing colleagues. This has had an impact on his confidence and self esteem, which has impacted on his ability to obtain alternative employment.

57. He has no disciplinary record and he was highly regarded; he submits that he should be re-employed and that he should be given an opportunity to prove that he is a competent nurse within an agreed support plan.

Relevant law

84. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

85. Section 98(4) provides that 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, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

86. In a dismissal for misconduct, in *British Homes Stores Ltd v Burchell* [1980] ICR 303 the EAT held that the employer must show that: he believed the employee was guilty of misconduct; he had in his mind reasonable grounds upon which to sustain that belief; and at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

87. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to "reasonableness" under section 98(4) (*Boys and Girls –v- McDonald* [1996] IRLR 129, *Crabtree –v- Sheffield Health and Social Care NHS Trust* EAT 0331/09).

88. The employer does not need to have conclusive direct proof of the employee's misconduct – an honest belief held on reasonable grounds will be enough, even if it is wrong. The *Burchell* test was subsequently approved by the Court of Appeal in *Panama v London Borough of Hackney* 2003 IRLR 278. The principles laid down by the EAT in the *Burchell* case have become the established test for determining the sufficiency of the reason for dismissal where the employer has no direct proof of the employee's misconduct, only a strong suspicion.

89. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed as well as the penalty of dismissal were within the band of reasonable responses (*Iceland Frozen Foods Ltd –v- Jones* [1982] IRLR 439). The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the

decision to dismiss and to the procedure by which that decision was reached (*Sainsbury v Hitt* 2003 IRLR 23). The relevant question is whether the investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

90. The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

91. In *Salford Royal NHS Trust v Roldan* 2010 IRLR 721 the Court of Appeal emphasised that employers should exercise more care when dealing with a dismissal which could have consequences beyond the loss of employment with a particular employer.

Tribunal's deliberations and decision

Observations on the witnesses and the evidence

92. The claimant in this case represented himself. He had clearly prepared well and was able to question witnesses about the detail in order to highlight concerns about the disciplinary process. The difficulty for Mr Diplexcito which he recognised when it came to submissions was that he was not conversant with the relevant law.

93. Much of what he highlighted were details which would have made no overall impact on the unfairness question in any event. As I understood his submissions, he sought to rely on the fact that while each of these errors taken individually may not have had an impact on the fairness, overall this called into question the fairness of the decision.

94. Most of his concerns were, quite rightly, related to the bladder scan issue. As discussed below, I too had concerns about how that matter was investigated and the conclusions reached by both Mr Kennedy and Ms Farrell. However,

the claimant was not dismissed for this issue, and that of course is highly significant in this case.

95. Notwithstanding, I gave some consideration to whether it could be said that any failings in the way that the bladder scan issue had been investigated and dealt with could have somehow “tainted” the decision to dismiss in regard to the blood sugar issue, discussed below.

96. With regard to the credibility and reliability of witness evidence, there were a number of facts in dispute about what the claimant had done or not done in regard to the incidents under scrutiny, and in particular whether the claimant had or had not taken the blood sugar levels which he had recorded as having done in the NEWS charts, but which were not recorded as having been done by the electronic monitoring tool. However, as discussed below the answer to these questions were not ones which I required to determine. That said I accepted the evidence of all of the respondent’s witnesses as credible and reliable.

Unfair dismissal claim

97. Before turning to consider whether dismissal was unfair in the circumstances, I wish to highlight two matters in particular. The first is that it is not for this Tribunal to determine whether Mr Diplexito did or did not undertake the bladder scan or more importantly whether he did or did not undertake the blood sugar observations. Rather the question for the Tribunal is to determine whether the respondent acted within the “range of reasonable responses”, that is whether their investigation, dismissal process and decision to dismiss were the actions of a reasonable employer, acting within a reasonable range.

98. The second matter is that, although I had concerns about the decision relating to the bladder scan in particular which Mr Diplexcito highlighted, he was not ultimately dismissed for any reason related to that. The focus must be on the actions of the respondent in regard to the ultimate decision to dismiss in regard to the blood sugar issue.

