Case Number: 3200750/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Robinson**

Respondent: **Homerton University Hospital University Trust**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **19 November 2020**

Before: **Employment Judge Housego**

Representation

Claimant: Murray Idris, Solicitor, of Rees Myers, Solicitors
Respondent: Camille Ibbotson, of Counsel, instructed by Hempsons LLP, solicitors

JUDGMENT

1. **The Claimant was not unfairly dismissed by the Respondent.**

2. **Had there been an unfair dismissal, by reason of procedural errors, there would have been a 100% *Polkey* reduction in the basic and compensatory awards.**

REASONS

Summary

1. The Respondent says that it dismissed the Claimant for misconduct. The Claimant admits some misconduct, but says not only was the process unfair, but that most of what was alleged could not reasonably have been considered to be true, that it took far too long to be fair, and that in any event the sanction of dismissal was too harsh, and outside the band of responses of the reasonable employer. The Respondent says that it genuinely believed, after proper investigation, that there had been serious misconduct in June 2019, and with the history of complaints and with what was admitted, that the Claimant was less than candid, and that dismissal was within the band of responses of the reasonable employer, particularly considering the

way they say the Claimant dealt with the process.

Evidence

2. I heard oral evidence from the Claimant, and from the people from the Respondent who dismissed the Claimant, and who heard her appeal (Sarah Peterson and Louise Egan, respectively).

3. The Respondent provided an agreed substantial bundle of documents and a skeleton argument, and a cast list and chronology.

Law

4. No sophisticated legal analysis is required. The reason put forward is conduct which is a potentially fair reason for dismissal (S98(2) of the Employment Rights Act ("the Act")). Was that the reason? If yes, did the Respondent have a genuine belief on reasonable grounds of misconduct by the Claimant? If yes, was it misconduct justifying dismissal? (A notice period was paid.) Was dismissal within the range of responses of a reasonable employer? Was the dismissal procedurally fair? If not what were the chances of dismissal if there had been a fair procedure? If there was an unfair dismissal did the Claimant cause or contribute to her dismissal by her conduct?

5. As I made clear at the hearing, I do not decide on factual contribution unless necessary. This is because the decision whether a dismissal is fair or unfair involves findings of fact about what the employer did, and an assessment of whether it was fair or unfair. However, findings of fact about contributory conduct are findings of fact, on the balance of probabilities, about what the Claimant did, or did not, do. There is an extant referral to the Nursing and Midwifery Council ("NMC"). If the NMC decides to refer the Claimant to its fitness to practice ("ftp") panel it will formulate its own charges. The NMC's ftp panel also decides facts on the balance of probabilities. While the NMC's ftp panel will make up its own mind it would be unfortunate if any findings of fact made in this judgment had any effect on such proceedings.

6. In deciding fairness Section 98 (4) of the Act provides

   "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

   There is no burden of proof, for it is an assessment of the fairness of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer. The test in *Burchell* (reference below) is whether the employer had a genuine belief in misconduct on reasonable grounds, after proper investigation.

7. I have also considered section 207A of the Trade Union and Labour

Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (“the ACAS Code”).

8. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly.”*

9. The compensatory award is dealt with in section 123. Under section 123(1) *"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"*.

10. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: *"where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”*

11. There is provision for increase in compensation of up to 25% if the Acas code is not followed by an employer which unfairly dismisses an employee.

12. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sarkar v West London Mental Health NHS Trust [2010] IRLR 508 CA; Sainsburys Supermarkets Ltd. v Hitt [2002] EWCA Civ 1588; Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533_06_2601; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The range of responses of the employer is not infinitely wide but is subject to S98(4): Newbound v Thames Water Utilities [2015] EWCA Civ 677, paragraph 61. It is unfair to dismiss automatically by reason of gross misconduct: Department for Work and Pensions v Mughal (Unfair Dismissal: Reasonableness of dismissal) [2016] UKEAT 0343_15_1406. Mezey v South West London and St George's Mental Health NHS Trust [2007] EWCA Civ 106: suspension is not a neutral act (paragraphs 11-13). I have considered the guidance in Software 2000 Ltd v. Andrews & Ors [2007] UKEAT 0533_06_2601 about remedy.

13. The reason given by the Respondent was misconduct which is a potentially fair reason for dismissal. The first question is whether that was the reason. If it was the reason the issue is whether it was fair, or not. Those questions are determined by the findings of fact.

