

## EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Mrs K Thomas**

-v-

**Sandwell And West Birmingham NHS Trust**

### FINAL MERITS HEARING

(HEARD IN PERSON AND BY THE CLOUD VIDEO PLATFORM )

Heard: at Birmingham and remotely by the Cloud Video Platform

On: **14 – 18 September 2020, deliberations and judgment 19 November 2020**

Before: **Employment Judge Perry, Mr E Stanley & Mrs J Keene**

#### *Appearances*

For the Claimant: **Mr J Small (counsel)**

For the Respondent: **Mr J Heard (counsel)**

## REASONS

*These written reasons are provided following an in-time request from 3 December 2020 (oral reasons having been given on 19 November 2020 and the Judgment having been electronically signed by me on 20 November 2020).*

*References in these reasons in square brackets are usually to the page of the bundle, but in the context of a case reference are to the paragraph of the judgment or if preceded by the initials of a witness or document to the paragraph of that statement or document. References in curved brackets are to the paragraph of these reasons or as the context suggests, an issue.*

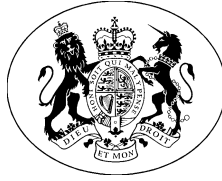
### THE BACKGROUND AND ISSUES

1. Mrs Thomas is a registered nurse, immediately prior to her dismissal was a (ward) sister and at the time of the final (merits) hearing was aged 41. She started this claim on 18 April 2019 following ACAS early conciliation between 8 and 21 March 2019.
2. We will refer in these reasons to the parties as Mrs Thomas and the Trust.
3. The complaints and issues were clarified at a Preliminary Hearing before Employment Judge Flood on 25 October 2019 :-

#### *“PROTECTED DISCLOSURES*

*1. Did the Claimant make a qualifying disclosure of information as follows:*

*a. Concerns raised verbally to the Head of Nursing on 23 December 2014 regarding AMU2 ward being unsafe due to staff shortages and the dependency of ill patients being too high – s.43B(1)(b) and (d);*



*b. Concerns raised in the Claimant's grievance dated 9 September 2015 regarding the ward being unsafe due to staff shortages, the dependency of ill patients being high and the bullying treatment the Claimant received as a result of making the report to the Head of Nursing on 23 December 2014 – s.43B(1)(b) and (d);*

*c. Concerns raised verbally and by email to April Hawkins and Debbie Frettwell in January 2017 relating to the staffing of ward D11 and the safety of patients in the NHS – s.43B(1)(b) and (d);*

*d. Concerns raised verbally and by email to April Hawkins in October 2017 regarding the understaffing of the ward and Vicky Howard fraudulently claiming her hours – s.43B(1)(a) and (b);*

*e. Concerns raised verbally and by email to April Hawkins in November 2017 to March 2018 regarding Joanne Cresswell fraudulently claiming her hours, the impact on patient safety and the detrimental impact this was having on the Claimant's health and wellbeing – s.43B(1)(a), (b) and (d);*

*f. Concerns raised verbally and via email to April Hawkins in March 2018 regarding staffing levels; drug errors; and lack of medical cover – s.43B(1)(a), (b) and (d).*

*2. Are the disclosures identified above qualifying protected disclosures?*

*3. Was this information disclosed in the reasonable belief of the Claimant that it was in the public interest?*

*4. Did the Respondent subject the Claimant to a detriment by the following acts or deliberate failures to act:*

*a. Between November 2017 and March 2018, April Hawkins breached the Claimant's confidentiality by revealing details of the issues raised by the Claimant to Joanne Cresswell;*

*b. The ongoing breakdown of relationships between the Claimant and Joanne Cresswell;*

*c. The Respondent, including Joanne Cresswell, colluded to remove the Claimant from her employment;*

*d. Joanne Cresswell set the Claimant up for the allegations of fraud and breach of confidentiality;*

*e. Joanne Cresswell interfered with the supply of the Claimant's sick notes to the Respondent;*

*f. The Respondent destroyed evidence held by the Claimant in her locker whilst the Claimant was on sickness leave.*

*5. If so, was this done on the ground that she had made one or more protected disclosures?*



6. *Were all of the Claimant's complaints presented within the time limits set out in sections 48(3) (a) & (b) of the Employment Rights Act 1996? Dealing with this issue may involve consideration of when the treatment complained about occurred; whether there was an act and/or conduct extending over a period, and/or series of similar acts or failures and whether it was not reasonably practicable for a complaint to be presented within the primary time limit. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 9 December 2018 is potentially out of time, so that the tribunal may not have jurisdiction to hear it.*

**UNFAIR DISMISSAL**

7. *Was the Claimant dismissed because she made one or more protected disclosures?*

8. *Can the Respondent show that for the purposes of s.98(1) and s.98(2) Employment Rights Act 1996 that the Claimant was dismissed because of her conduct?*

9. *If the Respondent discharges the burden of showing a potentially fair reason for dismissal for the purposes of s.98(1) and s.98(2) Employment Rights Act 1996, was the decision to dismiss her fair in all the circumstances for the purposes of s.98(4) Employment Rights Act 1996 and in particular:*

*a. Did the Respondent have a reasonable belief in the Claimant's misconduct following a reasonable investigation?*

*b. Was the decision to dismiss within the band of reasonable responses open to the Respondent?*

*c. Did the Respondent adopt a fair procedure in making the decision to dismiss?*

10. *In the alternative, can the Respondent show that for the purposes of s.98(1) and s.98(2) Employment Rights Act 1996 that the Claimant was dismissed due to Some Other Substantial Reason, specifically the breakdown of trust and confidence in her due to the nature of the allegations?*

11. *If the dismissal is unfair, did the Claimant contribute to her own dismissal and/or should there be any reduction due to the Claimant's conduct?*

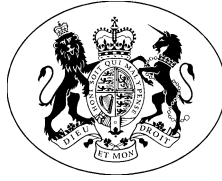
12. *If the dismissal is procedurally unfair, what is the percentage chance that the Claimant would have been fairly dismissed in any event?*

13. *Did the Respondent or Claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase or decrease any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A").*

**UNLAWFUL DEDUCTION OF WAGES**

14. *Did the Respondent make a deduction from the Claimant's wages?*

15. *If so, were the deductions permitted?*



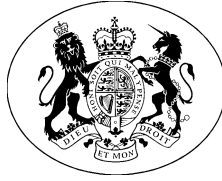
*16. Were the wages deducted properly payable to the Claimant?*

*UNPAID ANNUAL LEAVE*

*17. When the Claimant's employment came to an end, was she paid all the compensation she was entitled to under regulation 14 of the Working Time Regulations 1998?"*

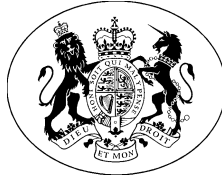
## **THE EVIDENCE**

4. We had before us a bundle comprising four lever arch files and amongst the other documents were :-
  - 4.1. A Cast list
  - 4.2. A Chronology that that Mrs Thomas elaborated on by providing details of the wards she worked on and when, and
  - 4.3. Written submissions from both representatives,
5. Additional documents were also supplied during the hearing including but not limited to some A4 enlarged copies of some of the matrices prepared as part of the investigation relating to the matters that Mrs Thomas was ultimately dismissed for.
6. We had before us witness statements from:-
  - 6.1. Mrs Kadian Thomas, the Claimant,
  - 6.2. Ms April Hawkins, the Trust's Group Director of Nursing,
  - 6.3. Ms Lynn Keightley, one of the Trust's Employee Relations Casework Team Managers, the investigating officer,
  - 6.4. Ms Tina Robinson, who was formerly the Trust's Group Director of Operations (she has now left the Trust's employment), the dismissing officer,
  - 6.5. Ms Ruth Wilkin, the Trust's Director of Communications & the appeal officer, and
  - 6.6. Ms Deborah Fretwell, the Trust's Deputy Group Director of Nursing for Medicine and Emergency Care.
7. Unfortunately, Ms Fretwell suffered a serious injury immediately before the start of the trial and was not called. We indicated we would give such weight to her evidence as we deemed appropriate.
8. We expressed our concerns at the start of the claim that the time estimate would be insufficient. The evidence and submissions were concluded within the trial window but there was insufficient time for the panel to deliberate fully. Accordingly we identified a date for deliberations (19 November 2020) and also a separate provisional remedy hearing, the intention being that if the panel were in a position to give judgment on 19 November 2020 we would do so and the parties would then be able to consider, what if any issues arose for remedy (the money claims not having been able to be addressed for a variety of reasons and it having been agreed *Polkey* and contribution issues would be addressed at the same time as the money complaints) so they could make representations



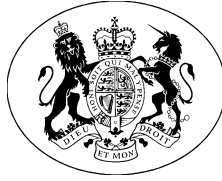
on any directions required in advance of the remedy hearing. It was agreed the parties would attend via the Cloud Video Platform on 19 November 2020 which they did.

9. Despite this claim including a wages/holiday pay complaint and the Tribunal repeatedly seeking the same, Mrs Thomas's final payslip was not provided until essentially the end of the trial. It appeared from what we were told this had not previously been provided on the basis Mrs Thomas owed money to the Trust. If money was owed, that was a matter not for the Trust to determine, but the Tribunal.
10. Given it was not disputed Mrs Thomas had worked shifts and money was due to be paid for them the proper course that should have been adopted by the Trust was for it to have calculated the pay it argues was due (together with holidays etc.) and then to make from that whatever deductions it alleges were due. That was necessary, not least, so Mrs Thomas could calculate what holiday entitlement she had been paid and the parties could ascertain their liabilities for Tax and NI and Mrs Thomas's pension entitlement. That failure to comply, with one of its most basic obligations, does the Trust no credit in our judgment and its failure to provide that meant the Tribunal was not able to properly address the wages and holiday complaints.
11. It was thus determined they will be addressed later alongside remedy (if appropriate)
12. Having deliberated we indicated we would be able to give a summary of our findings and conclusions (a rationale) on the principal issues if that assisted the parties but if there were factual matters that required a determination regarding remedy, we asked the parties to reflect on them having heard our rationale and identify these so if needs be we could determine them prior to hearing remedy. The parties were agreeable to that course. We delivered our rationale which is set out below.
13. Reasons were subsequently sought by the Trust. Conscious that both parties were professionally represented, the Judge's diary, outstanding requests for reasons and the administrative burden that placed upon the tribunal. Employment Judge Perry asked the parties to prepare a note of the rationale and to reflect on that. The Trust did so and repeated the request for reasons. The Employment Judge identified from his note that Mr Heard appeared to have been disconnected for at least a short part of the delivery of the rationale (although his solicitor was not) and there were several sections where his note did not reflect the Employment Judge's note of the rationale.
14. Employment Judge Perry thus indicated written reasons would be provided but asked the parties to agree a chronology (as the existing chronology was very brief) not least to direct their minds to the factual matters agreed, not solely as to matters of remedy but also to assist the Tribunal in foreshortening the need to relay much of the chronological background as that appeared to be agreed.
15. Given some of the findings the Tribunal made, he also cautioned that that request would inevitably mean the reasons would be placed on the Tribunal's website. Despite that warning no request for anonymisation or pursuant to Rule 50 of the Employment Tribunal's Rules of Procedure has been made. As we say our rationale is set out below.
16. Our findings below are made on the balance of probabilities from the information before us. We have limited them to matters relevant to the issues we need to determine.