99. In a dismissal where the focus is on an allegation of misconduct, I require to consider in particular the three limbs of the test from the case of *Burchell*, and I now do so in turn.

Reason for dismissal

100. The burden of proof is on the respondent to show that the reason for dismissal is a potentially fair reason. The first issue to consider is thus whether the respondent has shown that the claimant has been dismissed and that the reason for the dismissal was misconduct.

101. I did not understand the claimant to dispute that he was dismissed for misconduct which is a potentially fair reason for dismissal. This means that the first limb of the Burchell test is accepted, and therefore I concluded that the first limb of the Burchell test had been met and that the respondent believed the claimant to be guilty of misconduct.

102. Accordingly the respondent has shown that the reason for the dismissal of the claimant was conduct, which is a potentially fair reason for dismissal.

Reasonableness of decision to dismiss

103. The Tribunal then turned to consider whether the respondent acted reasonably in dismissing the claimant for misconduct. The burden of proof is neutral at this stage. The question is whether it was reasonable in all the circumstances for the respondent to dismiss the claimant for misconduct.

104. I then considered the second limb of the Burchell test, namely whether or not the respondent had in mind reasonable grounds upon which to sustain the belief that the claimant was guilty of misconduct. In this case, the respondent had received complaints from patients and records were identified which indicated a discrepancy between what had been recorded by the claimant, and what had taken place.

105. Given that information, I accepted that the respondents had based their belief on reasonable grounds.

The Investigation

106. I then turned to the third limb of the Burchell test. The respondent must have carried out as much investigation as was reasonable before forming the belief in the claimant's misconduct. The range of reasonable responses test applies to the conduct of the investigation, as well as to the overall disciplinary process and the decision to dismiss.

107. However, it should be noted that this is one of those cases where the outcome has a particular significance for the claimant. Although Mr Diplexcito conceded he did not know about the law, he submitted, from a common-sense perspective, that given the seriousness of the consequences for him, that he could lose his livelihood, it was particularly important that a thorough investigation had taken place. I accepted that submission, not least because it is clear from case law, such as *A v B* 2003 IRLR 405, that the more serious the allegations, and the more significant the outcome, the more thorough the investigation by the respondent ought to be. This is particularly the case where the facts are in dispute.

108. Mr Diplexcito had a good number of concerns about the investigation. In particular, he raised a concern that not all staff on duty on the nights in question were interviewed, that health care assistants had not been interviewed and he also pointed out during the hearing that none of the patients had been interviewed either. Although he had not raised the latter point before, he said that he was not aware that they could have been interviewed.

109. I accepted that it was appropriate for Ms Huntly to take a view on which witnesses she required to interview. I noted that she had interviewed 10 individuals whom she believed to be the most relevant. Mr Diplexcito thought she should have interviewed more staff, but when I asked him whether the respondent's failure to interview certain individuals meant that they were deprived of evidence which would have support his position, he accepted that there was nothing he was aware of.

110. Mr Diplexcito expressed concern that not all documents had initially been available to Ms Huntly, and that he had to bring a number of documents to her

attention, but once this information had been brought to her attention, these were taken into account in the process.

111. There were a number of matters about which the claimant raised concerns about which clearly made no difference to the outcome. Although he submitted that Ms Reid had lied in her evidence during the investigation, even if that is correct, this related to the recruitment of the claimant to ward 24. Other concerns which clearly were minor and make no difference to the outcome were transcription errors in the management statement of case and inaccuracies in the time line regarding the further meetings which the claimant.

112. Mr Diplexcito raised concerns about his how grievance was dealt with, and about a breach of confidentiality by Ms Huntly, but these are clearly separate matters, which I understand have in any event been dealt with separately to the claimant's satisfaction.