14. If the reason is shown to be misconduct, the starting point for the issue of fairness is the words of section 98(4) themselves. In applying that subsection the Tribunal must consider the reasonableness of the

employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own view of the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

15. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

The Respondent's case (the following paragraphs in this section are not findings of fact, but are what the Respondent says about matters)

16. The Claimant started on 20 July 2015 as a band 6 midwife. She was dismissed for gross misconduct on 17 December 2019, but was paid (through a misunderstanding about what the Claimant's entitlement was) for her full notice period, although dismissed with immediate effect.

17. Between February 2018 and January 2019 there were 4 complaints about her from colleagues and 4 complaints about her from female patients on maternity wards. The grounds of resistance detailed them. They may be categorised as displaying a lack of empathy with colleagues and patients: forceful and lacking in compassion and unsupportive. The latter 2 were on 02 November 2018 and 02 January 2019.

18. On 01 November 2018 the Matron met the Claimant, and she was placed on a two month informal management programme and provided with set objective, and had a ward manager or band 7 midwife to support her on each shift. The Claimant declined training in conflict resolution.

19. This period was successfully completed, and in December 2018 the Matron organised a meeting with the Claimant to sign it off with a formal outcome letter. A further complaint was received on 02 January 2019 and so this was not done, and matters went into abeyance.

20. The Deputy Head of Midwifery met the Claimant on 11 April 2019 (the length of time was in part as the Claimant was on holiday 25 February 2019 – 31

March 2019). On 08 May 2019 a *"Standard Setting"* letter was issued. This stated that similar complaints would be likely to lead to formal disciplinary action.

21. On 03 June 2019 Patient A raised a complaint against the Claimant. It was alleged that the Claimant had used her mobile phone in a clinical area, in the presence (and within the earshot) of Patient A and had used vulgar, non medical, terminology concerning female genitalia, with particular reference to that of Patient A, and contrasting Patient A's with the Claimant's own personal intimate hygiene. Patient B was nearby and was asked about it by the Ward Sister. She said that she had seen some sort of altercation, but did not want to be involved.

22. On 05 June 2019 the Ward Sister and Maternity Matron met the Claimant and she was removed from clinical duties, as this breached the standards setting letter (of 08 May 2018).

23. On 12 June 2019 the Claimant was suspended on full pay from work after the Ward Sister (of a ward other than that where the Claimant had been working) complained that after 05 June 2019 the Claimant had gone to that other ward and spoken to Patient B (who had been moved). Patient B had a cousin who was a ward domestic, and the Claimant had approached him to see if Patient B's baby had been born and if she could go to congratulate her. The Claimant was alleged to have spoken to Patient B about Patient A's complaint, shown her a document about it, and acted in an intimidatory way towards her. The decision was to prevent the Claimant interfering with witnesses and to safeguard vulnerable patients.

24. The Claimant was told she could ask for a formal review of the suspension but never did. There was a bi-weekly review internally. The suspension was for no longer than necessary.

25. The disciplinary process started on 28 June 2019, and was led by the Deputy Head of Midwifery. As there had been earlier concerns the terms of reference for the investigation included the whole period from February 2018, and whether behaviour had failed to improve after informal support and a standards setting letter. In particular there was focus on possible breach of patient confidentiality, and possible abuse of position by coercing a patient into providing a statement in support of her.

26. WG, who had no other connection with the matters in issue, was asked to investigate and to produce a report, which he did, dated 10 October 2019, sent, with appendices, to the Claimant on 25 October 2019. It was denied that he was anything but impartial. This took a long time for a variety of disparate reasons: for a while the Claimant was off sick, WG himself had an extended period of leave for *"unforeseen circumstances"*, problems in viewing the cctv and the Claimant seeking union representation.

27. WG put forward issues of use of personal mobile phone in clinical areas, lack of empathy to patients and colleagues, inadequate support of new midwives and colleagues under stress, not being clear enough about getting consent before instituting treatment, limited concern or remorse about complaints, and lack of insight.