## THE BACKGROUND

17. Mrs Thomas qualified as a Registered General Nurse in September 2006 having undertaken all her practical training as a student nurse at Sandwell Hospital, which was one of the hospitals within the Trust.
18. She told us because of a recruitment freeze when she qualified, she had to move to find full time work. She moved back to Birmingham in 2008 and worked for the Trust from 8 October 2008 at its sites at Sandwell Hospital and City Hospital, Birmingham.
19. Within her claim Mrs Thomas complained about her treatment by virtue of having made protected disclosures. The list of issues identified six disclosures, six acts of detriment (s.47B) and that the principal reason for her dismissal were the disclosures (s.103A). A precis as to what they related and whom they concerned is included in the Issues (see (3)).
20. At the start of the hearing Mr Small confirmed that only some of the disclosures were relied upon (1d-1f). Accordingly, Mrs Thomas was cross examined on those matters.
21. By the time we came to hear submissions, the detriment and dismissal complaints were withdrawn in their entirety, but we need to briefly refer to some of them for both context and for other reasons given some related to allegations of patient safety.
22. We sought at the start of the hearing a detail of the wards on which Mrs Thomas worked and their dates. Mrs Thomas corrected some of the dates in her note of wards and dates.
23. We address the difference in Mrs Thomas' recollection of these matters below (29 to 35). We place no great weight on that given the passage of time but in our judgment that illustrates the inherent problems with recollection for a nurse in remembering which wards s/he was working on over a period, let alone, a specific date and who s/he was working alongside on that shift.
24. Ms Keightley's investigation report set out the Trust's version of the wards Mrs Thomas worked on at the relevant times and we set them out below but at this point we need to record that in early December 2017, one of them, Newton 1 Ward at Sandwell Hospital, essentially became the Older Peoples Assessment Unit (OPAU). That was described in the subsequent disciplinary investigation report [633] as a permanent ward that admitted elderly frail patients (many of whom had dementia and similar conditions) for a short period of time to either discharge them or transfer to the elderly care base wards.
25. Mrs Thomas told us following her return from maternity leave in July 2014 she worked on AMU2 (an assessment care unit (poisons and toxicology)) ward. She stated that in September 2015 she complained about bullying by her manager at the time and also a Matron, Carmel Madden [KT/16].
26. She believed that treatment was due to her race and she was signed off work for a period of around 7 to 8 months with work related stress. The outcome of that dignity at work complaint dates from December 2015 [180-187] and upheld parts of the complaint. Mrs Thomas appealed the decision. The appeal was heard by Ms Ruth Wilkin on 16 March 2016. Her conclusion was that the investigator had not interviewed some of the witnesses Mrs Thomas considered to be important, the issues were not examined as robustly as they might have been and there was a suggestion Mrs Thomas had provided some new evidence. Ms Wilkin concluded that the investigation should be re-opened but asked Mrs



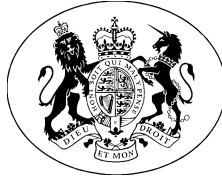
Thomas to outline the areas she considered were outstanding and the evidence she alleged had been excluded. Mrs Thomas was also asked if she wished to consider mediation [197–198].

27. Mrs Thomas accepted before us that it was for her to progress that re-investigation of her complaint by providing the information requested. She acknowledged she had then attended an interview with Claire Toms of the Trust’s casework investigations unit on 7 April, was sent the minutes and was asked to provide that information by 29 April. She did not accept that she had been sent a letter by the Trust dated 6 May stating that if that information was not received by 13 May 2016 her dignity at work complaint would be closed. The letter of 6 May was not before us.
28. Mrs Thomas was also shown a letter dated 28 May 2020 [207] indicating the complaint had been closed. She initially asserted that the 28 May letter was fabricated. When she was again asked if she was asserting it was fabricated or alternatively that she had not received it, she indicated the latter. She then appeared to assert she did not accept the investigation was closed by HR and that she had raised a complaint about that via her union. She was asked to take us to where she raised such a complaint in her 32-page witness statement or the documents but could not.
29. Mrs Thomas returned to work in April 2016 and moved to Lyndon 5 (an extra capacity, winter pressures) ward and remained there until 2 September 2016. She then moved to ward D11 at City Hospital on 25 September 2016, then had a period of absence before moving back to Lyndon 5 again on 5 December 2016. A few days later Ms Cresswell joined Lyndon 5 as ward manager. That appears to be the first time she and Mrs Thomas worked together.
30. The way those events are recorded in the note Mrs Thomas signed of her subsequent interview on 2 October 2018 [411] is that having lodged a grievance against Carmel Madden, a vacancy came up on Lyndon 5 and Mrs Thomas moved there on 5 December 2016. She was then transferred to ward D11 at City Hospital but did not like it there and moved to Lyndon 5. When Lyndon 5 closed, she was redeployed back to D11 and when OPAU opened, she stated was posted there permanently.
31. In the revised list of wards Mrs Thomas provided at the start of the hearing, made only one mention of moving to D11 in September 2016, instead of the two referred to in her signed note of her interview on 2 October 2018 [411] and the one move to D11 she makes in her witness statement [KT/27] is dated December 2016.
32. Mrs Thomas also substantially revised the dates within the list of wards, in particular regarding her return to work on Lyndon 5 and when she first worked with Ms Cresswell. Mrs Thomas initially dated both in the list of wards to September 2017.
33. In her witness statement Mrs Thomas dates Lyndon 5 reopening to December 2017 and states she was moved back there “to pull it together again” [KT/29].
34. We find that date is an error on Mrs Thomas’ part on the basis firstly, it was part of her case that following her email to Ms Hawkins on 9 October 2017 suggesting she wished to resign from Lyndon 5 [221] she was moved to OPAU in October 2017, and secondly, Mrs Thomas’ assertion that when she moved to OPAU permanently [KT/40-41] and did not return to Lyndon 5.



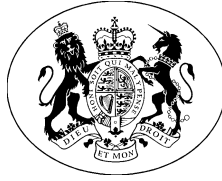
35. Based on the Mrs Thomas' account in her revised list of wards and the findings of the subsequent disciplinary investigation as to the wards on which she did bank shifts between 1 April 2017 and 30 April 2018, we find her second move to Lyndon 5 was in December 2016 and Ms Cresswell moved there a few days later
36. The suggestion made by the Trust was that Mrs Thomas moved to OPAU to follow Ms Cresswell as they were friends, shared lifts and childcare. Mrs Thomas accepted to a degree that had been the case but that had ceased. When asked when the cessation occurred she appeared to suggest that was sometime between her move to OPAU and the time of the subsequent anonymous whistleblowing complaint ('AWC'). We turn to that next.
37. On or about 12 April 2018 the Trust received an 11-page anonymous whistleblowing complaint ('AWC') [239-285]. It was addressed to April Hawkins, Carmel Madden, Shirley Castro, Toby Lewis (the Chief Executive of the Trust) and the Nursing and Midwifery Council ('NMC') and made allegations relating to the OPAU.
38. The AWC primarily related to a complaint about the way OPAU was being run, and amongst other matters included an allegation that Ms Cresswell was making claims for payment of bank shifts that she allegedly had not worked.
39. The AWC was referred by Elaine Newell, the Trust's Chief Nurse, to the NHS Counter Fraud team on 17 April 2018 [275-276]. We address the outcome of the counter fraud investigation at (44) below.
40. On 20 April 2018 the AWC was forwarded by Carmel Madden via email to Claire Obiakor, one of the Trust's E-roster champions (E-Roster was essentially the Trust's computer rostering system). Ms Obiakor had been working alongside Ms Cresswell and Mrs Thomas on OPAU to assist in correcting time balances that were apparently owed to staff [641 [4.5.3]].
41. On 25 April 2018 the AWC was emailed to Mrs Thomas from Ms Obiakor's email account [262].
42. On 26 April 2018 Ms Cresswell and another individual emailed Elaine Newell complaining that the AWC had been circulated contrary to it having been made "in confidence" [253 & 257]. The Trust asserts its procedures essentially required that staff treated whistleblowing complaints confidentially. In contrast Mrs Thomas asserted that whistleblowing complaints were not encouraged by the Trust and when such complaints were made, they were routinely gossiped about.
43. On 1 May 2018 Mrs Thomas emailed a copy of the AWC to Ms Cresswell [262].
44. Two counter fraud reports ensued. The first concerned Ms Cresswell and was dated 22 June 2017 [274]. The second dated 28 June 2017 [283], Mrs Thomas. The fraud investigation concerning Mrs Thomas related to bank shifts claimed between 1 April 2017 and 30 April 2018 ('The Reference Period').
45. The counter fraud report concerning Mrs Thomas identified [285] that Claire Hubbard, the Trust's Group Director of Nursing, had informed the NHS counter fraud investigators that she had commenced a whistleblowing investigation and as part of that a number of staff within the OPAU also raised similar concerns to Ms Hubbard in relation the number





of falsified bank shifts that Mesdames Cresswell and Thomas had allegedly verified on behalf on one another.

46. Following the review of the bank shifts Ms Cresswell had claimed for, the NHS Counter Fraud Team identified Mrs Thomas had verified a high number of Ms Cresswell's shifts (97 of 108). As a result, the Trust asserts [285] the Counter Fraud Team reviewed Mrs Thomas's bank shifts to verify their accuracy.
47. Counter fraud's review referenced 3 data sets (1) car park access swipe cards, (2) an ID swipe card for hospital access and (3) the shifts Mrs Thomas had been rostered to work.
48. The review identified [285] amongst other matters that :
- 48.1. of 138 bank shifts claimed by Mrs Thomas between the period between 1 April 2017 and 25 April 2018, 78 had been retrospectively added to the Roster system, 76 of which had been authorised by Ms Cresswell demonstrating a high number of roster verifications between both Mrs Thomas and Ms Cresswell, and
- 48.2. between 8 January 2018 and 25 April 2018 (the period within which counter fraud were able to obtain all three data sets), that 24 bank shifts were claimed by Mrs Thomas of which 22 included hours that have been overclaimed or entire shifts not worked at all.
49. To place that into context at her subsequent investigation interview on 2 October 2018 [413] Mrs Thomas stated that bank shifts had to be both allocated and verified by someone other than the person working the shift.
50. Ms Hubbard's conclusions from her initial enquiries were that the AWC had been shared by members of staff so the Trust asserts Mr Lewis requested a preliminary investigation to be undertaken to determine who had shared the AWC. That investigation was undertaken by Kam Dhami, the Trust's Director of Governance.
51. Ms Dhami's report [291-298] was dated 10 July 2018 and summarises how it came about:-
- "1.1 On 12 April 2018 Toby Lewis (TL), received an anonymous whistleblowing letter purporting to be from staff on OPAU that raised matters of integrity and probity about ward manager Jo Cresswell (JC). The letter header indicated that it had also been sent to April Hawkins (AH), Carmel Madden (CM), Shirley Castro (SC) and the NMC.*
- 1.2 TL discussed the letter with Elaine Newell (EN) and an approach to handling the matters raised in the letter was agreed between them. This Involved EN discussing and sharing the) letter with Counter Fraud.*
- 1.3 On 30th April 2018 JC emailed TL and raised concerns about disclosures which meant that a "large number of senior nursing staff and others were familiar with the complaints, prejudicing the investigation". Following email communication TL spoke to JC on 2 May. TL informed JC that her concerns about confidentiality breaches would be Investigated by Kam Dhami (KD) with an aim to report back to him (TL) by the end of May. ..."*
52. We relay some of Ms Dhami's findings at (93). Her conclusions [298] so far as they are relevant to us were these:-
- "3.2 JC breached information governance requirements because she accessed emails from a system that was not hers and she did not have the owner's permission to view the contents.*



