EMPLOYMENT TRIBUNALS

Claimant: Ms S Sanderson

Respondent: NHS Blood and Transplant

Heard at: **Watford (by CVP)** **On:** **21, 22, 23, 24 & 25 June 2021**

Before: **Employment Judge Reindorf (sitting alone)**

Representation:

Claimant: In person
Respondent: Mr P Loftus (solicitor)

JUDGMENT

The claim for unfair dismissal fails and is dismissed.

RESERVED REASONS

INTRODUCTION

1. In an ET1 presented on 17 May 2019 the claimant brought a claim of unfair dismissal. She had been employed by the respondent as a Senior Sister from 31 March 2014 until her dismissal on grounds of serious misconduct which took effect on 24 December 2017.

2. The respondent defends the claim. It says that the claimant was dismissed for serious misconduct after a fair investigation and was given a fair appeal. The claimant had a live final written warning for similar misconduct, which the respondent took into account when deciding on the appropriate sanction.

THE EVIDENCE AND HEARING

3. The hearing took place over five days by video (CVP).

4. For the respondent I heard evidence from Mr Darren Bowen (Head of Strategy for Blood Supply), Ms Liz Armstrong (Head of Transplant Development), Mr Dean Neill (Assistant Director for Planning, Performance and Stock) and Mr Shane White (Deputy People Director). The claimant gave evidence on her own behalf. All witnesses produced written witness statements and were subjected to cross-examination. There was a trial bundle consisting of 857 pages. I had regard to those pages to which I was referred.

5. I heard closing submissions on the morning of the fifth day of the hearing. I gave judgment with brief reasons at 4pm but there was insufficient time to give full oral reasons.

THE ISSUES

6. The issues in the case were set out in the Case Management Summary made at the Preliminary Hearing on 12 November 2018. I changed Issue 11(v)(b) from “Did the claimant commit an act of gross misconduct?” to “Did the respondent reasonably conclude that the claimant had committed serious misconduct?”.

APPLICATION FOR THE PRODUCTION OF DOCUMENTS

7. The claimant made an application for the production of further documents which I refused for the following reasons which I gave orally:

    7.1. In cross-examination on the third day of the hearing the claimant put a line of questions to the respondent’s witness Mr Neill relating to incidents which she said were comparable to those in respect of which she was dismissed. She said there were documents which showed that the people involved in these incidents were dealt with differently to her. These documents had been in the bundle for the preliminary hearing which took place on 12 November 2018.

    7.2. It appeared to me that the claimant wanted these documents to be produced for this hearing so that she could put them to the

witness. I asked her whether she wanted me to make an order for their production and it seemed to me, though it was not entirely clear, that she did.

7.3. Mr Loftus for the respondent informed me that he had emailed the claimant on 17 April 2019 attaching a draft bundle index, in respect of which he asked for the claimant's agreement. On 18 April 2019 the claimant replied saying "Apologies, currently all my documents are with RCN legal team. I am not aware of any more documents to add but I will chase and get back to you." Mr Loftus heard no more about it.

7.4. At the Telephone Preliminary Hearing on 23 March 2020, which the claimant did not attend on the basis that she was working, Mr Loftus raised with the Employment Judge that the claimant had produced the same witness statement for the final hearing as she had for the Preliminary Hearing in 2018. He said that the witness statement referred to documents which the respondent had decided were not relevant for the final hearing and which did not appear in the final hearing bundle.

7.5. The Judge ordered that if the claimant wanted to rely on those documents, which amounted to 280 pages, she should produce a supplementary bundle. He gave her until 4 January 2021 to do so, a period of some 9 months.

7.6. The Telephone Preliminary Hearing Summary was sent to the parties on 10 April 2020.

7.7. The claimant did not produce a supplementary bundle. Nor did she comply with the other orders made at the Telephone Preliminary Hearing. She did not ask for clarification of the orders.

7.8. At the outset of this hearing the claimant said that she had not received the final hearing bundle. It was emailed to her on the morning of the first day of the hearing and we then adjourned until the second day so that she could acquaint herself with it. She did not raise the issue of the apparently missing pages on the second day of the hearing. She said that after her dismissal she was clinically depressed and had put the documents away in a box and did not look at them. She did not explain satisfactorily her correspondence with Mr Loftus from which it appeared that at the time that the bundle was being prepared, over two years ago, the documents were with the RCN legal team and she was expecting them to assist her with commenting on the bundle contents, nor her assertion to Mr Loftus at that time that she thought the bundle was complete.