28. There was a disciplinary hearing on 11 December 2019, taken by Shirley Peterson, Deputy Chief Nurse and Head of Midwifery. This considered 4 allegations:

*"**Allegation 1:** Your standards of professionalism in relation to your attitude and behaviour towards staff and colleagues repeatedly fell below that required of an employee of the Trust and an NMC registrant between Feb 2018 and June 2019. During this period four complaints from colleagues and six complaints from women were received.*

***Allegation 2:** Despite an informal programme of support and the issuing of a Standard Setting Letter in May 19 warning of disciplinary action should more complaints be received. A further complaint was received from a woman on 3rd June 2019 relating to care you provided to her on 2nd June 2019 whilst the woman was an antenatal inpatient on Turpin Ward.*

***Allegation 3:** That you met with an inpatient who had been witness to an incident that had resulted in a complaint being received by another patient on 3rd June 2019. Despite the inpatient stating that she didn't wish to be involved further with the incident you went to the ward to meet with her. This is an allegation of breach of trust and abuse of power in relation to apparent coercion of inpatient.*

***Allegation 4:** You provided inpatient with the details of a complaint received by another patient in the presence of the ward domestic."*

29. The Claimant did not accept all of the allegation about use of the mobile phone, but accepted that she had been using it in a clinical setting, though not the use of the words attributed to her. The Claimant gave varying accounts of why she was in the ward where Patient B was, and it was concluded that she had gone there specifically to discuss the allegation made against her by Patient A, having sought directions from her cousin (the ward domestic) as to where she was to be found. The cctv showed her showing a piece of paper to Patient A, and it was thought this was the complaint document, there being no reason for the Claimant to be showing Patient B any document at all. The Team Leader on that ward had spoken to Patient B soon afterwards, and Patient B had told him that she had seen the complaint, and there was no other way she could have done so had the Claimant not shown it to her soon before.

30. These were considered to be gross misconduct, and so the complaints before June 2019 were not considered, as they had been addressed informally, but they were relevant to sanction as the Claimant had not addressed the issues identified in those informal steps (and so by implication there was little hope that matters would improve).

31. The dismissal letter said that this was gross misconduct but that as there were no previous disciplinary matters notice pay would be paid. The Claimant had attempted to mislead the disciplinary process, and her accounts had been various, and this brought into question the integrity and honesty of the Claimant, so that overall it was so serious that the working relationship was irretrievably damaged and so dismissal was the outcome.

32. There was an appeal, on the basis that there were procedural failings, and in particular Patient B should have been asked to give a witness statement, and was not, that the evidence of the ward domestic was contradictory, and that the sanction was too harsh.

33. The appeal was on 30 January 2020, taken by Louise Egan, Deputy Chief Nurse. The appeal was dismissed. The issue of the absence of a witness statement from Patient B was not raised in the dismissal hearing, and it would have been inappropriate to ask her for a witness statement, as she was vulnerable, having just given birth prematurely, and in any event there were reports of oral statements made by her. There were 3 other witnesses whose accounts were credible. No good reason was advanced as to the way in which the ward domestic's account was said to be contradictory, and it was not the sole basis for dismissal: the cctv showed the Claimant going to Patient B's ward, speaking to Patient B and showing her a piece of paper. The Claimant had accepted that a final written warning was justified. It was accepted that the allegations did not individually appear to amount to gross misconduct, but her conduct taken in the round and lack of honesty in the disciplinary process resulted in a breakdown of trust and amounted to gross misconduct.

34. Against that background the dismissal was for gross misconduct and was substantively and procedurally fair. While the Claimant said there were *"fundamental failures"* these were not clearly identified, other than as in the appeal. Repeated inconsistency and dishonesty in the process contributed to the decision to dismiss. While the ward domestic was far from clear in the detail he was clear that the Claimant had sought out Patient B. The submission that others had in some way influenced the process was inchoate.

35. If there was any procedural failing, the application of *Polkey* meant that there should be no compensation, as dismissal was within the range of responses of the reasonable employer. Any residual liability should be extinguished by a finding that the conduct of the Claimant was the sole reason for her dismissal.

36. I do not add the submissions about gross misconduct and notice and wrongful dismissal. Whatever label the Respondent gives, there was pay for the notice period, and what is in issue is whether dismissal was fair or unfair (given the tests set out above) not whether it was for gross misconduct or not.

The Claimant's case

37. While her standards of professionalism in her use of the mobile phone and towards her colleague SR in relation to the Patient A complaint fell short of what was expected, the dismissal was unfair.

38. The Respondent took account of complaints between February 2018 and April 2019. This was not fair, as they were historical and were not considered to warrant any disciplinary action.

39. The Respondent relied, in part, on there being substantiated complaints about standard of work and attitude towards colleagues and members of the public. But there were no substantiated complaints, because they were not investigated.