*Furthermore, she asked a member of staff to forward emails about the whistleblowing letter to her inbox (JC's)*

*KT was aware that she was accessing an email account that was not her own, but did as requested by her line manager (IC) and forwarded some emails on to her inbox.*

*3.3 Other staff knew about the existence of the whistleblowing letter and its contents, specifically TB, KT and is, through JC. This was information that JC shared with them so no confidentiality breach occurred."*

53. Thus, the Trust alleges the AWC directly gave rise to the two disciplinary allegations that Mrs Thomas was subsequently dismissed for. We relay them at (59).
54. Mrs Thomas questions how she subsequently came to be accused of making fraudulent bank claims when no complaint of wrongdoing named her. She goes on to allege that by virtue of an email from Claire Hubbard (the Trust's Group Director of Nursing) [327] to one of the Trust's fraud investigators, Sophie Coster, Ms Hubbard stated that whilst she had no evidence of any wrongdoing she felt that Mrs Thomas and Ms Cresswell were not working their contracted hours. Thus Mrs Thomas states, that Ms Hubbard had come to the view that Mrs Thomas was guilty, that Ms Hubbard had no supporting evidence for that assertion and as the Trust's Group Director of Nursing and one of the disciplinary process commissioning managers, that suggested she had an agenda that was biased and that she did not undertake her role as a commission manager in a fair handed manner.
55. Irrespective of any allegation of bias we find that an allegation such as that in the AWC having been made, any senior public authority official would have been duty bound to have ordered an initial investigation and following the initial findings identified by NHS counter fraud would also have been duty bound to commission a full investigation of those matters.
56. It was not in dispute that apart from absences Mrs Thomas and Ms Cresswell worked together for the whole of the *Reference Period* save for a relatively short period in October 2017.
57. From early June 2018 Mrs Thomas was absent from work having told us she had been attacked by a patient the month before. She returned to work on or about 17 October 2019, but she did not work with Ms Cresswell or at OPAU instead undertaking triage work at a single access point.
58. Mrs Thomas raised no issue regarding that move before us having told us that the friendship she shared with Ms Cresswell having essentially broken down by the time of the AWC.

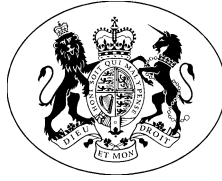
### ***The Investigation***

59. Ms Lynn Keightley was appointed to carry out the disciplinary investigations relating to Mrs Thomas and Ms Cresswell in respect of both allegations. Carmel Madden (a Matron) and Ms Obiakor) were also investigated but only in relation to the second allegation.
60. No date was given when Ms Keightley was appointed but it is clear from the examples we give below that some of the investigative steps taken preceded Mrs Thomas being formally told that an investigation had been commissioned on 10 September 2018. Some



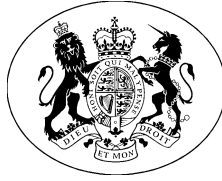
of the data sets sought were also initially requested by Ms Keightley's Line Manager, Lesley Barnett, the Trust's Deputy Director of Workforce.

61. Examples of those initial investigatory steps are that on 14 August Ms Barnett sought the Trust's records relating to door swipe card/access information [315] that we refer to at (66) below and on 25 July 2018 Gavin Dubb, one of the Trust's IT Specialists, emailed Sean Long with internet usage of Mrs Thomas and Ms Cresswell [308]. The door swipe card/access request was copied Ms Keightley, as was the response enclosing data previously sent to counter fraud. For a further example see (67-69).
62. On 10 September 2018 Ms Hubbard wrote to Mrs Thomas [354] informing her that a formal investigation had been commissioned in relation to the following allegations:
  - 62.1. That between 1 April 2017 and 30 April 2018, Mrs Thomas had allegedly claimed for bank shifts that she did not work; and
  - 62.2. That Mrs Thomas had allegedly breached the Trust's Information Governance rules by discussing/sharing confidential information relating to a whistleblowing complaint by accessing the email inbox of Ms Obiakor.
63. By another letter sent the same day Ms Keightley wrote to Mrs Thomas to inform her she had been appointed as investigating officer and to invite her to an investigatory meeting on 25 September 2018 [332]. Mrs Thomas was advised of the right to be accompanied and asked to submit a written report outlining her involvement in the incidents by 14 September [355-357].
64. Mrs Thomas told us she received those invitation letters a few days later (on 16 September). However she did not provide the written account sought of her involvement.
65. The investigatory meeting with Mrs Thomas was rescheduled more than once due to Mrs Thomas' union rep. being ill or unavailable. It eventually took place on 2 October 2018 [408-419].
66. Ms Keightley stated in her witness statement that the data collection part of her investigation was in two main tranches. The initial tranche included her obtaining the following records:-
  - 66.1. E-Roster (see (40));
  - 66.2. Car park records;
  - 66.3. Door swipe/Fob access records;
  - 66.4. Off duty records/Allocation sheets (Ms Keightley told us [LK/17] the off-duty records identified who worked on a particular shift on a particular date and the allocation records show which staff member was allocated to care for which patients on a particular shift).
67. As part of that part of her investigation, on 21 August 2018 [316] Ms Keightley also sought from one of the Trust's IT Specialists, Mr Dubb, a report of Mrs Thomas's IT access including her emails between 1 April 2017 and 30 April 2018 and any information for the time that the Claimant was working on wards Lyndon 5, AMU1 / Newton 1 and OPAU. She told us she wanted that data because she considered that if Mrs Thomas been at work,

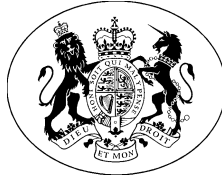


even if she had been undertaking a clinical role she would have expected Mrs Thomas to have accessed a computer during her shifts for the purposes of sending emails or accessing any of the electronic patient management systems.

68. On 5 September 2018, Mr Dubb responded that there was no record of the Claimant accessing the network at all. Ms Keightley considered that to be odd and asked him to double check. He responded by providing an audit report [353] which confirmed that there was no IT data available for the Claimant.
69. Ms Keightley then asked him to run a search of all IT log in and out records for Mrs Thomas using all Trust computers. Mr Dubb replied on 14 September 2018 [373] confirming that he was unable to run a report for all IP addresses at the Trust and had also explored whether it was possible to obtain this information via the domain controllers but had been told it was not possible and the reports he had provided were based on the IP addresses of the PCs that he was able to access.
70. The absence of email records may be explained by Mrs Thomas' oral account to us that she accessed her work emails using her personal phone (see (178)).
71. As to the Off-duty records/Allocation sheets Ms Keightley acknowledged in her report [634] that there were no records available from Lyndon 5 between 1 April and 25 September 2017 (this was because it was a winter pressures (top-up) ward). Mrs Thomas worked on Lyndon 5 between 1 April and 1 December 2017. Thus, those records were not available for almost six of the eight months that she worked on that ward. Ms Keightley attached to her report the off duty records/allocation sheets that were available and which related to the disputed bank shifts (Appendix 24).
72. As to the bay allocation sheets Ms Keightley conceded when checking them against the disputed shifts she had missed an entry on the 6 February 2018 [1075]. She told us her manager was checking her work and on the basis that was picked up by neither, her manager also missed that entry.
73. Mr Small argued that highlighted a lack of care in the investigation and that supported Mrs Thomas' assertion that the Trust was only looking for evidence that could be used against Mrs Thomas and not evidence supporting her case.
74. As to door swipe/Fob access records Ms Keightley readily acknowledged that door swipe/fob records could not be solely relied on as an exact record [645 [5.2]] & [LK/12].
75. Ms Keightley told us that having reviewed the initial tranche of the datasets she identified that Mrs Thomas was paid for 133 bank shifts during the *Reference Period* [633]. They are detailed in Appendix 20 to her report. Having reviewed the E-Roster data for Mrs Thomas (Appendix 15) that identified three wards on which Mrs Thomas had worked during the *Reference Period*,
  - 75.1. Lyndon 5 ((1 April – 6 October 2017),
  - 75.2. Newton 1 (4 November -17 December 2017) and
  - 75.3. OPAU (14 August 2018 – 5 April 2018)and that Mrs Thomas had worked 47 of the 133 bank shifts claimed.



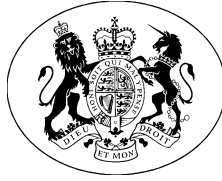
76. Ms Keightley told us she then compiled an initial evidence matrix [735-8]. On cross-checking the evidence the number of shifts worked was revised upwards to 50 [635] and as to the remaining 83 shifts, there were 42 where the initial evidence suggested that Mrs Thomas had left shift earlier than the shift finish time (appendix 25a) and 41 where there was insufficient evidence to support Mrs Thomas had attended for duty at all (appendix 25b).
77. It is unclear when precisely that was done but Ms Keightley told us she then sought to source further evidence [636] which included:-
- 77.1. The records of the 641 patients her investigations identified as having been inpatients on wards for the **remaining** 83 shifts in query (*'the Patient records'*);
  - 77.2. Electronic Bed Management (*'eBMS records'* (these identify patients being moved around)
  - 77.3. The ward-based *'Controlled Drug Charts'* (these did not relate to patients individually)
  - 77.4. An audit trail of the *E-Roster*.
78. For reasons that we address at (91-103) the patient records were not considered until after 19 October 2018. Before we address what Ms Keightley referred to as the second part of her investigation, we set out intervening events.
79. On 2 October Ms Keightley conducted investigatory interviews with Mrs Thomas [408-419], Ms Cresswell [420-434] and Ms Obiakor [435-447] (there are three versions of Ms Obiakor's interview note one of which is signed and dated [439A-439E]).
80. When they met on 2 October Ms Keightley put to Mrs Thomas the outcome of some of her investigations to date. They included the number of shifts Mrs Thomas had requested that had been allocated to her (69 of 138 (that total differs to the number of shifts claimed: 133)), a further 60 had been allocated by Ms Cresswell, Ms Cresswell had verified 127 of them for payment and 78 of them had been verified retrospectively between 1 and 139 days after the shift took place. Ms Keightley told us that data came from the Trust's E-roster system.
81. We find Ms Keightley had already been progressing matters before speaking to Mrs Thomas and the data she had, showed when shifts had been allocated, undertaken and verified.
82. During the interview with Ms Keightley, Mrs Thomas stated that she believed she had a good relationship with Ms Cresswell but that Ms Cresswell had turned against her, and cited Ms Cresswell's lack of support since Mrs Thomas' assault and the death of a close relative. Mrs Thomas also raised a concern that when she had gone into work on 1 September 2018 to locate certain documents that she needed as part of her regular professional revalidation exercise and her locker and cupboard were empty [KT/61].
83. Mrs Thomas also stated that she, Ms Cresswell and Ms Denise Lunn (the OPAU ward clerk) could verify bank shifts, accepted that such shifts needed to be recorded on e-roster as quickly as possible, at least in advance of the shift, or at the last minute. Other matters addressed included the wards where she had worked (see [24**Error! Reference source**



**not found.))**, the need to use swipe cards/fobs to gain access and the AWC. On the swipe cards/fobs point she said that it was routine to follow colleagues through doors without having to use her personal card/fob and elaborated on that further stating that the door to OPAU was routinely left open [537]. That last point is a concern for us, given by its very nature the OPAU it included dementia patients who were at risk of absconding.