113. Mr Diplexito submitted that Ms Huntly acknowledged that there were further areas which could have been explored and in particular the inconsistencies in the statements of Ms Connery and Ms McCutcheon regarding the bladder scan allegation. She acknowledged that there was an entry for the blood scan which he had signed, and she conceded that there was a misunderstanding about the whereabouts of the claimant at the time of the conversation with the patient about the bladder scan. Mr Diplexcito brought to the attention of the Tribunal that, despite her assertion that she had no further opportunity to interview Ms Connery again because she was on long term sick leave, her rotas show that she was at work during the months of August, September and October 2019. He argued that these were all further areas which should have been explored.

114. While it may have been that these matters could have been further investigated at this stage, these matters were further considered later in the disciplinary process. Significantly any concerns of substance relate to the bladder scan issue, which was not, ultimately, upheld as a reason for dismissal.

115. On the key matter of the blood sugar checks, Ms Huntly confirmed and accepted that the claimant's response had been consistent throughout the whole process; and also that he had been trained on, and knew the workings

of, the blood sugar monitoring tool; and that he had undertaken checks on other patients on the same dates.

116. Notwithstanding, I could not say that the investigation which was carried out in relation to the blood sugar issue did not fall within the range of reasonable responses. The key aspects of the investigation in relation to this matter were the patient's input, the NEWS charts, the claimant's response, the data from the BM monitor and the confirmation from the clinical scientist, and the claimant's failure to provide any explanation for the discrepancy. These were matters which were in any event revisited at the disciplinary hearing and significantly at and after the appeal hearing, discussed below.

The disciplinary hearing

117. When assessing whether the decision of the respondent to dismiss was based on a genuine belief formed after a reasonable investigation, I take into account not simply the investigation carried out by Ms Huntly, but subsequent consideration of the evidence gathered through the disciplinary process before the decision to dismiss was made. However, Mr Diplexcito also expressed concerns about the basis of Mr Kennedy's decision to dismiss.

118. Mr Diplexcito expressed particular concern about the tone and language of the outcome letter, specifically in regard to allegation 1, and the reference to the fact that Mr Kennedy had "reluctantly" concluded that this allegation should not be upheld.

119. I recognised Mr Diplexcito's concerns regarding how this allegation was dealt with. While Mr Kennedy found that the evidence was not sufficiently clear to allow him to uphold this finding, nevertheless, relying on such evidence he felt able to express criticism of the claimant's practice which, as he recognised himself, was not under scrutiny.

120. However, as this allegation was not upheld, I could not say that this impacted on the outcome, and I could not say that this influenced the conclusions in regard to the other allegations, given the evidence relied upon to support them.

121. Mr Diplexcito pointed out that while Mr Kennedy stressed that he was a risk to patients, he had continued to work on the wards for some time before his

suspension, causing him to query the extent of the risk. However, I accept that it would not be appropriate to suspend the claimant without having sufficient information to warrant such a move.

122. Nor did I find that the other concerns raised by the claimant impacted on the outcome. Some again were minor, such as Mr Kennedy's suggestion that the investigation had begun in September 2019, whereas Ms Huntly said that it had begun in August; such as the fact that initially the first and second allegations were grouped together; and about Ms Huntly asking leading questions during the hearing and about where witnesses sat waiting to be called for the hearing. I was satisfied that none of these matters had any influence on the outcome.

123. In regard to others, such as the fact that Mr Kennedy had seen his grievance and was aware, that he had previously gone through the NMC process (because the claimant himself had raised it), there was nothing to suggest that Mr Kennedy had been influenced adversely by either of these matters. Further while Mr Kennedy acknowledged that he was aware that the claimant had mental health issues, and that it would have been difficult for him to talk about them, as Mr James established, there was no suggestion that the claimant was suffering from mental health issues at the times of the alleged incidents.

124. Other matters were irrelevant to the issue for determination, for example the failure of a nurse to record in the nursing notes of the conversation between the nurse and the patient regarding the bladder scan, which Mr Kennedy acknowledged ought to have been done, and the fact that the patient who was transferred to HDU had had nursing intervention.