40. The investigation report of WG was not impartial, as it reported as a fact that there were 8 such complaints, when (while there were such complaints) none were investigated in any depth or at all, so that it was unfair to rely on them at face value. They had been dealt with informally, and concluded, and could not later be resurrected as disciplinary matters.

41. It was not fair to rely on the ward domestic, LR, who at interview had said that he could not recall much, that only 2 days after the 07 June 2019. What he had said was not backed up by the cctv. Patient B was said to have told a midwife, CD, that she had seen a document, but the altercation between Patient B and CD was at 2:19pm and the cctv showed the Claimant showing Patient B a document at 2:28pm – so afterwards, not before, so it could not have been the cause of the altercation.

42. The dates of allegations made were not disputed. But the standards setting letter was not appropriate. The allegations leading to it were taken as proved when they were not. Further, it was not right to issue this about matters so long before which had not been properly examined – about 5 months, with no issue in between.

43. More, this was a hangover from an informal 2 month supervision period which had been satisfactorily concluded. It was not fair to carry that forward to be the justification for the standards setting letter.

44. While there were matters in June 2019 that might have led to disciplinary action, that was far away from being fair grounds for dismissal.

45. The *Burchell* test was not met this this case. The historical complaints were not serious as no action was taken. They were no more than background, as was now accepted by the Respondent, in Ms Egan's oral evidence. The *"standards setting"* letter was not issued properly: it was issued on 08 May 2018, and that was 5 months after the alleged incident on 02 January 2018. That was not within the Respondent's policy (bundle page 43). Because it was not properly issued, logically it was not possible for there to be action for breach of it.

46. For the 2nd allegation about Patient B none of the substance of it had been accepted as correct by the Claimant, so relying on her admissions about Patient A did not justify dismissal (and those admissions demonstrated insight).

47. As for using her mobile phone, everyone did that, and so even if it was not in compliance with the rules it was no reason to impose a disciplinary sanction.

48. So far as allegation 3 in the dismissal letter was concerned, when pressed for details SR had been unable to give details. In cross examination the Claimant had been convincing about this. There was no reason to think

Patient B had been coerced. LR's witness statement (at 355) was contradicted by the time line and was inconsistent.

49. The sanction was too severe, and to attempt to justify it the Respondent wholly unfairly added in an allegation that the Claimant had misled WG (who investigated) and the hearing. There was never alleged at the time, and there was no evidence of it, and it was not said in what way she was said to have done so, or how she was said to have been dishonest or to have lacked integrity in her accounts.

50. It was the Respondent who had without reasonable and proper cause conducted itself in a manner which was calculated or likely to destroy or seriously to damage the relationship of trust and confidence.

51. Procedurally the process was unfair. The Claimant should have been interviewed before being removed from clinical duties. A crucial witness, Patient B, had not been interviewed at all. She was relevant to 02 and 05 June 2019. She would have supported the Claimant's account: it was wrong to conclude that it was inappropriate to take a statement from her, and wrong to draw adverse inferences against the Claimant for seeing Patient B.

52. The investigation and disciplinary process was influenced in a way that was adverse to the Claimant by WG (who wrote the investigation report) and by CD (the midwife who reported that Patient B had said that she had seen Patient A's complaint and wanted nothing to do with it), SL (who suspended her) and RS, who should have got a statement from another midwife (Ms S) who was in charge of the ward where the Claimant had been working on 02 June 2019.

53. The Claimant had a conversation with Patient B, but that was not to do with Patient A, but because she knew Patient B was in hospital, and she knew LR, Patient B's cousin, so went to visit Patient B (because she was delivered of her baby prematurely). It was not her fault that many months later she had difficulty in recalling what paper she had shown Patient B, and that she had later had a thought as to what it might have been was far from showing that she was dishonest in any way.

54. The dismissal letter referred to substantiated complaints – which was wrong on two counts, first there were no substantiated complaints: there were unsubstantiated complaints, which was not the same thing at all, and it was wrong to take account of earlier informal matters long before that were not disciplinary at all.

55. In reality the disciplinary action was about two things. First the use of the mobile phone and what was said. While the words alleged were denied, although some inappropriate language was admitted, but not in reference to Patient A: but even if it were so, this would not be a dismissal matter. Secondly seeing Patient B: it was unfair to dismiss her when the evidence was so scant and contradictory. Again, even if both were believed to be so, dismissal for gross misconduct was outside the band of responses of the reasonable employer. That other things had been added was indicative of the fact that what was really in issue was not enough to dismiss.