84. On 8 October Ms Keightley conducted investigatory interviews with Terry Byrne, a ward Manager [455-462] and Denise Lunn, the Ward Clerk for OPAU [463-469F] (there are two versions of Ms Lunn's interview note).
85. Ms Lunn is recorded as having stated in that interview that she was the only administrator on the OPAU ward, describing the number of computers and access to them in the office on the ward, how they were accessed (using a log in and smart card) and that they were closed when inactive. She stated that she had used to help her former managers with the e-rostering system but when Ms Cresswell and Mrs Thomas started on OPAU, she discovered that Mrs Thomas had removed her access to the e-rostering system [466] and she did not understand why this was the case but when Mrs Thomas went off sick, she was again asked to help by Ms Cresswell.
86. When asked how bank shifts were requested and then allocated, Ms Lunn asserted that Mrs Thomas undertook bank shifts at weekends and alleged that inputting the bank shifts was all Mrs Thomas did. When asked who verified shifts, she identified Mrs Thomas and Ms Cresswell but was unsure about anyone else apart from another sister, whom she called Shirley [467] (in contrast Mrs Thomas asserted to Ms Keightley at their interview on 2 October that Ms Lunn could also verify shifts [414]). When asked about verification of bank shifts, she explained that was by the hours worked being signed for in the "Orange Bank Book" and that being signed off by whomsoever was in charge.
87. As to the concern raised by Mrs Thomas about her locker/cupboard being emptied and items being thrown away (see (82)) Ms Lunn confirmed that she and Ms Cresswell had tidied a cabinet in the ward office that was used as a personal drawer, and apart from some chipped mugs and a mouldy cup, no diaries, folders, paperwork or other items were thrown out. She also stated that Mrs Thomas's locker had been accessed at one point to check if there was any food in it (that had gone "off") whilst she was absent), but nothing had been removed [467-468].
88. On 12 October Ms Keightley wrote to Mrs Thomas to invite her to a second investigatory interview on 22 October 2018 [473].
89. Mrs Thomas' claimant's complaints about the *Patient Records* fall into two main themes; sampling (we return to this at (104) below when we consider the review of the *Patient Records*) and who reviewed the *Patient Records*.
90. As to the latter given Ms Keightley was not a clinical member of staff, on 19 October 2018 Ms Keightley wrote to Mrs Thomas to inform her that Sister Joanne Thomas (we will refer to her as Matron Thomas to distinguish her from the claimant), had been appointed as Ms Keightley's Technical Adviser [520]. Mrs Thomas complained about Matron Thomas' appointment on 19 October 2018 [521]. Mrs Thomas told us [KT/72] that:-

*"Jo Thomas was always very friendly with Joanne Cresswell ... I strongly believe that Jo Thomas volunteered herself to the investigation by April Hawkins [?]\* to overlook*



*the evidence that would prove my innocence and I know the evidence exists but was ignored. Jo Thomas was the one collecting the evidence, her finger was seen on the picture of the controlled drug book she copied for the investigation, ..."*

91. The Trust asserts that as a result, April Hawkins, its Deputy Group Director of Nursing, was appointed as Ms Keightley's Technical Adviser in Matron Thomas' stead. It points us to an email sent to Ms Hawkins on 7 November asking if she could help [596].
92. Mrs Thomas asserts that she was never told that Ms Hawkins would replace Matron Thomas and disputed that was so (hence the query we identify in the quote at (90) denoted by the [?]\* we have inserted) about 'the investigation by April Hawkins') and points to a thumbprint on the documents in support of that assertion We return to our findings on the review of the patient records below (starting at 97) but before we do so need to address some other matters that occurred in the interim.
93. One other matter we need to relay before moving on is that also on 19 October Ms Keightley conducted an investigatory interview with Ms Hawkins [532A]. Amongst other matters Ms Hawkins indicated she had been told to keep the contents of the AWC confidential and when she was asked who she had spoken to about the AWC, Ms Hawkins named several individuals, but did not name Ms Cresswell or Mrs Thomas. However she expressly stated that she had not spoken to anyone else. That is consistent with Ms Hawkins' account given to Ms Dhami's investigation where she was recorded as saying this [294]:-

*"• AH confirmed that she had received a hard copy of the whistleblowing letter via external mail.  
• She has not shared the contents of the letter with anyone.  
• She knew that PG and CH were already aware of the letter"*

and Mrs Thomas' account was this:-

*"• JC went to what she thought was her computer to look at her inbox and found emails from CM to CO.  
• JC brought these to KT's attention and, because she was so upset after reading the letter, asked her (KT) to forward them to her to "secure the evidence", which she did.  
• There was another whistleblowing email from JS that CM had forwarded to CO.  
• KT commented that CM and CO are best friends.  
• Because of the breaches in confidentiality, JC decided to request a meeting with EN. KT attended the meeting to support JC as did TB. JS went because her confidential whistleblowing email to CM had also been forwarded on by her to CO.  
• The meeting went ahead, EN asked the four of them to document their accounts and she would speak to TL on the confidentiality breach concerns.  
• It was pointed out to KT accessing emails in someone else's account without their permission was unacceptable."*

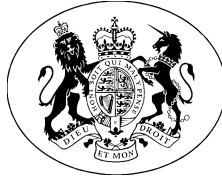
94. On 22 October 2018 Ms Keightley met with Mrs Thomas for a second investigatory interview [473 – 474] [533]. Also that day Ms Keightley again interviewed Ms Cresswell [541]. The following day, 23 October, Ms Keightley interviewed Ms Obiakor (for a second time) [549] and Vikki Howard, who was the senior sister then assigned to Lyndon 5 [559].
95. On 28 October 2018 Ms Howard emailed in response to a query Ms Keightley had raised regarding historic off duty records/allocation sheets from Lyndon 5 [583] to say the only



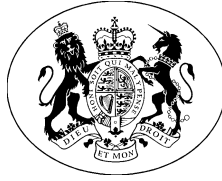
ones that were available were from 26 September 2017 because they had not been retained because of the ward being opened/closed due to winter pressures.

96. Mrs Thomas asserts a single paragraph in the investigation report that followed referred to the unavailability of those records for Lyndon 5 between April and September 2015 [634] yet in contrast the report suggested that those records acted as a register of attendance. Mr Small suggested the significance of that is that of the shifts for which the Trust allege there was no record of an attendance by Mrs Thomas at all, 32 (of those 39) days occurred prior to September 2017 and thus those records did not in fact cover 82% of the dates in question. Mrs Thomas argues that at the very least the Trust should have highlighted that issue and its effect on both the register of attendance argument and its significance more generally.
97. As to her review of the second tranche of data Ms Keightley told us [LK/28] that Ms Hawkins with the support from a ward clerk reviewed the patient notes (Clinical Data Archive System (“CDA”) records) and produced a list of patients where a record had been found that indicated that Mrs Thomas had been in work [1099]. We were told that was placed on top of a stack of patient notes and that Ms Keightley then worked through them to verify that Mrs Thomas had made entries, highlighting them.
98. Ms Keightley also told us she obtained the controlled drug charts [1333] in so far as they were available for the relevant patients but as Lyndon 5 was a winter pressure / pop up ward, again the records were not available for all the shifts in question (see (95)).
99. Mr Small specifically challenged Ms Keightley and Ms Hawkins as to whose was a thumb print was on one of the documents that were copied as part of the investigation [1336] asserting it belonged to Ms Hawkins (indeed there were several such thumbprints over the following pages).
100. We were told those records were controlled drug charts and thus were of a different type to those Mrs Thomas alleges were to be reviewed by Matron Thomas.
101. Ms Keightley told us specifically the thumb print was hers because she recalled photocopying those records personally on her phone’s camera because the controlled drug charts (on which the thumb prints appeared) could not be removed from the wards. Ms Hawkins told us it could have been anyone’s thumb print but she was clear she had reviewed the patient records. Mrs Thomas’ assertion that Matron Thomas had undertaken the patient record checks was solely based on her not being told that Ms Hawkins had been appointed in Matron Thomas’ and runs counter to the direct evidence of both Ms Keightley and Ms Hawkins which is supported by the notes Ms Hawkins confirmed she had produced [1099]. We find that Ms Hawkins assisted Ms Keightley (and not Matron Thomas), Ms Keightley photocopied the controlled drug charts and it was her thumb print upon them.
102. Despite having been told by the Trust that it was not Matron Thomas but Ms Hawkins who had assisted the investigation Mrs Thomas maintained her position without any evidence to support the same other than the conjecture on her own part about the thumbprint. We find that does Mrs Thomas no credit.
103. That dispute aside the evidence before us was on balance that the Trust’s consideration of the Patient Records took place after 7 November 2018 (see (91)).





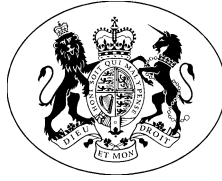
104. As to the sampling point by virtue of the number of records and time it was estimated it would take a clinician to review each record (30 minutes) the Trust decided to review alternate dates from a combined list of the disputed shifts for both Mrs Thomas and Ms Cresswell and a selection of those records on the alternate dates. We explain below (201) the sampling process adopted by the Trust. The Trust acknowledges that of the disputed shifts for which claims had been made 43 dates related to Mrs Thomas.
105. The review of the CDA / patient records identified two shifts that Mrs Thomas had claimed for where there was evidence Mrs Thomas had worked at least part of that shift.
106. Mrs Thomas takes issue with the way the sampling process was undertaken splitting them between the dates on which claims were made spread across Ms Cresswell and Mrs Thomas and then taking every day across the aggregate meant that on some days more than one patient record was looked at but on others none (55 patients sampled against 41 shifts), that only approximately 18% of the total number of records were looked at and if the result from the sample had been applied to the whole, the number of disputed shifts would have reduced from 41 to 30 and the sampling process was thus of limited, if any, assistance in determining whether Mrs Thomas actually worked on a specific day(s).
107. The Trust argues that statistically that does not diminish the scope or probability of the random sample finding a record on which Mrs Thomas made an input and that at no point until her appeal did Mrs Thomas challenge a sample being taken. The Trust argues that even if the 18% were applied to the whole and 30 were the resultant figure (which it disputes) that had no impact on the reasonableness of the investigation, that was still a significant figure and given the large number of bank shifts that Mrs Thomas was found not to have worked had no impact either on her subsequent dismissal.
108. We address our conclusions on the sampling issue below (201-202 & 213-216).
109. Ms Keightley told us the *Controlled Drug Charts and eBMS* records respectively did not record any entry by Mrs Thomas or demonstrate Mrs Thomas working any particular shift.
110. Mrs Thomas accepts the IT Records & *eBMS* records were of no assistance because there was no evidence she had logged in to the system at work or any entries for her. Similarly for the CDA drug charts because they did not start until October 2017 [1334] and so post-dated 31 of the shifts in question.
111. On Friday 9 November Ms Keightley sent the notes of the two investigation meetings she held with Mrs Thomas with an apology for the delay getting them to her and a reminder they needed to be submitted within 5 days [601-602].
112. Mrs Thomas responded the same day stating she would amend them over the weekend and get them to Ms Keightley by Monday (12 November).
113. By an email of 13 November Mrs Thomas apologised to Ms Keightley stating she was due to get the notes back to her the previous day and asked if she could drop them off and have a brief discussion. Ms Keightley did not pick that up until around after the end of the normal business day and so suggested Mrs Thomas drop them off the following day (14 November) [601].