125. While Mr Kennedy also upheld the allegation which was made relating to the bladder scan (discussed further below), in regard to the other two allegations, relating to blood sugar checks, Mr Kennedy advised that he relied on the fact that the blood sugar checks could not be verified through the monitor audit tool and that no possible explanation could be made other than observations which were documented by the claimant which had not in fact been undertaken. He found each of these to amount to gross misconduct.

The Appeal

129. The claimant appealed on the grounds that the decision was unduly harsh and "full consideration has not been given by the panel to the inaccuracies identified by myself and my trade union representative during the disciplinary hearing in regards to evidence presented by the investigatory team".

130. Those concerns principally related to the bladder scan issue and at this hearing the particular concern which the claimant highlighted related to the panel's justification in relation to the bladder scan. He expressed concerns about the inaccuracies in the justification, and specifically that it was noted that the reference to the bladder scan had been counter signed, which was not correct.

131. However, in regard to allegation one the conclusion was that, "the panel are not comfortable that the evidence provided supports the original decision that this matter was gross professional misconduct. The original determination of summary dismissal has therefore been reduced to first/final written warning on the ground of failure to adhere to documentation standards required of a staff nurse and loss of trust".

132. The panel thus concluded that the evidence in relation to that allegation did not support the decision to dismiss. However, it was also stated that "the panel have difficulty accepting your position that you carried out the bladder scan on patient C".

133. I was concerned about this aspect of the appeal panel's decision, as I was concerned about Mr Kennedy's position in evidence that having reflected on it, he too would have issued a final written warning in relation to allegation 1 because he had some doubts about the evidence.

134. I questioned both Ms Farrell and Mr Kennedy on this and both appeared to agree that they took the view that the sanction was related to the sufficiency of evidence. As the dismissal did not in any event relate to this allegation, I accept that it has no consequences for the outcome of this case

135. However, I hope that the respondent will now reflect on the inappropriateness of coming to conclusions about sanctions based on the strength of the

evidence. Either there was sufficient evidence to find the claimant guilty of that misconduct or there was not. Employers do require to make conclusions on these matters, based on the balance of probabilities, and decisions regarding liability should be considered separately from decisions regarding the appropriate sanction.

136. Thus, while I can understand the claimant's concerns when details are inaccurately recorded, and concerns about how this matter was dealt with throughout, the claimant was not, in the end, dismissed for this issue, but rather for the failures in regard to the blood sugar observations.

137. Following the hearing Ms Farrell undertook further investigations into the blood sugar issue so that the panel could be sure that the evidence supported the decision, which included a further blood sugar check report and confirmation of the position from the clinical scientist. The panel thus looked again at the evidence to support that and concluded that the results charted were fraudulent. It was for that reason that they upheld the decision.

138. In all the circumstances, I could not say that the disciplinary process overall fell outwith the range of reasonable responses open to the employer.

Reasonableness of the sanction of dismissal

139. I accept that even if the Tribunal is satisfied that the requirements of *Burchell* are met, then the Tribunal still needs to consider whether dismissal was a fair sanction and reasonable in all the circumstances. In this case, the respondent ultimately categorised two counts of misconduct as gross misconduct resulting in summary dismissal. The question is whether that was fair in all the circumstances, having regard to the equity and the merits of the case, including the size and administrative resources of the respondent.

140. The claimant's position was that dismissal was unduly harsh. I considered that question carefully, not least because of the potential extreme consequences of dismissal for him. I gave some thought to whether dismissal was the appropriate outcome given that Mr Kennedy had not upheld allegation one and that allegation three was subsequently not upheld on appeal. That left

only the instances of the blood sugar issues. Mr Kennedy had concluded that these individually warranted dismissal on grounds of gross misconduct.