56. The whole process was unfair – the Claimant was taken off clinical work without discussion, likewise suspended, there was a failure to gather the necessary evidence and there was prolonged delay in getting to a hearing. There had been prejudgment, the taking into account of matters that were not disciplinary, and which were in any event unsubstantiated.

57. The standards setting letter was 5 months from the date of the allegation on 02 January 2020, and was unfairly issued, and so was not capable of being breached.

58. The Claimant had not accepted any part of Patient A's complaint: in so far as the Claimant had used her phone at work, that was (even if in breach of the rules) a commonplace, and no-one else was disciplined for doing so.

59. Points 2-5 in Patient A's complaint were central to the attempt to justify dismissal, but the Claimant's admissions went no further than point 1, and the rest were demonstrably not reliable.

60. There were, when examined, no inconsistencies in the Claimant's account. In her oral evidence, when cross examined, the Claimant had explained that she was answering specific questions, not giving an overall account.

61. As to Patient B, the employer should only properly have concluded that the Claimant was not trying to coerce her and that all she did was reply to Patient B's enquiry, and only then discuss the complaint, following which Patient B freely and voluntarily sent the email to the Respondent. There was no evidence to suggest coercion, and this was only speculation.

62. The statement of LR was contradicted by the cctv. He had not been present at all. The cctv supported the Claimant's version of events: the altercation was before, not after the document was shown to B by the Claimant.

63. For allegation 4 the statements of SJC and SL were undated and unsigned and should have been given little weight. Nor did their statements marry with the notes from their colleagues, for example whether SJC spoke to Patient B on 07 June 2019 – page 230 contrasted with the account in appendix 22 to the investigator's report.

64. The decision-making process of Ms Peterson was flawed. It was not a reasonable conclusion that the document being shown to Patient B was Patient A's complaint. The cctv showed the Claimant tearing off a piece of the paper to write the email address on it, and the email was the next day. Allegation 4 was therefore unfounded.

65. All in all, the Claimant was guilty of only one part of allegation 2, and that guilt was limited to the admissions made to SR.

66. The dismissal was unfair, as too harsh on the facts and the evidence. It was unfair to suspend on 12 June 2019, 6 months before the dismissal: the case should not have gone to a disciplinary at all after the email from Patient B, and instead of 6 months suspended then dismissed the whole matter should have been closed after a few days.

Findings of fact

67. The chronology of the complaints about the Claimant, and what was done, and when, is not disputed. In the light of my decision I make no findings of fact about what the Claimant actually did, or did not do, in relation to the words overheard by Patient A, or what happened when the Claimant went to see Patient B. Nor do I make findings of fact about any other complaint, as there is no evidence on which I could do so. The Respondent made no findings of fact about them: indeed this is one of the complaints of the Claimant, that they were treated as substantiated when they were not.

68. The complaint made by Patient A was recorded by the Claimant's line manager, a midwife CD, who made a routine inspection of the ward, asking patients if all was well. The concerns were communicated in an email from her to SL (Deputy Head of Midwifery) on 03 June 2019:

    "1. LAR was using her mobile phone in the clinical area for personal use.

    2. LAR was talking about the client over the telephone stating that "her pussy stinks" and that her own" "pussy never stinks" and that she "is fresh."

    3. Client booked in at Royal Free but attended Homerton as she was nearby at the time. LAR told her that she should have gone back to Royal Free.

    4. Client stated that she was on fit to be discharged and LAR said that she would be forcing her to go home regardless as the bed is needed. Client then proceeded to attend A+E as she was still in a lot of pain. A+E contacted Turpin following a urine test which showed UTI. The client was then readmitted to Turpin ward.

    5. Client discussed concerns with LAR regarding her fear of discharge due to a history of DV. LAR stated that "you are not at risk as the case has been closed." The client found this very inappropriate and uncaring.

    6. She witnessed LA are being rude to another staff member –? SR. Client states that LAR waved her hand across her face and told her to shut up."

69. I find as a fact that the Respondent was concerned at the level of complaints from patients and colleagues. As the adage has it, perception is reality, at least for the person (patient or colleague) having the perception of the Claimant's actions. There is no reason to think (and the Claimant does not say) that any of them were malicious, or other than genuine concerns. It is not unreasonable for the Respondent to have taken action when a level of complaint was received.

70. To the extent that the Respondent's case sets out that history it is factual. The deductions made (for example what the document shown by the Claimant to Patient B was, or whether the Claimant was referring to Patient

A’s genitalia) are not adopted by me as findings of fact.