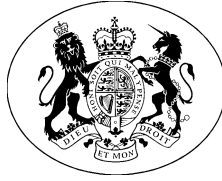
114. The notes for both investigatory interviews were signed and dated 12 November 2018 by Mrs Thomas (2 October 2018 [419] and 22 October 2018 [540]).
115. Mrs Thomas accepted when she gave evidence that despite having made handwritten amendments to the notes of both investigation interviews they were still not accurate. The explanation she gave us for this was she needed more time to make the amendments, she had told Ms Keightley of that and Ms Keightley had told her that she had a deadline to meet and that whether Mrs Thomas sign the notes or not the report will be submitted.
116. Whilst Mrs Thomas did explain why they were later than she had said and also later raised an issue about not having enough time when she was at work to respond to a request for comments made by Ms Keightley on 15 November (see (120)) Mrs Thomas did not indicate that the signed notes with her handwritten amendments were not accurate. If that had been her view in the context of a disciplinary investigation for fraud, we would have expected her to make that clear. She did not.
117. Ms Hawkins sent to Ms Keightley on 14 November a list of factors to consider (grouped into 4 points) when considering the impact of the medical records on the disciplinary investigation [603-604]. One of these related to *“Poor documentation from nursing staff on L5 and OPAU records, at the time of viewing the random records for that time period. The expectation would be that there would be at least 2 entries over a 24 hr period for a stable patient, and several nursing entries if there were clinical instability.”* The remainder related to the role of senior nurses on shift and the effect of Bank working on this.
118. Following that exercise and the 2 shifts identified in the review of the CDA / patient records Ms Keightley :-
- 118.1. reduced the number of shifts from 41 down to 39 (see (76)) where there were insufficient records to indicate that Mrs Thomas had attended work at all,
- 118.2. increased from 42 to 44 the shifts where there was evidence of Mrs Thomas attending but appeared to have finished the shift early, and
- 118.3. identified 50 shifts where Mrs Thomas had worked the full shift.
119. On 15 November 2018 at 10:37 am Ms Keightley emailed to Mrs Thomas her lists of the bank shifts where
- 119.1. there was “no evidence” Mrs Thomas had attended work (*the “no evidence” shifts*), and
- 119.2. there was evidence the Claimant had worked but had left her shift early (*the “part worked” shifts*), [613].
120. Ms Keightley posed twelve questions in total to Mrs Thomas (6 questions for each of the no evidence and part worked lists, that addressed the same 6 issues) and sought replies by 1 pm on Friday 15 November 2018.
121. Mr Small argued that despite being interviewed twice Mrs Thomas was never provided with any data to review so that she could give a proper response other than the lists provided on 15 November 2018.



122. Whilst it is unclear precisely when Ms Keightley compiled the data in the matrices she annexed to her report what is certain is that whilst Mrs Thomas was told about the matters we raise at (80) at the investigation meetings that took place on 2 and 22 October, the first time we can identify that the detailed results of Ms Keightley's enquiries and the matrices in which they were contained were put to Mrs Thomas. Was when they were sent to her on 15 November (see (118)). Even then it was not clear based on the evidence before us that the matrices in the form they were before us were sent to Mrs Thomas on 15 November.
123. We find the evidence indicates on balance the detail we refer to at (76 & 83) was not raised with Mrs Thomas at the meeting on 2 or 22 October by Ms Keightley.
124. The 15 November was not a Friday, but a Thursday and given the short deadline (2 ½ hours) for a response it is likely Ms Keightley intended the deadline to be 1 pm on Friday 16 November 2018.
125. The following day (16 November) Ms Keightley submitted to the Trust her draft disciplinary investigation report covering the disciplinary investigation in relation to all four of the individuals who were the subject of her investigation.
126. Ms Keightley told us [LK/32] that when she was considering the clinical data, she realised that Mrs Thomas' *"access to the e-roster system (the print out of which had been used to demonstrate the shifts she had worked and been paid for) would be recorded and could be evidence to demonstrate that she had been in work on a particular day."* and so she also reviewed Mrs Thomas' entries on the e-roster system.
127. Ms Keightley gave an example where that review allowed her to locate and discount a shift from there had been no evidence Mrs Thomas had worked the shift to one where the evidence showed she had not worked a complete shift [LK/33].
128. Having completed her review of all those records Ms Keightley formed the view that for a clinical member of staff, who was being paid to carry out a bank shift at a Band 5 level, it was remarkable that on a *"... particular day, there was no evidence of Mrs Thomas turning up or leaving the shift and no record of her carrying out the ordinary tasks you might be expected of a Band 5 nurse, or even being included within the allocation for that day."* [LK/35].
129. Whilst Ms Keightley's approach at (126) is to be applauded, that was not repeated by Ms Keightley in relation to her approach to her use of the claims and verification of bank shifts by Mrs Thomas.
130. The parties told us had to be done from one of the Trust's computers.
131. In her investigation Mrs Keightley identified that some of the claims and verifications had been retrospective and one of the e-roster matrices Ms Keightley produced showed the delay between a claim and the date of the shift [883]. The retrospective nature of the claims and verifications was not however something that formed the basis of her conclusions. However, that data was thus available to and used by Mrs Keightley yet it was accepted she did not use that to verify if those claims or verifications were made on the disputed dates.

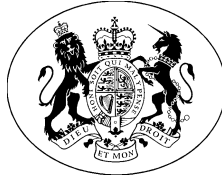


132. Whilst within the investigation report and bundle, elements of the data showing when the claims were made by Mrs Thomas and her verification of the claims of others were present within the investigation report and its appendices, that was not so for **all** the claims over the **reference period** or for Mrs Thomas' verification of the shifts of others during the **reference period**. That point is highlighted by the absence of any verification data by Mrs Thomas of the claims by others from the documents we were referred to at all.
133. If a claim or verification was done on a given day and the person making the claim or verification needed to take the steps required to do so from one of the Trust's computers that is strong evidence the person worked for at least part of that day. That data was available to Ms Keightley yet based on what she told us, on what the investigation report and the various appendices attached to it disclosed, that was not considered by her. Had it been she would have included within the report and its appendices the dates of all claims and verifications made by Mrs Thomas within the **reference period**. She did not do so.
134. A natural justice point also arises from that; whilst Mrs Thomas did not specifically seek that data given the seriousness of the allegations she faced and the difficulties she would have encountered showing she worked on a given day given the absence of that evidence in the swipe, fob and other datasets, she was not provided with data that was available to the Trust that she could have been used to defend herself.
135. On 19 November 2018 at 11:20 Ms Keightley emailed Mrs Thomas to say that as she had not heard from Mrs Thomas, in the absence of a reply by 1 pm the following day (20 November) the report would be submitted in absence of a response from Mrs Thomas.
136. Two hours later Ms Keightley told Ms Barnett, that she had been asked for an extension for a response by Ms Cresswell, had granted that and had therefore done the same for Mrs Thomas. In the meantime Ms Keightley indicated she was reviewing the draft report and asked Ms Barnett to do the same [609].
137. At 14:23 on 20 November 2018 (almost 90 minutes after that deadline for responses had expired) Mrs Thomas responded via email [610] to Ms Keightley stating she did not get time at work to respond and was at home tending to urgent family matters. She maintained she had worked all the shifts claimed for but if she had left early, that had been authorised by Ms Cresswell. She asserted that her personal belongings had been removed from her locker and they included her diary of shifts worked (see (87)). Finally, she stated that when Lyndon 5 ended she was sent a tranche of shifts that had not been verified, that resulted in staff queries who had worked but not been paid and she had done her best to resolve them.
138. The following Monday, 26 November 2018, Ms Tina Robinson, the Trust's then Group Director of Operations (she has since left the Trust), wrote to Mrs Thomas to inform her she had considered the investigation report, had concluded that a disciplinary hearing was warranted and that she would chair that hearing. Mrs Robinson set out the allegations, warned that the sanction could include dismissal and attached supporting documentation. She reminded Mrs Thomas of her right to be accompanied, that she could call witnesses (and contact them) and provide evidence but that she should give notice to



the Trust of her intention to do so and provide any documentation she relied upon at least two days prior to the hearing [623].

139. Notwithstanding that, the final version of the disciplinary investigation report relating to Mrs Thomas [625] was dated 29 November 2018 (three days later). The Trust states that was as a result of a decision to separate the findings into four separate reports for the individuals who had been investigated.
140. On 30 November Ms Keightley emailed Mrs Thomas to inform her that she had submitted the disciplinary report to Ms Hubbard, the Commissioning Manager, for consideration.
141. Mrs Thomas [KT/75-77] told us she believed Ms Keightley was commissioned to find her guilty and that despite Mrs Thomas informing Ms Keightley of matters that would prove Mrs Thomas' innocence Ms Keightley was not interested in looking at them, documents she provided were not used and she did not take notes of what Mrs Thomas said. Further, given Ms Keightley was not a nurse and had never done a shift on a ward she alleged Ms Keightley was not aware of what nursing entailed and Ms Keightley was not asking the right questions. Mrs Thomas told us she repeatedly asked Ms Keightley to speak to four witnesses whose names she gave to Ms Keightley but she did not and thus no one was interviewed who could verify Mrs Thomas was there on a given day. Given the number of consecutive days in question Mrs Thomas argued it was unlikely that a fellow member of staff would not have noticed Mrs Thomas' absence and so would have commented upon it had that been so.
142. Amongst other matters Mr Small takes issue with Ms Keightley's failure to identify within her report (and specifically the appendices) where data was and was not available so that there was no risk of the dismissing/appellate officer thinking the data sets covered all of the dates in question, the degree of interference from her manager (which included checking Ms Keightley's work (and even so both missed an error concerning the 6 February 2018 entry) and the initial collation of the data sets having been requested by her manager) but also as to the pressure to curtail her investigation and the impact that had on her independence.
143. On that last point whilst Ms Keightley accepted before us she was under pressure to conclude the investigation as soon as possible notwithstanding she gave Mrs Thomas additional time to respond in relation to her requests of both 9 and 15 November.
144. Ms Keightley told us she had asked Mrs Thomas for evidence and to be pointed to where Mrs Thomas would like Ms Keightley to look and that Mrs Thomas referred her to one name only – Andrea – which was in relation to the locker but that issue was not pursued by Mrs Thomas during the disciplinary process.
145. Ms Keightley asserts Mrs Thomas had the opportunity to identify witnesses for her to speak to and obtain her own evidence from witnesses but Mrs Thomas did neither of those things. We were not pointed by Mrs Thomas to where she gave the names of the additional witnesses to Ms Keightley in her witness statement or elsewhere. The first mention of them is in the context of the issue concerning their attendance at Mrs Thomas' disciplinary hearing.
146. We should record however that several witnesses were interviewed who worked with Mrs Thomas and the basis for the investigation was the type of complaint Mrs Thomas

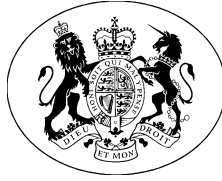


argued would have occurred at (141). Further and given the comments we make at (23) following it is difficult to see how those witnesses would be able to point to evidence that indicated the claimant had worked one of the disputed shifts on a given day.