141. I came to the view that dismissal was a reasonable sanction in the circumstances for the following reasons.

142. The outcome of the investigation and the conclusion following the disciplinary hearing upheld on appeal was that the claimant had recorded results of tests that had not been undertaken. It was confirmed during the investigation that the patient had said that they had not been done, which was accepted given that these were said to have been done during the night and that would have necessitated the patient being woken up; the patient was deemed to have full capacity; the results were not recorded on the BM monitor tool; there was no reason why that would be if they had been done; and the claimant could not offer any explanation for that. The conclusion therefore reached by the respondent was that the claimant had lied, and this is highly significant in this case.

143. Mr Kennedy said that he considered but discounted any alternatives to dismissal. This related to concerns about "obvious lack of veracity and the nature of the offences which caused me extremely serious concern about your probity and trustworthiness".

144. In evidence he said that he had considered a first and final warning and a supported improvement plan. This however was discounted because in any patient facing role, if his actions continued, he would be a further risk to patients. All other roles involved patients who required monitoring. Although the claimant had lodged reflective accounts to demonstrate remediation and further understanding of the respondent's concerns and Mr Kennedy said that he had taken account of these, he could not account for the lack of empathy for patients throughout the disciplinary process.

145. Clearly the fact that the claimant was found to have lied is a key factor in this question. However, Mr Kennedy was very clear that the implications of not having checked a patient's blood sugar levels could be very significant.

146. Ms Farrell also expressed concerns about the potential consequences of a failure to record blood sugar levels. Ms Farrell said she had no confidence that the claimant would not do it again, because he failed to provide any explanation at all, and showed no remorse or sincerity. She confirmed that fraudulently recording observations and falsifying records could have serious consequences for patients. Accurate tests are critical to their medication, care and safety. If a patient goes into hypoglycaemic shock, as a result of not having blood sugar levels monitored this can be serious

147. The consequences of the claimant's failure, and subsequent denial, are to be considered in context. The band of reasonable responses test is designed precisely to deal with the situation, where what is unreasonable in one sector might well be reasonable in another. The test is designed to recognise that while the Tribunal might consider that the actions of an employer were unreasonable, still an employer might act within the band of reasonable responses in dismissing an employee.

148. Further, the EAT in *Strathclyde Joint Police Board v Cuick* UKEATS/0060/10 considered the role of Tribunals in determining the question whether or not an employer has acted within the band of reasonable responses. The EAT stated that "the tribunal ought to consider the question of what a reasonable employer would have done in context; that is, by asking themselves not just what any employer, acting reasonably, would have decided but what a reasonable employer whose business/activities were the same as or similar to those of the respondent, would have done in the circumstances". In making that statement, the EAT was relying on the dicta of the Lord Justice Clerk in *Ladbrokes Racing Ltd v Arnott* 1981 SC 159 that the test involves considering what "would have been considered by a reasonable employer in this line of business in the circumstances which prevailed".

149. The respondent having ultimately found that the claimant lied following a thorough investigation of the issue, there is, in my view, little scope to argue that the sanction of dismissal was disproportionate, given what was alleged the claimant had done in the context in which it had taken place. Trusting

employees is a necessary ingredient of all employment relationships and that is only underlined in the role held by the claimant.

150. It follows that other factors which the claimant asserted had not been taken into account, such as his reputation with his colleagues, his subsequent reflections, and the fact that he had no previous negative disciplinary record with the respondent, could not be said to render the sanction disproportionate

151. Here the claimant is in a critical role entrusted to caring for vulnerable people and the consequences of his actions can have very serious consequences for their health and well being. The respondent took the view that the claimant had not told the truth, putting patients potentially at risk. In the context in which the claimant was working, I find that the sanction of dismissal falls within the range of reasonable responses.

Conclusion

152. The Tribunal has concluded that dismissal for misconduct was within the range of reasonable responses open to the respondent in these particular circumstances, and therefore that the dismissal was not unfair. This claim does not succeed and is therefore dismissed.

Employment Judge: Muriel Robison
Date of Judgment: 17 November 2020
Entered in register: 23 November 2020
and copied to parties