



EMPLOYMENT TRIBUNALS

Claimant: Bibi Caunhye

Respondent: The Hillingdon Hospital NHS Foundation Trust

Heard at: Watford Employment Tribunal (Via CVP) **On: Monday, 26th and Tuesday, 27th April 2020**

Before: Employment Judge Mr. M. Salter

Representation:
Claimant: In person.
Respondent: Mr. S. Sudra, counsel.

JUDGMENT

It is the judgment of the tribunal that:

1. the Claimant's claim that she was unfairly dismissed is well-founded and accordingly succeeds;
2. absent the errors in the process it was 75% likely the Claimant would have been fairly dismissed, accordingly her Compensatory Award will be reduced by that amount; and
3. the Claimant caused or contributed to her dismissal entirely and so her Basic Award and Compensatory Award shall be reduced by 100%.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons given orally at the final hearing that took place 26th and 27th April 2021. In accordance with Rule 62(3) of Schedule 1 of the

Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (“the 2013 Regulations”) written reasons will not be provided unless they are asked for by any party at the hearing or by a written request presented within 14 days of the sending of the written record of the decision. If no such request is made, then the tribunal will only provide written reasons if requested to do so by the Employment Appeal Tribunal or a court.

2. If a request is made then the written record of the reasons may use more formal language than I use here, however the substance of the decision will remain the same.
3. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal’s Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.
4. These reasons have been prepared at the request of the Claimant.

BACKGROUND

The Claimant’s case as formulated in her ET1

5. The Claimant’s complaint, as formulated in her Form ET1, presented to the tribunal on 6th February 2020, is in short, she was unfairly dismissed.

The Respondent’s Response

6. In its Form ET3, received by the tribunal 25th March 2020, the Respondent denied that that dismissal was unfair, contending it was for a potentially fair reason, namely a reason related to the Claimant’s conduct, and that the dismissal occurred after a reasonable investigation and was within the band of reasonable responses open to it.

Relevant Procedural History

7. The matter was subject of automatic directions and listed for a two day Final Hearing before an Employment Judge sitting alone to include deliberation and consideration of remedy. Parties were given time to notify the tribunal if this period was not sufficient [40].

THE FINAL HEARING

General

8. The matter came before me. The Claimant represented herself. The Respondents were represented by Mr. S. Sudra of counsel.

List of Issues

9. The parties had not been able to produce an agreed list of issues between themselves and so time was taken at the outset of the first day to identify what the issues were in the claim.
10. During those discussions the Claimant confirmed her claim was one of unfair dismissal only and did not contain claims under the Equality Act 2010, Human Rights Act 1998, Health and Safety at Work Act 1974 or those various other Acts and Regulations set out in her list of issues.
11. Paragraph 1-10 of the Respondent's draft list of issues was, therefore adopted.

1. *What was the reason or principal reason for the Claimant's dismissal and is it a potentially fair reason within section 98(1)(b)&(2) of the Employment Rights Act 1996?*

The Respondent asserts that the Claimant was dismissed for a fair reason (namely conduct).

2. *Did the Respondent have a genuine belief in a set of facts amounting to misconduct?*
3. *Was this belief based on reasonable grounds?*
4. *Did the Respondent carry out a reasonable investigation?*
5. *Was the dismissal procedurally fair within the meaning of s98(4) of the Employment Rights Act 1996?*
6. *Did the dismissal fall within the range of reasonable responses?*

7. *Did the Claimant unreasonably fail to follow the statutory ACAS Code of Practice on Disciplinary and Grievance Procedures in failing to attend disciplinary meetings?*
8. *Was the dismissal fair in all the circumstances (including the size and administrative resources of the employer's undertaking) and did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee?*
9. *If the dismissal is found to be unfair, would the Claimant have been dismissed in any event had there been no unfairness (Polkey)?*
10. *If the dismissal is found to be unfair, did the Claimant contribute to their dismissal by their own blameworthy conduct? If so, to what extent?*

Particular Points that were Discussed

Timetabling

12. We discussed the timetable for the hearing. The parties confirmed that they were optimistic that evidence would be finished within the day.
 - (a) the Claimant said she had 20 minutes cross-examination for all the Respondent's witnesses apart from Ms Stanfield who she estimated she had 10-15 minutes.
 - (b) Mr. Sudra estimated around an hour-and-a-half for his cross-examination of the Claimant.
13. This would enable evidence and submissions to be completed within the first day of the listing giving me time to consider my decision, give judgment and then conduct a remedies hearing (if necessary) on day two. As it was, evidence finished after 4:30 on day one.