### ***Disciplinary Process***

147. Mrs Thomas's Disciplinary Hearing took place on 10 December 2018. The disciplinary panel was chaired by Ms Robinson. The disciplinary panel's HR advisor was Mr Nick Bellis, one of the Trust's HR Business Partners. Mrs Thomas was accompanied by Simon Morley, her union representative. Ms Keightley presented the management case and Ms Cresswell attended to give evidence.
148. Following a request from Mr Morley that the Trust's other witnesses be present there was a short adjournment before the disciplinary hearing so that could be facilitated. The attendance of Denise Lunn was also secured.
149. Ms Robinson told us that Mrs Thomas wanted to call several witnesses on the day but had not provided witness statements to the Trust in advance of the hearing. Mrs Thomas asserts she was not allowed to call any of the witnesses she wished to call (Andrea Edward Brown (Registered Nurse), Sister Rose Bogle (Ward Sister), Sister Shirley Gangardeen (Ward Sister), Venessa Miller-Kerlew (healthcare worker)), but does not state that she had provided their names or witness statements to the Trust in advance of the hearing as the invitation letter had requested. Indeed her statement [KT/83] records that they had agreed to provide witness evidence in support which suggests they had not because otherwise she would have referred to their statements. Nor were we taken to those statements (as distinct from the ones used at the appeal stage (see (165))).
150. Ms Robinson told us following a discussion it became apparent they were all character witnesses and Mrs Thomas confirmed that the witnesses could not provide evidence that she had attended work on the days in question. Ms Robinson told us that as character evidence was not likely to be challenged by management, she agreed to allow Mrs Thomas and Mr Morley to obtain and submit written statements for the witnesses and also allowed one of the witnesses to attend via phone as they did not have time to produce a written statement.
151. Mrs Thomas alleges a that after the discussion about calling the witness but before the decision was announced she was asked to leave the room whilst Ms Keightley was permitted to remain. She makes no mention in her witness statement [KT/80] if her union representative was permitted to remain. Ms Keightley could not recall such an incident but was very clear that had she remained so to would Mr Morley, Mrs Thomas' union representative. Had Mrs Thomas been asked to leave but not Ms Keightley we have no doubt Mr Morley would have complained. No evidence was led before us that he did so. Nor was that issue raised in Mrs Thomas' detailed statement of appeal. On balance we conclude there was no discussion with the disciplinary panel from which Mrs Thomas and Mr Morley were excluded but at which Ms Keightley was present.
152. Ms Keightley presented the management case and explained the process she had adopted before calling Ms Cresswell and Ms Lunn who read the transcripts of their interviews. She told us both were asked questions.

**Here**



153. Mrs Thomas was then asked to present her case. Ms Robinson told us Mrs Thomas had not provided a statement of case in advance of the disciplinary hearing, had not prepared any form of case to respond to either allegation and in respect of the first allegation provided no evidence to demonstrate that she had completed the bank shifts where the Trust had found no evidence of her attending. Ms Robinson accepted Mrs Thomas provided evidence of text messages between her and Ms Cresswell to show that there had been an agreement to leave work early on one occasion. But was unable to explain why there was no digital footprint or any evidence for her attending shifts on the disputed dates.
154. Ms Robinson told us Mrs Thomas did not call the witness she had mentioned earlier via telephone, so Ms Robinson told us she prompted her to do so, but despite the prompt failed to do so, so she offered a further adjournment so that Mrs Thomas could discuss that with Mr Morley. That break was accepted and when the hearing reconvened Mrs Thomas confirmed that she wished to continue without calling the witness. She told us an issue was also discussed concerning Mrs Thomas' use of her door fob.
155. At the end of the hearing, Ms Robinson indicated the hearing would reconvene on 12 December 2018 for her to give her outcome.
156. On 11 December 2018 Mrs Thomas emailed Ms Keightley to request copies of the recordings of the investigatory meetings, raised concerns about Mr Powell, who had delivered Mrs Thomas's disciplinary pack to her, that a character witness had not been interviewed; and the lack of CCTV [660]. Ms Keightley forwarded this email to Ms Robinson to respond [661].
157. On 12 December Mr Bellis responded to Mrs Thomas on Ms Robinson's behalf allowing her to call a witness at the hearing later that day provided that witness could give non character evidence in support of Mrs Thomas [666A].
158. Mrs Thomas did not respond within the timeframe set out in the email and as such the meeting reconvened at midday on 12 December. Ms Robinson, Mr Bellis, Ms Keightley and Mr Morley were in attendance. Mrs Thomas was not. The reason Mrs Thomas alleges was that she had not read that response. Mr Morley confirmed to the meeting he had received and read this. No explanation why she did not attend in any event was provided.
159. The hearing proceeded and Mrs Thomas was dismissed. A letter confirming the disciplinary outcome was sent later that day [663]. Allegation one was upheld. Having discounted the shifts where Mrs Thomas had attended work but left early Ms Robinson found there were a total of 41 shifts where there was no evidence that Mrs Thomas had attended work at all. The Trust accepts that was an error and should have referred to 39 shifts instead of 41. That error aside, Ms Robinson, like Ms Keightley, thus did not rely upon what the investigation identified as part worked shifts.
160. Allegation two was also upheld by Ms Robinson on the basis Mrs Thomas had admitted to sending the email on 1 May 2018 and that was consistent with the email at [262]. The mitigation Mrs Thomas raised, that she had advised that she "wouldn't get into trouble" for doing this, was not accepted by Ms Robinson given she had undertaken Information Governance Training and should have been aware of the implications of such a breach of confidentiality.

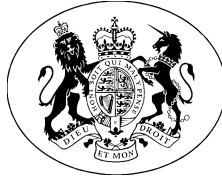


161. Ms Robinson concluded that Allegation 2 constituted misconduct and Allegation 1 Gross Misconduct and determined that Mrs Thomas should be dismissed without notice and with immediate effect. The termination letter stated that was effective Wednesday 12 December 2018.
162. There is an issue when Mrs Thomas became aware of her dismissal given she was not present. We indicated that would be an issue for remedy if it arose.
163. Given the disciplinary panel determined that Mrs Thomas was paid for work she had not carried out, she was informed that the Trust would require her to repay that amount along with any hours that she owed the Trust. On 18 December 2018 Ms Keightley emailed Mr Mohammed Ali in the Trust's finance department to request a total value for the shifts the Trust was seeking to recover from Mrs Thomas [668]. The value was later confirmed as £8,714.14

### ***The Appeal Process***

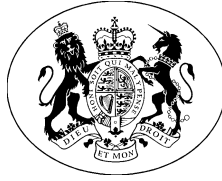
164. On 21 December 2018 Mrs Thomas appealed the decision to dismiss her [674]. She refuted the allegations against her and amongst other matters suggested that given the seriousness of the allegations the Trust had failed to provide evidence demonstrating that she had worked those shifts and as to the second allegation, that the finding against her (discussing and sharing confidential information as a result of accessing Ms Obiakor's email account) was different to the allegation with which she was charged (forwarding an email from Ms Obiakor's email account), that the decision to dismiss her was not a reasonable one in all the circumstances and the Trust had failed to follow procedure in coming to the conclusions reached.
165. On 17 February 2019 Ms Barnett wrote to Mrs Thomas to inform her of the date set for the appeal hearing (1 April) and amongst other matters set out the permissible bases on which she could appeal, that the appeal would be based on submissions only and not be a rehearing unless the interests of justice required it and advising her of the right to be accompanied [697]. She asked Mrs Thomas to confirm her attendance and the name of her representative by 18 March and to outline the grounds of her appeal and any supporting evidence that she intended to rely upon at the hearing by no later than 25 March 2018. She was asked in the event she planned to call any witnesses to confirm that in writing, stating their names.
166. On 18 March 2019 Mrs Thomas emailed Sue Green of the Trust with a list of four witnesses for the appeal hearing [704]. Witness statements for three of the four were before us Vanessa Miller-Kirlew [705], Shirley Gangadeen [709] and Andrea Edwards-Brown [710]. They were dated between 22 and 25 March 2019. That of the fourth proposed witness, Rose Bole, was not.
167. Mrs Thomas' appeal hearing was held as scheduled on 1 April 2019 and chaired by Ruth Wilkin, the Trust's Director of Communications, with HR support from one of the Trust's HR Business Partners, Mr Del Radway. Ms Robinson and Mr Bellis attended to present the management case (a copy of which is at [712]). Mrs Thomas was also in attendance.
168. Ms Wilkin states she allowed Mrs Thomas' request to call the three character witnesses at the appeal hearing by telephone. However, only two of these witnesses were contactable on the day of the hearing, Ms Gangadeen having emailed the Trust that day





that she would not be available [711]. Mrs Thomas repeats her complaint they were not spoken to at the time. Mrs Thomas also raised a number of other matters in her appeal, including her repeating points she had previously raised including that if she had not worked a shift it would have been raised by colleagues, that her shifts had been verified by colleagues, use by colleagues of her key fob (although that potentially raised other issues), the failure to consult the Trust's Pyxis Pharmacy system, use of all the patient records, CCTV records, IT systems and emails. She also raised several issues concerning allegation 2 that we address at (173) below.

169. Ms Wilkin told us she decided to delay her appeal decision to determine whether there was any additional evidence that could reasonably be gathered and considered. On 10 April 2019 she wrote to Mrs Thomas to advise that she had asked Mr Radway to make enquiries if it was possible to access the data from the Pyxis system [714]. She told us Mr Radway made the enquiries with the Trust's pharmacy department, however, this data could not be produced from the archive records. Based on what she told us that was the only additional enquiry she made. She told us did not seek to check if CCTV footage was available because she told us she was aware from other matters it was not or seek to check other issues raised.
170. Eight days later, on 18 April 2019, this claim was presented to the Employment Tribunal.
171. On 17 May 2019 the outcome of the appeal hearing was sent to Mrs Thomas [722]. Ms Wilkin rejected Mrs Thomas's appeal and found that Ms Robinson's decision to dismiss Mrs Thomas was fair and reasonable in the circumstances.
172. It was contended by Mrs Thomas before us amongst other matters that:-
  - 172.1. the appeal hearing was a sham in that none of the issues Mrs Thomas raised were dealt with and that the appeal simply rubber stamped the disciplinary panel's decision. Again, alleging Ms Wilkin did not interview any of the key witnesses and did not engage in the appeal process.
  - 172.2. Ms Wilkin failed to deal with allegation 2, that in turn raised serious issues in that no disciplinary action was taken against Mrs Hawkins whereas action was taken against Mrs Thomas.
  - 172.3. Ms Wilkin was mistaken about the numbers (and thus fraction) of patient records reviewed.
  - 172.4. that Ms Wilkin found Mrs Thomas guilty of matters that were not even in dispute, specifically the retrospective verification of shifts which played no part in the management case, and
  - 172.5. made assumptions based on her own experience rather than seeking to check if these matters were (e.g., that it was not normal practice for swipe cards not to be used).
173. As to the point concerning allegation 2 within Mrs Thomas' statement for the appeal having raised the disparity between the content of allegation 2 (that Mrs Thomas discussed and shared confidential information ) and what Mrs Thomas was found to have done in the disciplinary outcome (forwarded an email) Mrs Thomas said this:-



*“By her own admission, Joanne Cresswell told you in the hearing that she accessed the inbox of Claire Obiakor and that she sent to me the e-mail. Not the other way around.*

***Joanne Cresswell went to see April Hawkins and it was at that point that she asked me to send the email to her. This was a direct request from my manager and my manager’s manager. I did as I was instructed in the same way as I did when the investigating manager asked me to provide the email. The allegation is denied and you already have evidence proving that I was not responsible for accessing the in box and therefore the allegation put to me cannot be substantiated. The information was shared with me and not the other way around.***

*The allegation is denied and you already have evidence proving that I was not responsible for accessing the inbox and therefore the allegation put to me cannot be substantiated. The information was shared with me and not the other way around. However I do not see others who were involved in this being subject to the same treatment as me. Why is that I am led to question.*

*I believe that my inbox was accessed by Joanne Cresswell sending the email on. However it appears that you have failed to take that into account. During the disciplinary hearing, I told you that I had raised on a number of occasions both in writing and verbally, concerns that I had regarding Joanne Cresswell over a period of a year. I raised this with the Trust on many occasions, all of which were never dealt with. Some of those concerns amounted to whistleblowing complaints regarding ward safety and the safety of our patients as a result of her failures to come to work. You were aware of the breakdown in the relationship between myself and Joanne Cresswell and so I advised you that as a result of this breakdown in our relationship, and the complaints that I made about her, I am now the subject to this investigation disciplinary and now dismissal because she implicated me due to her becoming aware of the complaints that I raised. This is to my detriment.*

***... (our emphasis)”***

174. The section emphasised in that quote by us was put to Ms Hawkins who accepted she had had that discussion with Ms Cresswell and that she had authorised the email to be sent on. She was asked if she told anyone about that prior to the Tribunal hearing as part of the investigation. She told us that she had not been asked the question.
175. Mr Small questioned why Mrs Hawkin’s evidence only came out at the Tribunal.
176. We address the investigation meeting Ms Keightley held with Ms Hawkins on 19 October at (93). When Ms Keightley was asked before us about Ms Hawkins’ failure to mention her discussion with Ms Cresswell in the context of firstly that investigation meeting and secondly, Ms Hawkins later taking part in the investigation Ms Keightley accepted that it was inexplicable (our phrase) that she had failed to do so.
177. However, whilst one way that would have come to light was Ms Hawkins having set out that had been done at her investigation meeting another was if Mrs Thomas had raised that issue earlier.