Conclusions

71. The chronology of the process is not satisfactory: the 2 month informal supervision period ended in late December 2018, and that concluded satisfactorily. The standards setting letter was not issued until 08 May 2019, after an incident on 02 January 2019 (and not until a further matter in April 2019). That is too long to be fair. The suspension from clinical duties was on 05 June 2019 but the dismissal was not until 17 December 2019, almost a year after the end of the informal supervision period and over 6 months from the removal from clinical duties on 05 June 2019 and suspension on 12 June 2019. There can be no excuse for such a prolonged delay.

72. The Respondent’s decision was delayed and, in that broadest sense, that procedure was not fair to the Claimant. The issue, though, is whether that made the dismissal unfair.

73. The terms of reference related back to February 2018, and it was not fair to ask, as an allegation to be investigated, to go back so far: the disciplinary investigation should have been restricted to the matters in June 2019, with the other matters as previous complaints relevant as background but not as separate allegations. These older matters were discussed with the Claimant and letters written to those complaining, and the Claimant offered support and training to deal with them (for example at 157). They are relevant to the decision about what to do about a serious later matter: whether that later matter is part of a pattern of behaviour or an isolated aberration is important.

74. The investigation report set out facts established. It is entirely sensible for an investigation report to set out facts that are not in dispute. It is not right for an investigation report to find facts about what is in dispute. It is the role of the investigator to collect the evidence, and to set out the alternative accounts and evidence in support of them. The investigator may then conclude that the evidence is such that there is a case to answer and recommend a disciplinary hearing.

75. What an investigator should not do is what was done here – make findings of fact about what happened where it is a matter of dispute. That is for the decision maker to decide. Investigation, decision and appeal are three separate matters, or should be. Here the investigator decided as a fact that the Claimant had breached confidentiality by sharing details of and discussing Patient A’s complaint with Patient B in the presence of the domestic (in fact the cctv showed that he was not with Patient B when the Claimant was talking to her). He also decided that there were breaches of the NMC Code and the hospital’s confidentiality and disciplinary policies. That was to overstep his remit and so there is force in Mr Idris’ submission that WG may have influenced the outcome.

76. The issue is clearly displayed in the conclusions section (473). WG found as a fact that the Claimant’s standards of professionalism repeatedly fell below required standards, and that she had breached the NMC Code of Conduct. The fact that there was a subsequent complaint was cited as the

reason for a finding of fact that the care of Patient A fell below standards. It concluded that on the balance of probabilities the Claimant went to the other ward to discuss Patient A's complaint with Patient B, and showed to Patient B Patient A's written complaint. These were findings of fact for the decision maker to make after considering the evidence and after a disciplinary hearing. It is wrong for the investigation report writer to tell that person what her findings must be. Otherwise there would no hearing on the merits, just to decide on sanction.

77. The report went even further, purporting to decide that this was gross misconduct. In a section headed *"Recommendations"* is stated that *"It is the conclusion of the investigation that the findings in relation to the allegations constitute (gross) misconduct in accordance with the Trusts Disciplinary Policy and Procedure in the areas below."* It goes on to state that there were substantiated complaints, when the only ones substantiated were the ones he had himself decided were substantiated, and the earlier ones had not been investigated in a disciplinary context.

78. The only indication that this is not a final determination is towards the end of the lengthy report is where it is said *"This conduct, if substantiated, also falls short of the Trust Values, of Personal, Safe, Responsible and Respectful."*

79. The decision makers disavowed reliance on earlier matters, but plainly they influenced them both. They were informal performance issues and not disciplinary matters, and so to that extent should be disregarded. However, there is a world of difference, when considering sanction for a later matter found proved, between a model midwife who has made an isolated error of judgment and someone with a track record of complaints from patients and colleagues. It was not unreasonable to bear in mind the back story of the Claimant.

80. Allegation 2 was proper to consider – there had been a further complaint after the Standards Setting letter of 09 May 2019. It does not mean that complaints before 09 May 2019 would be the subject of disciplinary action, and the dismissal letter does not do so. The reference in the dismissal letter to the Standards Setting letter is correctly limited to justifying disciplinary action for the 02 June 2019 allegation (which would have justified action in any event, as it was serious).