Litigant in person

14. As the Claimant was representing herself I took time to explain to her:
 - (a) the purpose and approach to cross examination;
 - (b) the requirement to put her case to every witness, or I will consider she accepts the point left unchallenged;
 - (c) that she would get an opportunity at the end of the hearing to make submissions, if she wanted to, to tell me why she should win her claim; and
 - (d) that, whilst it was my function to ensure she was not unfairly disadvantaged when representing herself, I could not, and would not, conduct her case for her and so would not cross-examine the witnesses on her behalf.

DOCUMENTS AND EVIDENCE

Witness Evidence

15. I heard evidence from the Claimant on her own behalf. I also heard evidence from the following witnesses on behalf of the Respondent:

- (a) Janet Lynam, the Respondent's Head Nurse for Primary Care, who took the initial decision concerning the Claimant's restriction of duties;
 - (b) Suet Mei Yoon, the Respondent's Neonatal Nurse Manager, who conducted the investigation;
 - (c) Anita Hutchins, who was, at the relevant time the Respondent's Director of Midwifery and Lead Nurse, and who conducted the Disciplinary Hearing;
 - (d) Rachel Stanfield, who at the relevant time was the Respondent's Deputy Director of People and Organisational Development, and who considered the Claimant's appeal did not comply with the Respondent's policies; and
 - (e) Zoe McDowall, the Respondent's Services Manager for Theatres and Anaesthetics, who was the Claimant's line manager and who's statement addresses issues of remedy only.
16. The statements for both parties totalled some 49 pages. All witnesses gave evidence by way of written witness statements that were read by the me in advance of them giving oral evidence. All witnesses were cross-examined.
17. Startlingly, the statement of Ms McDowall only addressed mitigation of loss, and not a key dispute of fact in this matter: whether she had given the Claimant permission to take the drugs in questions. Mr Sudra requested permission to ask supplemental questions on this issue and the Claimant did not oppose this.

Bundle

18. To assist me in determining the matter I have before me today an agreed bundle consisting of some 800 pages prepared by the Respondent.
19. I pause here to comment on the size of the bundle for a case of this type. As is depressingly frequent I was referred to only a small number of documents and pages in this tome, a file that contained documents going as far back as 1989; contained over 400 pages of policies when my attention was taken to roughly 20 pages of these, and where there were references these were often to one or two paragraphs of a multi-page document, yet the entire document had been included in the bundle.
20. Time and resources of the parties and tribunals are wasted by such an approach to the bundle and it is wholly unrealistic of the parties to expect the tribunal to read these documents within the time scale the parties had agreed for the case.

21. My attention was taken to a number of these documents as part of me hearing evidence and, as discussed with the parties at the outset of the hearing I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

SUBMISSIONS

22. Submissions commenced at 1014. The Respondent closed its case until 1032, the Claimant made her submissions until 1040.

Respondent

23. I required the Respondent to make their submissions first as, despite bearing the burden of proof, I thought it would be of assistance to the Claimant to see an experienced advocate make submissions and the structure that was adopted.

24. Mr. Sudra's submissions referred me to the guidelines authorities in this area and summarised the findings he said I should make. In summary form, and I mean no disrespect for addressing them in this way:

- (a) the Claimant was not authorised to take the drugs off the premises and accepted this;
- (b) the Claimant was in breach of her obligations under the NMC Code;
- (c) the investigation was thorough, scrupulous and full;
- (d) there was material from which the Respondent could conclude the Claimant had committed an act of gross misconduct.

Claimant

25. The Claimant made brief oral submissions which I have considered with care but do not rehearse here in full. In essence, her submissions repeated her evidence in the hearing.