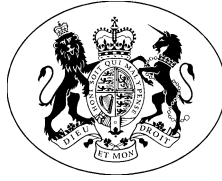
178. Mrs Thomas's version of those events at her investigation meeting on 22 October [538-539] is not as detailed as that within her statement for the appeal. Her account was that email was sent from Ms Obiakor to her NHS email account and she accessed that via her mobile phone. Mrs Thomas stated she went to Ms Cresswell to tell her about that as Ms Obiakor had left the ward for the day. When she did so, Ms Cresswell told her that she had sent it to Mrs Thomas to secure the evidence and that Ms Cresswell already had a paper copy of the AWC.
179. In that interview Mrs Thomas made no mention of the discussion between Ms Cresswell and Mrs Hawkins authorising the email being sent on. Based on the evidence before us the first time that we can trace that directly being mentioned by Mrs Thomas was in her appeal statement. Yet that was a highly relevant matter as Mrs Thomas' statement of appeal makes clear. The explanation Mrs Thomas provided for her failure to relay that is that the notes she signed were not accurate. Those signed notes were of course provided as part of her disciplinary investigation.
180. Mrs Thomas' account within her statement of appeal concerning allegation 2 is now not only supported by Ms Cresswell, but Mrs Hawkins (and the email trail [262]).
181. Thus, absent Mrs Thomas having raised it previously and Mrs Hawkins having failed to include her discussion with Ms Cresswell authorising the sending on of the AWC in her interview the first time that issue could have come to light was on the appeal. Thus, the thoroughness of Ms Wilkin's investigation was again highly relevant given the importance the Trust placed on the dissemination of the AWC.
182. Ms Wilkin could not recall having seen the witness statements from the disciplinary hearing or checked for them. Mrs Thomas's statement for the appeal hearing which was not included within the trial bundle (this was provided as a separate document).
183. We set out our findings in relation to Ms Wilkin below (211226 to 232).

## THE LAW

184. The summary provided Mr Heard was accepted by Mr Small as a fair summary of the law. We adopt it:-

### ***Ordinary unfair dismissal***

185. *British Home Stores Ltd v Burchell* [1978] IRLR 379 sets out the long established test for fairness in conduct dismissals:
- 185.1. Did the Respondent genuinely believe that Mrs Thomas was guilty of misconduct?
- 185.2. Did Respondent have reasonable grounds on which to sustain that belief?
- 185.3. At that time the Respondent formed that belief had it carried out a reasonable investigation?
186. The band of reasonable responses test applies to the Burchell test (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23). In applying s.98(4) ERA a tribunal will determine whether the decision to dismiss was within the band of reasonable responses (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439, as confirmed in *Post Office v Foley*; *HSBC Bank*



Plc (formerly Midland Bank Plc) v Madden [2000] IRLR 827). A tribunal may not substitute its decision for that of the employer's.

187. When applying s.98(4) ERA a tribunal is to consider the dismissal and appeal stages of the disciplinary process: West Midland Co-Operative Society Limited v Tipton [1986] IRLR 112.
188. In Turner v East Midlands Trains Ltd [2013] IRLR 107 it was said at paragraphs 20–22:

*“20 The second observation is that when determining whether an employer has acted as the hypothetical reasonable employer would do, it will be relevant to have regard to the nature and consequences of the allegations. These are part of all the circumstances of the case. So if the impact of a dismissal for misconduct will damage the employee's opportunity to take up further employment in the same field, or if the dismissal involves an allegation of immoral or criminal conduct which will harm the reputation of the employee, then a reasonable employer should have regard to the gravity of those consequences when determining the nature and scope of the appropriate investigation.*

*21 In A v B [2003] IRLR 405, paragraph 60, when giving judgment in the EAT in a case involving alleged criminal behaviour by the employee, I said this:*

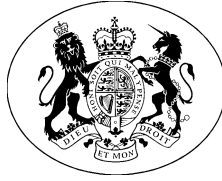
*'Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.'*

*This dictum was approved by the Court of Appeal in Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 paragraph 13.*

*22 The test applied in A v B and Roldan is still whether a reasonable employer could have acted as the employer did. However, more will be expected of a reasonable employer where the allegations of misconduct, and the consequences to the employee if they are proven, are particularly serious.”*

### **Unlawful deduction of wages/holiday pay**

189. Part II ERA 1996 is essentially designed for straightforward claims where the employee can point to a quantified loss: Coors Brewery v Adcock [2007] IRLR 440 (paragraph 56).
190. An 'overpayment' (s.14(1) ERA) can include deductions made following an employee's dishonest claims for pay: SIP Industrial Products Ltd v Swinn [1994] IRLR 323.
191. The burden is on a claimant to lead evidence of holiday loss: Timbulas v Construction Workers Guild 0325/13 (and in particular, paragraph 18 where the EAT gave examples of steps a claimant could take to find out what holiday had been taken).

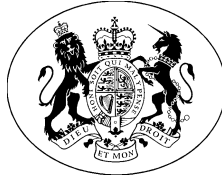


192. An overpayment can be one which is made for 'any reason' Key Recruitment UK Ltd v Lear UKEAT/0597/07 (paragraph 10).

## OUR PRINCIPAL FINDINGS AND CONCLUSIONS (RATIONALE)

### *Unfair Dismissal*

193. The Trust accepts Mrs Thomas was an employee, was dismissed, had qualifying service and the claim was brought in time following early conciliation. It follows that in order to be a fair dismissal the Trust must have a genuine belief in the potentially fair reason it gives for her dismissal; misconduct. The burden is on it show that was so. If that is shown the burden then becomes a neutral one for us to consider if that belief was held on reasonable grounds following a reasonable investigation. Those matters are tested using the band (or range) of reasonable responses test which also applies to the final question we have to address, the sanction applied, which here is dismissal.
194. In a case such as this, involving allegations of dishonesty/fraud, it is common ground the Trust accepts it has to consider both inculpatory and exculpatory evidence.
195. here
196. Whilst Mrs Thomas casts doubt on the process adopted by the Trust and suggests that this was prejudged, in our judgment the factors that Mrs Thomas advances to suggest that that is so are overwhelmingly outweighed by the countervailing factors; having received a whistle-blowing complaint the Trust was duty bound to investigate. We find it did so and as a result it identified that there were prima facie grounds to show that not only the person identified (but unnamed) in the whistleblowing complaint (who it appeared was Ms Cresswell) but also Mrs Thomas, had made claims for shifts worked for which there was little or no evidence to show that they had been worked.
197. A disciplinary investigation then ensued that we find was principally undertaken by Ms Keightley. We find that she wished to investigate the matter in far greater depth than her line managers appear to have wished and we accept what she told us in that there were limits placed upon her investigation by her line manager (both as to time and documents). However, despite instructions to the contrary from her manager, to bring the investigation to an end she extended the period for Mrs Thomas to provide responses to certain questions that she had posed to Mrs Thomas.
198. Ms Keightley provided before us a detailed rationale how she approached matters. Based on the evidence we heard we find that Ms Keightley undertook the investigation as best she could, and she genuinely tried to locate any documents that could shed light on matters. Having received an initial tranche of a number of data sets and having reviewed them she accepted some of those initial data sets - the absence of a swipe card or car park information were inconclusive and did not mean that Mrs Thomas did not work the shifts in question. She then went back and sought additional data sets and/or at least made enquiries to see if they could be located.
199. That issue highlights that despite the nature of the ward upon which Mrs Thomas worked being to care for vulnerable elderly individuals (many of whom had dementia and similar conditions) the Trust accepted there were failings in the record keeping of that ward. Whilst we find steps were taken to attempt to remedy that issue, it had not been resolved and given the nature of that ward, it is a matter of concern to us that the Trust's systems

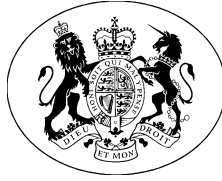


were such that it was possible for a senior member of staff like a ward sister to have no footprint for working on a given day.

200. Ms Keightley readily accepted when errors were made on the Trust's part for instance the failure of Ms Hawkins to address certain matters that we will turn to in due course. We find Ms Keightley was a genuine and truthful witness.
201. One of the additional data sets Ms Keightley sought was the Trust's patient records to identify shifts where Mrs Thomas worked. One of the major criticisms Mrs Thomas makes of the Trust's investigation, was premised on the difficulty Mrs Thomas faced to prove that she had been in work on a given day. Moreover, the Trust's failure to consider the entirety of one of those datasets namely the patient records and instead to consider only a sample of these.
202. We do not consider that the decision to take a sample of that patient record data set inevitably leads to the conclusion that the whole of the investigation process was fundamentally unfair. However, by virtue of the way the process was implemented and then presented we find that the investigation was not a reasonable one, namely within the band of reasonable responses for the reasons we give below.
203. Ms Keightley's categorised shifts into three types:-
  - 203.1. those where the data indicated Mrs Thomas had been in for the whole shift (50 in number),
  - 203.2. part of the shift (initially 42 in number and latterly 44) or
  - 203.3. none of the shift (initially 41 in number and latterly 39).

She essentially gave Mrs Thomas the benefit of the doubt at least with regards to the category where there was some evidence to show Mrs Thomas had been in on a given day, and if there was some evidence, she treated that as a partial shift.