81. The dismissal letter then examines this allegation with some care. It records that the Claimant accepted that she had been on the telephone in a clinical area, and plainly within the earshot of Patient A (otherwise there would have been no complaint) and was (for no reason that she could account) probably discussing with her interlocutor that her *"fanny is fresh"* and so on, and was rude to another staff member by waving a hand in front of her and telling her to *"shut up"*. Note is taken by Ms Peterson that Patient A was not removed from the hospital back to another hospital as it had been alleged by Patient A had been threatened by the Claimant, and so that part of the complaint was not made out. On balance Ms Peterson decided that the discussion on the phone had been, as Patient A had complained, a matter of comparison of Patient A's genitalia with that of the Complainant.

82. It is not professional for a midwife in a professional context to use other than professional terminology about the female body. There is no reason to speak on a mobile phone to someone outside the organisation within a clinical context. There is no reason why the subject of the Claimant's own genitalia should have been a subject to be discussed on the phone when in a clinical setting with a patient. It is not an unreasonable conclusion for Ms Peterson to reach that the whole of Patient A's complaint was what happened – that saying *"My fanny doesn't stink or smell"* was said and was likely to be a reference to a comparison with Patient A's genitals. I make no finding of fact that this is what happened: I find only that it was reasonable of Ms Peterson so to conclude on the evidence before her.

83. The same process results in a finding that it was reasonable for Ms Peterson to conclude that the Claimant had gone to see Patient B expressly to show her Patient A's complaint. There was no particular reason for her to go and see Patient B. Patient B was in a different ward. The Claimant was not in a clinical role, having been removed from such duties on 05 June 2019. The Claimant was not a particular friend of LR, although well enough acquainted to know that he was Patient B's cousin. She did not know Patient B personally. She knew Patient B was a witness to what happened with Patient A. The cctv showed the Claimant showing Patient B a piece of paper. The Claimant could not account for what it was. There was no obvious reason for the Claimant to show Patient B a piece of paper. It was not a congratulations card. CD said that Patient B was agitated and said that she did not want anything to do with Patient A's complaint against the Claimant, and after the visit there was an email from Patient B which was supportive of the Claimant (appendix 32 to WG's report, (at 516) on 08 June 2019 at 17:44 from a Galaxy Smartphone – about A getting distressed but that she was not being required to leave the hospital, which was the other part of A's complaint).

84. With those matters in mind, it was not unreasonable for Ms Peterson to find that on the balance of probabilities that the Claimant had gone to see Patient B expressly about Patient A's complaint, that the complaint was the document being shown, and a request for support made, there being no obvious reason other than a request by the Claimant for Patient B to email RS, the Matron of the hospital, as she had. Whether Patient B's cousin LR was present or not is not really material to that conclusion. The timings on the cctv appear to have been out of synchronicity, but the facts as above are not in dispute: it is the conclusions that are important. Ms Peterson concluded that there was no other explanation for the reason that email from Patient B was written, and it is not an unreasonable conclusion for her to have reached. Patient B was, according to the cctv, agitated with CD before the Claimant visited her, but that did not explain to the decision makers what the Claimant was doing seeing Patient B, a witness and a patient, at all, or what she was showing her. The Claimant should not have gone to see Patient B at all, in the circumstances, at least not without seeking permission to do so, because of Patient B's connection to Patient A's complaint.

85. It was always clear to the Claimant that Patient B was a witness to what happened with Patient A, and might be asked for a statement. It was always going to be improper to go and see her, acquaintance or not. It is not that B and the Claimant were friends: she was the cousin of an acquaintance,

which is a tenuous connection at best. Ms Peterson was not unreasonable in doubting the stated reason for the Claimant's visit.

86. It was not appropriate to weigh in the scales a *"lack of integrity or dishonesty*" by the Claimant in the process. That was never an allegation put to her. Given her denial the Claimant was entitled, after so long a gap, to suggest what the document may have been, and she cannot be criticised for lack of honesty in her denial of what was said in the presence of Patient A only because her account was not accepted as correct.

87. It is, on the other hand, not unreasonable to consider the extent of remorse contrition and insight for matters admitted. There was little in evidence for the decision makers of that.

88. Ms Egan's appeal dealt with the matters raised by the Claimant, rather than review the whole decision. There are a number of issues about the appeal, the notes of it are not available, the reason being that the person who took them left the Respondent and they cannot be found. That is not an acceptable way to deal with matters. The Claimant should have been supplied with copies, and the originals put on the hr file, Ms Egan formed the view from the file that Ms Peterson's concerns about credibility and integrity were well founded. It was never an allegation that the Claimant lacked integrity or honesty, and that should not have been a consideration, as it was for Ms Egan as for Ms Peterson.