MATERIAL FACTS

General Points

26. From the evidence and submissions, I made the following findings of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by the witnesses in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their

accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.

27. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

The Claimant and Respondent

28. Is an NHS Trust in West London. The Claimant was employed by it in various nursing roles from 1990 to her summary dismissal on 4th October 2021 [6]
29. At the time of her dismissal her line manager was Zoe McDowall, Theatre Services Manager. Ms. McDowall is not able to prescribe drugs.
30. The Claimant had a career break, returned in April 2019. She and Ms. McDowall verbally agreed that instead of returning to her role as Theatre Recovery Manager, she would undertake office-based duties as a Care Quality Commission compliance officer developing Standard Operating Procedures and updating guidelines [454]. There is some dispute as to this role, but I do not consider it necessary to make any findings on this issue.
31. The Claimant accepts she was subject to the Nursing and Midwifery Council Professional Standards of practice and behaviour for nurses, midwives and nursing associates [59], where at 18.5 it is stated:

Wherever possible, avoid prescribing for yourself or for anyone with whom you have a close personal relationship.

[74]

11th June 2019

32. The Claimant needed to take unexpected leave part-way through the working day due to some news she received about her brother. She was understandably distressed and anxious to attend to her brother who had an operation.

33. The Claimant accepts she took some Codeine Phosphate from the Respondent's drug cupboard in Theatre Recovery before she left. Codeine Phosphate is a drug that can only be administered by prescription. The Claimant was unable to prescribe drugs and was aware that the NMC Code advises against self-prescription (above).
34. The Claimant contends she took this drug because of a headache and that Ms. McDowall authorised this. Ms McDowall denies she authorised the removal of the drugs and says she does not have authority to prescribe drugs for herself or others.
35. There is, therefore, a straight dispute of fact as to what occurred at this time. The Claimant says she raised this at the meeting she had (see below) however those others at the meeting deny this and there are no contemporaneous notes or minutes from this meeting. Doing as best I can with this lack of evidence I find that that the Claimant has not satisfied me that Ms McDowall did, in fact authorise, the Claimant to take the drugs off the premises; she was distressed by her brother's situation and accepted herself in evidence was "not thinking straight".
36. From this date the Claimant was off work on a short period of ill-health absence and then three weeks book leave from 14th June during which she was abroad.
37. Later on the 11th June, during a routine stock check, Trudy Grover, a Pharmacy Assistant, noticed tablets of Codeine Phosphate were missing from the drug cupboard in Theatre Recovery. Owing to the categorization of Codeine as a C5 drug it does not need to be checked every day. Ms. Grover conducted the check on Monday, 10th June 2019 and again on Wednesday, 12th June 2019 when she discovered the tablets there on the 10th were not present on the 12th and this amount of usage over this period was unusual.

12th June 2019

38. Ms. Grover reported the above finding to Ms. Mumani and Wilson Del Carmen. Mr. Del Carmen then raised the issue during a Theatre Sisters' meeting but no one could account for the missing tablets [473 §6].

13th June 2019

39. Ms. Mumani asked to meet with Ms. McDowall to discuss the incident [479]. However, Ms. McDowall was only able to meet up with her on her return from annual leave [477-478].

40. Ms. D'Souza, a work colleague of the Claimant, called Ms. Caunhye to see if she was coming in for the rest of the week [480]. During this telephone conversation, Ms. D'Souza mentioned that a concern had been raised during the Sisters' meeting about missing medication. The Claimant stated she had taken some codeine tablets. After the call, Ms. D'Souza reported this conversation to Ms. McDowall.

14th June 2019

41. The Claimant returned to work briefly to undertake a handover. She then flew from London Heathrow to Mauritius at 1700 and returning on 7th July 2019 at 0730 [475, 476]. She returned to work on the 9th July 2019 and remained there.