7.9. I explained to the claimant that comparative evidence is usually only relevant in an unfair dismissal claim where the cases are truly

similar. The claimant insisted that at least two of the cases upon which she wanted to rely were truly similar. She accepted that the documents were not before the disciplinary panel, but felt that they might have been before the appeal panel. Mr Loftus did not believe that they were before the appeal panel. The claimant said that her main point was that the respondent should have known about these cases and should have investigated them. She had not put this point to the investigator in cross-examination on day 2 of this hearing.

7.10. I decided not to order the production of the documents because:

i) The claimant had had over two years to produce the documents since the bundle index was sent to her.

ii) The claimant had had over a year since she was ordered to provide a supplementary bundle containing the documents, which she was given 9 months to do. She did not query the orders and appears to have simply ignored them.

iii) It is not proportionate to order the production of the documents. It would require further evidence to be given by the respondent's witnesses in chief, and time for them to give instructions to Mr Loftus. It would cause delay to the conclusion of the hearing.

iv) For those reasons production of the documents would be prejudicial to the respondent.

v) The documents appear to be of limited relevance since they were not put before the disciplinary panel and I was not taken to any evidence that they were put before the appeal panel.

vi) The claimant can still put the thrust of her point to the respondent's remaining witnesses.

FINDINGS OF FACT

8. I have made findings of fact on those matters which are relevant to my conclusions. I have not made findings of fact on every piece of evidence put to me.

9. The claimant was employed by the respondent in its London Middlesex Collection Team as part of the blood donation part of the organisation. She had been interviewed for the post by a panel which included Ms Trudy Redford (Area Matron). She was appointed as a band 7 Senior Sister, in which role she line managed a team including Session Nurses

and Donor Carers.

10. The respondent's disciplinary policy [100], which was agreed between management and the union, includes in its examples of "minor misconduct" which could lead to a Management Record of Informal discussion or an Improvement Note "failure to undertake your duties in a competent manner". Serious misconduct, which lies between minor and gross misconduct, may include:

    10.1. Refusal to carry out reasonable managerial written or verbal instructions.

    10.2. Actions which compromise NHSBT reputation.

    10.3. Failure to change your conduct as a result of earlier warnings.

11. The disciplinary policy also states that at the conclusion of a disciplinary investigation:

    Where appropriate and reasonable a sanction can be offered to you (up to and including a Final Written Warning), at this stage for you and your representative to consider as a potential outcome without the requirement to go through a full disciplinary panel process. This option will only be relevant where the case is clear and that you accept that this is your preferred outcome.

12. At the time of the claimant's appointment she had not worked at band 7 before and had no experience in blood donation or management. On appointment she attended a residential Leadership Induction Programme and a Clinical Induction Programme.

13. The claimant's job description [138A] contains the following provisions:

    The Senior Sister … will provide line management and leadership of a multl-discipllnary collection team to deliver a safe and efficient blood collection service.

    The post holder will be accountable on a daily basis for the performance of the team in meeting operational targets, clinical standards and regulatory compliance.

14. Amongst the "Key Duties and Responsibilities" in the claimant's job description are:

    10. To challenge poor practice and escalate concerns, facilitating action where appropriate removing barriers and facilitating best practice.

    15. Be accountable for ensuring that staff within the session environment are delivering efficient and effective high quality care.

    30. Be accountable for the training needs analysis for the Area collection

team and the provision of all training requirements to ensure achievement and maintenance of competency in clinical and non clinical skills.

47. To deliver training including mandatory training ensuring attendees understanding of the information presented.

91. Accountable for the timely completion of mandatory training for direct reports and for monitoring and addressing completion at team level.

15. The claimant's tasks included running blood donation sessions. Because she did not have prior experience in blood donation her clinical knowledge was not expert and her subordinates, the Session Nurses, were expected to assist her with on the job training in this area.

16. In June or early July 2016 Matthew Byron (Specialist Nurse – Care Quality) circulated a Training Brief and a Change Notification which was due to come into effect on 5 July 2016 [154]. This included a change to the correct discretionary tests for malaria risk in blood donors. The Training Brief [156] stated that it was suitable for "cascade training by/issue to", amongst others, Senior Sisters and nurses.

17. The claimant attended training on this Change Notification on 19 June 2016. She did not thereafter cascade the training to her team and nor did she check whether they had made themselves familiar with it.

18. On 11 July 2016 it transpired that a number of blood donors from the claimant's team's session had not been subject to the new discretionary tests for malaria risk. Fifteen of these blood donations were deemed to be "at risk" and one donation had to be retrieved from a hospital before it was transfused into a patient.