89. The Complainant is correct in saying that there were no findings of fact about the complaints adverse to her. She says that for that reason they must be disregarded. She says also that to go round and invite complaints from patients is simply unfair. I accept that it is a matter of routine for senior staff to ask patients about their experiences. That is a *"quality control"* process that is good practice, so as to be able to express appreciation for good practice and care, and gain early warning of possible problems. Especially given the well publicised issues with some maternity wards, and because of the vulnerability of the baby being born and when newborn this is far from seeking out complaints about staff, but the pursuit of high standards. Patients in maternity wards are, by and large, hugely grateful for the professionalism of the care they receive, not given to unmeritorious complaint. With perhaps a few exceptions it is no more than common sense to observe that if there is a series of unrelated complaints about a particular midwife there is a problem to be resolved. There does not need to be a finding of fact about each one for this to be a disciplinary issue. Nor would it be appropriate, at least in lower level complaints, to seek to obtain witness statements from complainants (though the more serious the complaint the more likely it will need to be reduced to writing and signed off by the complainant). Especially as Patient B had made it entirely clear to CD that she did not wish to be involved further the decision not to approach her further is entirely understandable.

90. The Complainant may well be right about the cctv timings: but there was no reason for CD to make up her account (that she had been told by Patient B in no uncertain terms that she had seen Patient A's complaint and wanted nothing to do with it). It was also clear that the Claimant had shown Patient B a document (which she has always accepted). There was no reason for

the Claimant to show Patient B any sort of document when the purpose of the visit was said to be to congratulate Patient B on the birth of her baby. It was not unreasonable for the Respondent to believe that Patient B stated to CD that she had seen the complaint of Patient A and wanted nothing to do with it, was because the Claimant had shown it to her. There was no reason for the Respondent to think that anyone else could have done so.

91. The outcome letter (of dismissal) dated 16 December 2019 (566-574) does demonstrate some independence of mind: allegation 1 was disregarded as the earlier matters were dealt with by informal action and it was not right to take disciplinary action about them later. That was correct. That does not mean that they are irrelevant: they are part of the Claimant's employment history, and the backdrop to subsequent allegations. That was a relevant consideration in relation to sanction.

92. The reason given for the dismissal was the genuine reason. That was conduct, which is a potentially fair reason. No other reason is suggested, and I find that conduct was the reason for the dismissal.

93. The procedure involved interviewing almost everyone relevant and the decision makers were appropriate. It would have been sensible to interview the midwife in charge of the ward on 02 June 2019, but the Claimant has not said what it is that this midwife could have said in her support. It was reasonable not to ask Patient B to give a witness statement, and at the appeal the Claimant did not say that this should have been done.

94. The Claimant does not agree with the Respondent's view about the complaints relating to June 2019, but it was not unreasonable for the decision makers to have formed those views, as they did so after full investigation. While that report was wrong to make findings of fact, the decision makers were not slavishly following that report. The prior history of complaint about the Claimant is not in dispute. The decision makers should not have considered that lack of integrity had a place in their decisions, and that seems unfairly to have elevated this into a gross misconduct dismissal.

95. However, after giving full weight to the matters I did not find were dealt with adequately (identified above) the matters admitted, and others which they genuinely thought after proper investigation had occurred, against the backdrop of a series of complaints over an extended period (and with admissions which the Claimant herself accepted warranted a final written warning) are such that dismissal is not outside the range of responses of the reasonable employer.

96. To summarise that conclusion, Ms Peterson and Ms Egan reasonably thought that the Patient A's complaint was likely to be true and that after than the Claimant had thought to bolster her defence by seeking out another patient and asking her to help her, that the matters the first patient alleged were highly unprofessional, and to contact another patient to ask for intercession on her behalf was also highly unprofessional. Against the backdrop of a substantial number of complaints over the last 2 years it was not unreasonable for the Claimant to be dismissed. The faults I find with the process do not vitiate that analysis of the underlying facts, as genuinely perceived by the decision makers, with good reasons to come to those

conclusions.

97. For the avoidance of doubt, that means that if those faults were such that the dismissal was unfair, the *Polkey* reduction would be 100%

98. It follows that the claim must be dismissed (and that had it succeeded there would have been no award).

Employment Judge Housego
Date: 07 December 2020