10th July 2019

42. It was not until this date that Ms. Mumani raised the Datix Report about missing medication [pp. 482-492]. On 484 under the heading "Incident Details" it states:

"On 12/19 28 Theatre Recover was supplied with 28 tablets of Codeine Phosphate as there were only 8 tablets in the box in Recovery. On 17th June the full box (28 tablets) of codeine phosphate was missing. This was replaced. At the next top-up visit on 19th June, the 8 tablets had gone. These was also approx. 100ml of codeine linctus 15mg/5ml in the cupboard which was also gone and which was replaced. This represents an unusually high use of codeine phosphate in a short period of time based on the historical use."

11th July 2019

43. The Claimant closed that DATIX report on 11th July 2019 at 09:13:33 [657]. This is before she was aware of any investigation into the drugs being taken by her on 11th June.

44. Later that day Janet Lynam (Assistant Director of Nursing) and Ms McDowall met with the Claimant. The Claimant did not receive any notification of the meeting. In this meeting the missing drugs were raised and the Claimant, in this meeting, admitted taking the drugs. The Claimant says Ms, McDowall

accepted she gave the claimant permission to remove the drugs. Both Ms McDowall and Ms. Lynam deny this was said by Ms McDowall.

45. The Claimant states she told Ms. Lyman that she had permission to take the drugs. Ms. Lynam does not recall this. Unfortunately, there are no notes of that discussion, so I have had to do the best I can with the recollections of the people present. I am not satisfied on the balance of probabilities, that the Claimant did say that Ms. McDowall admitted giving the Claimant permission to take the drugs, the Respondents' witnesses were clear, and this would be consistent with the fact that Ms. McDowall did not, I have found, authorise the Claimant to take the drugs in June.
46. Ms. Caunhye was advised that an investigation into the incident was to be undertaken in accordance with the Disciplinary Policy and that she was to be placed on restricted duties on full pay with immediate effect [504-507]. The restrictions were for her to work in outpatient/admissions and to not have access to controlled drugs.
47. The Claimant undertook these restricted duties and I am not told there were any issues or concerns about her behaviour or conduct during this period.

12th July 2019

48. It is uncontroversial that the tablets were returned, and the Claimant told me she returned the tablets on this day.

The Investigation

49. In late July Suet Mei Yoon was appointed to conduct the investigation [503].

5th August 2019

50. The case manager was then changed from Ms. Lynam to Ms. Hutchins. On 5 August 2019, that is three weeks after being placed on restricted duties, Ms. Hutchins wrote to Ms. Caunhye and advised that she had reviewed the allegations regarding the missing drugs and that due to the nature of the allegations she was to be excluded from duty on full pay with immediate effect [518-519]. This is despite there being no change of circumstances from the original decision to restrict the Claimant's duties. In evidence Ms. Hutchins sought to justify this on the basis that the Claimant had closed the DATIX report. However, this was known to the Respondent prior to the meeting with the Claimant on the 11th July.

51. Ms. Hutchins was later to approve the matter proceed to a disciplinary hearing and to hear the disciplinary hearing. In evidence she described this to me as “deciding” if the matter went to a hearing.

8th August 2019

52. On 8th August 2019 Ms. Mei Yoon interviewed Ms. McDowall [529], Wilson del Carmen [532], Ms. D’Souza [526], Ms. Muami [536] in the presence of Paula Tanner.

Investigation Meeting

53. On the 9th August The Claimant was invited to an investigation meeting [538] and on the 12, 19, 27, 28, 30 August and 2 September 2019, Ms. Yoon interviewed Ms Grover [pp. 541-543], Dr Hwaish [pp. 545-546], Dr Mansoubi [pp. 547-549], Ana Mendoza (Staff Nurse, Band 6) [pp. 558-559], Nehemiah Mogato (Staff Nurse, Band 6) [pp. 560-561] and Ivan Dona (Staff Nurse, Band 6) [pp. 564-565], respectively.

54. The Claimant attended a meeting with Ms. Mei Yoon on 21st August 2019 [550].

55. On 27 and 30 August and 2 September 2019, Ms. Yoon held second interviews with Ms McDowall [pp. 556-557], Mr Del Carmen [562-563], Ms D’Souza [pp. 566-567] and Ms Grover [p. 568], respectively, as there was some information which had not been clear the first time and some follow-up questions.

Investigation Report.