204. During Ms Keightley's evidence she stated that there was no IT evidence available to verify Mrs Thomas's claims for shifts worked. As part of Ms Keightley's investigation, it became apparent to us that she had considered the delays in some of those verifications of claims and thus those records were available to her. Thus, the panel questioned the lack of IT evidence and it was accepted by the Trust that by virtue of Mrs Thomas having to login to the Trust's computer system on site to make claims for bank shifts (and also for her to verify claims of others) that those records were available to it.
205. Whilst that information was therefore considered and available to Ms Keightley as part of her investigation and inherently, was used to inculcate Mrs Thomas (by virtue of those being the very claims being in issue) the Trust did not consider if any of the dates on which all those claims were made (as opposed to those to shifts worked which they related to) corresponded with dates on which Mrs Thomas was said to have claimed for but not worked (or partially worked).
206. Further the data available to us identifying when the claims were made appeared to be limited to the claims in dispute and did not extend to the entirety of 100 plus claims made by Mrs Thomas that were in issue and thus the records before us were only a fraction of that dataset. Thus, whilst Mr Small attempted to check if any of those claims exculpated



Mrs Thomas and could find no such evidence of the same, the number of claims that were before us were just a fraction of the whole.

207. That issue however is significantly reinforced by the large number of verifications Mrs Thomas undertook of Ms Cresswell's claims. Whilst it appears Ms Cresswell verified 127 of Mrs Thomas's claims it is not entirely clear how many claims Mrs Thomas verified of Ms Cresswell (or indeed others). It appeared to us (at least in terms of order of magnitude) to be at least of the order and indeed more than a number of claims that she herself made. Despite that, none of the verification data sets were provided to Mrs Thomas as part of the investigation process (or indeed to the disciplinary or appeal hearings) such that dates and times of the claims and verifications were identified so they could be properly considered.
208. However, they are not the only problems that stem from the way the Trust approached matters.
209. Having considered a fraction of the patient record data and discovered that the evidence showed Mrs Thomas had worked on part of at least two of the days. Ms Keightley rightly excluded them from the group for which there was no evidence to show that Mrs Thomas worked the entirety of the shift on given day and instead treated them with the group or which there was evidence Mrs Thomas had worked only a partial day.
210. Whilst Ms Robinson's evidence before us was that she clearly understood the fact that that change was based on only a fraction of the patient record data being looked at and we accept this, in her outcome letter Ms Robinson did not use the revised numbers Ms Keightley came to having taken into account the partial patient record data but instead referred to the number of claims that Ms Keightley had identified before that adjustment was made.
211. In contrast we find that Ms Wilkin by virtue of her responses to questions upon the issue had not appreciated that only a fraction of the data had been patient record data considered. The error on the part of Ms Robinson and the failure of Ms Wilkin to understand the point called into doubt the way the Trust approach the use of the fractional part of the patient record data and in particular the way that was presented in a form such that was understandable by Mrs Thomas or the dismissing or appeal officers. (We give examples that may go some way to explain their failure to appreciate those matters below at (219)).
212. To reinforce that point yet further what Ms Keightley did not do, having moved those two shifts from one category (no evidence to support an attendance) to another (the evidence supported a partial attendance), was to consider the effects of that.
213. Whilst it is apparent she decided not to look at what for the moment and for ease of reference we will refer to as the remaining 80% <sup>1</sup>, she did not identify the numbers of shifts that would have needed to warrant that further enquiry (i.e. a *threshold* level (see below)) or if not, what effect that had on the make-up of the numbers in the categories. What she did was to move the shifts concerned from one category to another without

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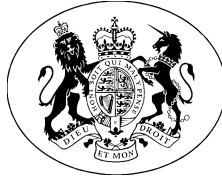
<sup>1</sup> that is 100% less the approximate fraction (20%) put forward by Mr Small (albeit he in turn attached a health warning to that figure) of the patient record data that were analysed.



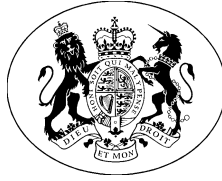
considering whether the reliability of the numbers as a whole would be affected or to put it another way whether the results within the sample should have been extrapolated across the whole.

214. That was not necessarily a failing wholly on the part of Ms Keightley but instead on the Trust as a whole. Ms Keightley had assistance from Matthew Maguire one of the Trust's technical staff to ensure the patient record data set was randomised (so it rightly could not be said the Trust was selecting data to suit its purposes). The way that randomisation process was done was that every other day on which a claim made by either Mrs Thomas or Ms Cresswell was used and then depending upon the number of patients in the ward that day a random fraction of them were sampled.
215. As an industrial relations jury it is not for us to attempt to calculate that fraction the sample made up of the whole, but it did not appear to be in dispute that the fraction was more complex than the approximate 20% figure suggested by Mr Small.
216. There was no evidence before us that given the multiple variables used to randomise and select from the (patient record) data set that the Trust's technical advisers had advised on the number of patient records (or shifts as the case may be), that would have been statistically significant (the *threshold*) such that an analysis of all of the data might be required or indeed if not how any shifts that were found to have been worked (in whole or part) from the sample should have been presented as part of the investigation.
217. Our concern as an industrial relations jury is that the Trust (or it's technical advisers) not having addressed how any shifts identified as having been worked in whole or part should have been assessed or how they should have presented as part of the investigation of the effect, if any, that those identified as such from the sample should have had on the whole.
218. We are expressly not suggesting that any shifts found to have been worked in whole or part from the sample should have been extrapolated across the whole; simply that the issue was not addressed. Similarly, for the *threshold*.
219. To reinforce our concern about the way that data was presented (see (211)), the investigation report and its matrices did not highlight what other information was available (or not). Examples of this are that
  - 219.1. Whilst the matrices did identify whether the CDA drug charts were available (they started in October 2017 [1334] and so the records post-date 31 of the shifts in question) - the records from Lyndon 5 ward were only available from September 2017 (thus out of the 39 shifts alleged to have been falsified 32 of those days occurred prior to September 2017) and
  - 219.2. The matrices did not specifically identify which of the shifts had been checked against the patient records and the number of patient records checked against the number of patient records available for that shift.
220. One final example of the implications of this issue is that the Trust thereafter made a deduction from Mrs Thomas's wages.





221. We remind ourselves that the test between what is required to be shown for a misconduct unfair dismissal and that for a deduction from wages are very different, as are on whom the (initial) burden rests with.
222. We should add at this point that an employer has an obligation to provide payslips to enable a claimant to identify the sums paid and those deducted.
223. We find the Trust made a deduction from Mrs Thomas's wages for all the shifts where no evidence had been found by Ms Keightley that Mrs Thomas had worked on a given day but no deduction was made in relation to the partially worked shifts category.
224. That deduction took no account that had the remainder of the dataset been considered the likelihood that other patient records could have been found that assisted Mrs Thomas, Ms Keightley only having considered about 20% of the whole (adopting again for ease of reference only the approximate fraction canvassed by Mr Small which as we say above neither we nor the parties necessarily accept is accurate).
225. We emphasise here that we specifically *do not* to suggest that *that should have been done* but to emphasise that in making a deduction it is for the Trust to show that it was entitled to do so and *its failure to consider what effect* the other 80% of the patient data set could have had in light of the results from the 20% that was considered lead us to conclude that it will not be able to show on balance that it was entitled to make the *entirety* of the deduction.
226. However, the errors that we identify above with regards to Ms Wilkin mistaking the 20% are not the only ones we find that occurred concerning the appeal. In her outcome [722-725] of 17 May 2019 she failed to address in her conclusions the substance of the second allegation against Mrs Thomas at all.
227. The Trust told us that the initial investigation that gave rise to the second allegation against Mrs Thomas emanated from Mr Lewis (the Trust's chief executive) who personally instructed Kham Dhami to undertake the initial investigation regarding the dissemination of the whistleblowing complaint. Given that was an issue that sounded to the highest level of the Trust that emphasises the significance the Trust placed upon those matters and reinforces the significance of Ms Wilkin's failure to address that issue properly.
228. If Ms Wilkin had properly investigated the second allegation, she would have identified three matters:-
- 228.1. The allegation made by Mrs Thomas that she and Ms Cresswell had been authorised by Ms Hawkins to forward the whistleblowing complaint from one to the other. Given that (the unauthorised dissemination issue) was the basis for allegation 2 against Mrs Thomas it leads to the question whether Ms Hawkins should properly have been *investigated* as to her own conduct (we should add that should not be taken to mean that would inevitably result in a disciplinary process),
- 228.2. When Ms Hawkins was interviewed on 19 October 2018 [532A] having disclosed the names of the individuals she had spoken to about the whistleblowing complaint (which did not include Ms Cresswell or Mrs Thomas) she expressly



stated she had not spoken to anyone else. That is at odds with the account she gave to us whereby she authorised sending the email including the whistleblowing complaint between Ms Cresswell and Mrs Thomas.

- 228.3. Ms Keightley accepted it was inexplicable (our phrase) that Ms Hawkins had also failed to mention her prior involvement when accepting the instruction to provide technical assistance to the investigation (Mrs Thomas having raised an objection on 19 October 2018 to Sister Jo Thomas, the person originally identified to assist the investigation [521])<sup>2</sup>.
229. All three matters were potential disciplinary issues and Ms Wilkin's failure to adequately address the second allegation in the appeal meant that these did not come to light. That reinforces from the perspective of both parties the need for a thorough investigation, disciplinary and appeal process, and that the failure to do so may mean that issue the Trust wished to have addressed was not identified.
230. As to Mrs Thomas, had Ms Wilkin investigated the second allegation thoroughly it would have been apparent Mrs Thomas made no mention of Ms Hawkins approving the sending of the whistleblowing email between her and Ms Cresswell at interview on 22 October 2018 [533 following] despite that having been discussed and Ms Hawkins having been requested to provide a full account by the Trust.
231. That approval was a crucial matter in relation to Mrs Thomas's appeal and thus also the matters investigated. Yet Mrs Thomas inexplicably did not give a full account when first asked for that or later when she submitted the investigation notes signed. That difference in her account and the failure to provide a full one was not just an issue concerning the weight to be given to her evidence but in itself was potential disciplinary matter.
232. Further, Mrs Thomas told us she signed the notes of the investigation meetings on 1 [408] and 22 October 2018 (both were signed 12 November 2018) yet she told us they were not accurate. In the context of a disciplinary investigation concerning dishonesty which potentially affected her ability to practice we find the reason she gave was implausible, when as a nurse, one of her primary roles was record keeping. Yet that was not apparent to Ms Wilkin.
233. On the issue of Mrs Thomas's compliance with her professional duties is the question of the protected disclosures. Whilst she later withdrew the protected disclosures and she also accepted before us that she did not believe they were protected disclosures at the time, she initially pursued them as a complaint. Thus, it was of concern to us that having told us she had initially believed them to be protected disclosures that she did not follow up those concerns to the NMC, the CQC or the Trust's own whistleblowing helpline as her professional duties dictated.

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<sup>2</sup> Whilst Mrs Thomas disputed that that Ms Hawkins was appointed to replace Matron Thomas we found that she was and whilst we do not know when she was appointed that must have post-dated Ms Hawkins' interview on 19 October 2018 as the complaint from Mrs Thomas objecting to Matron Thomas' involvement was the same day as Ms Hawkins' interview).



234. Across the depth and breadth of her account Mrs Thomas sought to portray events before us in very different light to their portrayal at the time, by way of example she told us that she distanced herself from Ms Cresswell long before the date of the whistleblowing complaint but when asked when that was, could not tell us and also when the contemporaneous evidence appeared to show Mrs Thomas had sought to follow Ms Cresswell to OPAU. Mrs Thomas sought to portray that very differently.
235. We find Mrs Thomas was not a witness on whom any weight could be given by virtue of those matters, which go to the depth and breadth of her account.
236. We conclude that whilst the Trust has shown it genuinely believed Mrs Thomas was guilty, that the investigation that underlay that was not within the band of reasonable responses and thus was unfair.

**Employment Judge Perry**

11 March 2021