56. In her report Ms. Mei Yoon report concluded there was a case to answer. Ms. Hutchins approved this and set the matter down for a disciplinary hearing (Hutchins WS12).

Disciplinary Hearing

57. Ms Hutchins wrote to the Claimant on 27th September 2019 inviting her to a disciplinary hearing. [601]. The letter, which is clearly a precedent letter does not contain the specifics of the allegations the Claimant faces, but does attach the investigation report that identifies the allegations as:

Allegation 1

Bibi has admitted to removing oral medication from the ward stock in the

Recovery Unit at Hillingdon Theatres. The missing medication was first noticed by Trudy Grover, Pharmacy Assistant and the incident was reported via DATIX, ref W89568.

Allegation 2

Bibi has breached her professional code of conduct.

Allegation 3

Bibi reviewed and closed DATIX W89568.

58. The disciplinary hearing took place on 4th October 2019. The Claimant attended with a friend.
59. There are, again, no minutes of this meeting.
60. Ms. Hutchins said that in reaching her conclusion that the Claimant had committed gross misconduct and that dismissal was appropriate, she considered the following factors:
 - (a) the Claimant's changing accounts of the approval she says she received from Ms. McDowall which did not appear in earlier conversations;
 - (b) Whatever the reason for taking the drugs it was a contravention of the trust's policies for the Claimant to prescribe drugs for herself or another;
 - (c) The Claimant closed the DATIX report, which Ms. Hutchins concluded was the Claimant deliberately trying to hide her involvement in the theft of the medication
 - (d) The claimant's account changed during the various meetings from taking the drugs for her headache, to taking them for her brother, and then taking the tablets for use on way to hospital;

Ms. Hutchin's Evidence to the tribunal.

61. Ms. Hutchins was questioned on the following matters:
 - (a) She was challenged as to her motives for conducting the hearing the way she did;
 - (b) She did not agree that the DATIX report was unclear;
 - (c) She said that the reason for dismissal was as set out in her witnesses statement, and that reasoning was missing from this document but was set out in her statement
62. The Claimant did not put that she was part of a conspiracy to remove the Claimant from her role but seemed at times to be implying this, I sought clarification of this from the claimant and she confirmed she was not arguing this.

63. After the hearing the Claimant received the outcome which advised her that her employment was terminated with immediate effect

Appeal.

64. The Claimant appealed her dismissal on 31st October 2019 in an overlapping appeal and grievance [636]. The time limit for this had been extended as the Claimant's instructed solicitor was on leave.

65. Ms Rachel Stansfield, considered the Claimant's appeal but could not determine which of the grounds in the Disciplinary Policy this document fell under. The purpose of the Respondent's appeal process is to review the decision to dismiss and not to re-hear the matter and the Policy states:

All appeals must be made in writing within 10 working days of receiving written notification of the disciplinary sanction, stating the grounds for the appeal, which must be on the grounds of one or a combination of the following:

- a. *The severity of the action given the circumstances of the case.*
- b. *A failure to adhere to agreed procedure where this would have had a detrimental effect on any outcome.*
- c. *The finding of the disciplinary hearing on a point of fact.*
- d. *New evidence*
- e. *Failure to consider mitigating evidence In the original hearing.*

66. The Claimant was written to and this was explained [652],. The Claimant did not respond. The Claimant said she did not receive the reply, and points out that the email address on the email of 28th November 2019 has the addressee line of "bibi caunhye" rather than an email address. However the email is its self a response, to an email from the Claimant dated 1st November 2019 [653] which is identified as "Bibi Caunhye" and then [\[mailto:caunhye04@yahoo.co.uk\]](mailto:caunhye04@yahoo.co.uk).

67. This is the same email address as is contained within the Claimant's ET1 [3]. I find as a fact that it was sent to the claimant, indeed the claimant accepted she had received an earlier email to the Claimant on [621] that was sent to her and shows the email address as being "bibi caunhye", further she accepts she received the email from Mr Handley received [652] where the email address displays as "bibi caunhye".

68. So by 6th January 2020 the Claimant had received the email but the claimant did not resubmit the appeal.

THE LAW

Statute

69. So far as is relevant the Employment Rights Act 1996 states:

98 General

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it—
- ...
- (b) relates to the conduct of the employee
- (4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.

Authorities and Texts

70. I reminded myself of s.98 of the Employment Rights Act and that when hearing a case of unfair dismissal, a Tribunal's powers are limited, specifically that I am not permitted to substitute my judgment for that of the employer. Rather, it is for me to say whether both the decision to dismiss (Iceland Frozen Foods -v- Jones [1983] ICR 17 EAT) and the way in which the investigation was conducted (J Sainsbury Pic -v- Hitt [2003] ICR 111 CA) fell within the range of responses of the reasonable employer, in the circumstances in which the Respondent found itself. If the dismissal or the conduct of the investigation falls within the range, it is fair, if outside, then it is unfair. In a misconduct case such as this, I am guided by the case of British Home Stores -v- Burchell [1980] ICR 303 EAT which sets out the well-known three-fold test, where the Tribunal must be satisfied that the employer held a genuine belief in the employee's guilt; that it had carried out a reasonable enquiry and that in consequence of that enquiry, it had reasonable grounds for holding that belief. The burden of proving fairness in this respect is neutral.

71. The Respondent referred me to *Hitt and Burchell*, above matters as well as *Post Office v Foley and HSBC v Madden* [2000] ICR 1283.

CONCLUSIONS ON THE ISSUES

General

72. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

Findings on the Issues

Did the Respondent have a genuine belief in misconduct?

73. I have decided that the Respondent did have a genuine belief in the guilt of the Claimant. My reasons are as follows the claimant accepted she took the codeine out of the cupboard and that this was not authorised by Ms. McDowall (Allegation 1). I also consider the Respondent had a genuine belief that the Claimant had breached her Code of Practice by self-prescribing (Allegation 2)

74. I was more troubled about genuine belief of guilt in relation to the closure of the DATIX report. On balance I consider that, just, the Respondent did genuinely believe the Claimant had shut this report, however I have concerns over the reasonableness of this and its impact on the decision to dismiss her (Allegation 3).

Was this belief based on reasonable grounds?

75. Again I consider the Respondent did have reasonable grounds to believe the Claimant's guilt in relation to the taking of the codeine and the code of practice.

76. I am troubled however about the reasonable grounds for this as it relates to the DATIX report. The DATIX report focusses on the supply of Codeine on the 12th June 2019 and its subsequent removal by the 17th June 2019. Clearly the claimant could not have taken these as she was off work for 12th to 14th June, retuning briefly on 14th June to handover, and then was on pre-arranged leave in Mauritius from the 14th June.

77. Ms Hutchins stated that her interpretation of the DATIX report was that it related to the 10th June supply. I do not consider that this was a reasonable

interpretation to take bearing in mind the clear terms of the DATIX report itself.

Did the Respondent conduct a reasonable investigation?

78. I find that a fair procedure was followed in the circumstances which complied with both the requirements of the ACAS Code and the general requirements of fairness. The Claimant was called to an investigation, she had a disciplinary meeting, was informed of her right to be accompanied. The Respondent invited the Claimant in writing to meetings at every stage of the process, afforded her the right to be accompanied, provided her with copies of the evidence, and afforded her every opportunity to explain her position.

79. I consider that the investigation was thorough and, indeed, no real challenge was made of Ms Yoon as to the adequacy of her investigation and nothing was highlighted that Ms Yoon had ignored or failed to enquire about.

80. I am troubled however by Ms Hutchins involvement throughout the process. she:

- (a) appointed an investigator;
- (b) changed the restriction on the claimant's duties to one of total exclusion from the Trust;
- (c) approved the referral of the investigation to a disciplinary hearing and then; and
- (d) conducted the disciplinary hearing itself.

For a Respondent with large (albeit stretched) resources and a dedicated HR function I consider the approval of the investigation report being conducted by the same manager who hears the hearing as one that falls outside the band of reasonable responses.

81. The flaw in this process is that the Claimant is going into the hearing before a manager who had reversed a decision to restrict her duties and suspend her from work and having reviewed the investigation report decides a disciplinary hearing should be convened.

82. Further, the interpretation of the DATIX report by Ms Hutchins is another ground of concern. The report is clear in its terms there was a shortfall in drugs between 12th and 17th June when the Claimant was not at work and then out of the country. I consider that it is reasonable for the Claimant to

have been unaware of the incident when reviewing the DATIX report and that it referred to drugs being taken before the dates contained in the report itself. To conclude, as Ms Hutchins did, that the claimant did this to hide her removal of the drugs is, I consider on the evidence I have, unreasonable.

Was the Dismissal procedurally fair within the meaning of s98(4) of the ERA?

83. Was the dismissal fair in all the circumstances of the case including the size and administrative resources of the Respondent. I consider that this includes assessment of whether there was compliance with the ACAS Code of Practice

84. The Respondent did comply with the minimal requirements of the code of Practice: the Claimant was aware of the allegations, had the material on which the Respondent relied was called to a meeting and was offered an appeal

85. For what it is worth I consider the Claimant did not comply with the Code of Practice in that she did not progress her appeal.

Did dismissal fall within the band of reasonable responses

86. I am mindful of the fact that I am judging the decision to dismiss according to the range of reasonable responses of a reasonable employer, and I should not substitute my judgment for that of the employer on this point. The decision to dismiss in these circumstances may seem harsh. However, taking all of the above factors into account, and bearing in mind the high standards required for drug retention, which the claimant accepted in evidence, I do not find that the decision to dismiss falls outside the range of reasonable responses in all the circumstances for an employer in these circumstances.

If the dismissal is found to be unfair, would the Claimant have been dismissed in any event had there been no unfairness (Polkey)?

87. In light of the above I consider that the dismissal was procedurally unfair.

88. I therefore move onto consider what would have occurred had the unfairness been removed: if separate managers were used in the process and if the DATIX allegation was dismissed.

89. I am satisfied that the Respondent could have fairly dismissed the Claimant in the circumstances of the removal of the drugs from the store. This is an act

of gross misconduct and would put the Claimant in breach of the NMC Code of Practice, thus allegation 1 and 2 would be made out.

90. Turning then to whether the Respondent would have dismissed the Claimant in these circumstances. Whilst the Respondent did not provide any evidence of previous incidence of drugs being removed from the Trust and the outcome of any resultant disciplinary proceedings, I consider that there is sufficient material in the documents before me to consider that this outcome is highly likely as the Respondent's policies and the Code of Conduct is clear as the prohibition on drug removal. Further, the Claimant was well aware of this and she did not have any authority to take these drugs. Had the employer conducted this particular disciplinary process fairly (that is absent the above errors) I consider that there was a 75% chance the Claimant would have been dismissed.

91. I find that it would be just and equitable to reduce the Claimant's compensatory award by 75% to reflect the probability of dismissal.

If the dismissal is found to be unfair, did the Claimant contribute to their dismissal by their own blameworthy conduct? If so, to what extent?

92. Further I consider that the Claimant, by taking the drugs, caused or contributed to her dismissal. I consider that even absent the DATIX allegation and the procedural errors above, the Claimant's conduct was such that the Respondent could have subjected her to a disciplinary process.

93. The Claimant has, therefore engaged in culpable or blameworthy conduct that entirely caused or contributed to her dismissal. There was no other reason for the claimant's dismissal other than her taking the medicine and, accordingly, breaching her NMC Code of Conduct. This is incredibly serious and an action the Claimant knew was serious. The Claimant was not victim of a conspiracy to remove her from her role.

94. In these circumstances, and bearing in mind the finding I made on *Polkey*, I consider that it is just and equitable to make a further reduction for contributory fault. This deduction is to be applied to both the Basic Award and the Compensatory Award.

95. I consider that the reduction here should be 100%.

Conclusions on the Complaints of Unfair Dismissal

96. It is therefore my determination that the Claimant was unfairly dismissed owing to the procedure adopted by the Respondent. I consider however that it would not be just and equitable for her to receive any financial compensation as a result of this. However I do make a declaration of unfair dismissal.

Employment Judge Salter

Tuesday, 8th June 2021

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.