19. A Root Cause Analysis ("RCA") meeting was convened on 15 July 2016, attended by the claimant and her line manager Phil Rowlands, amongst others. A record of the meeting [182] is contained in a document in which the failure to conduct the discretionary testing is classified as a "major incident" [179]. The respondent regarded this as an extremely serious failure with the potential to cause significant harm to patients and to the reputation of the respondent.

20. The meeting notes record the root causes of the failure as having been that:

    20.1. no training had been provided and the need for it had not been identified;

    20.2. there was no process for the cascade of GDRI updates by the claimant for her team;

    20.3. the national process of cascade had not been followed by the claimant;

20.4. the claimant had agreed when she received the training on 19 June that she understood it, but during the RCA meeting had said that she did not understand it;

20.5. the claimant had assumed that the Session Nurses got training via a different route but did not know by which route and also did not check with the Session Nurses that they had the recent update;

20.6. a lack of accountability had been noted during the meeting; and

20.7. there was no evidence that the Claimant had been trained to SOP3 Change Notification process.

21. The record also shows that the Session Nurses had been aware of the update but had not sought clarification of it.

22. The claimant was removed from clinical duties pending a disciplinary investigation, which was undertaken by Mr Darren Bowen. The claimant attended an investigation meeting on 3 August 2016 [213] at which she was accompanied by a union representative. She said at the meeting that she had not read the Change Notification (despite having been to training on it) and had thought she would read it later. She said that she had not been not sure that it was for her to cascade the training, commenting "I missed this". When asked whether it was her responsibility, she said the nurses should have trained her and that the answers that came back from the nurses were "wishy washy" and that Ms Marilyn Guzman, one of the Session Nurses, had assured her that the tests that were being conducted were correct. Later in the meeting she said that she did not know who was supposed to train her and had been told that she could get her Session Nurses to train her, but she did not have much confidence in them. There followed a detailed discussion of the extent of training that the claimant had received.

23. At a meeting on 2 September 2016 at which the claimant was accompanied by her union representative, and in a letter of the same date, Mr Bowen offered the claimant an uncontested final written warning ("FWW") to stay on file for 18 months. The FWW was offered to the claimant as an alternative to proceeding to a disciplinary hearing at which dismissal would be a possibility, in line with the respondent's disciplinary policy (paragraph 11 above).

24. Mr Bowen's detailed letter set out the conclusions that had been reached in the investigation, which were that the claimant had failed to comply with her duty to maintain the knowledge and skills she needed for safe and effective practice, but that there was evidence that management could have done more to provide her with coaching and support. The offer of an uncontested FWW was subject to a mandatory programme of training, mentorship and review.

25. In her witness statement the claimant described the offer of a FWW as

amounting to blackmail. She said that the message given to her was that she would "most likely" be dismissed. She withdrew that allegation during cross-examination when it was put to her that the letter did not contain any such threat. I find that the claimant was not subject to blackmail, threat or undue pressure.

26. The claimant also said that somebody at the meeting had told her that if she did not accept the FWW she would not get the training. She was unable to say who had made this comment. I find that the comment was not made. This was in all likelihood an example of the claimant's tendency to misinterpret and mischaracterise words and events; a recurring feature of her evidence which undermined her credibility as a whole.

27. The claimant accepted the offer of the FWW in writing on 9 September 2016 [225]. It was issued on 12 September [226]. The claimant attended the training programme, which she completed on 8 November. She was signed off as competent. After her return to her team she was assigned a mentor and had weekly support calls with Mr Bowen and Ms Redford. This was a high level of support, significantly in excess of what the respondent would usually offer to a Senior Sister.

28. Shortly after the claimant's return to the team Ms Redford became her line manager. On her first day back in the role Ms Redford alleged that the claimant had made an error taking blood samples, in respect of which the claimant was later vindicated.

29. The claimant gave evidence that in December 2016 Ms Guzman was subjected to some form of disciplinary action in relation to her competence, which was directly relevant to the issue which had led to the FWW. She said that this showed that the FWW was unjust because it meant that the error in relation to the discretionary tests was Ms Guzman's fault and not hers. No documentary evidence was provided in relation to this. On none of the numerous occasions on which the claimant described this during the hearing did she state coherently what Ms Guzman had been disciplined for or how it undermined Mr Bowen's conclusion in his letter of 2 September 2016 (paragraphs 23–24 above).

30. Some six months after the claimant's return to the team, on 17 May 2017, an audit was carried out by Ms Redford and Mr Bowen in advance of an inspection by the respondent's regulator. The claimant had been asked to print up the training matrix for this purpose. She said in evidence that she had printed a version of the training matrix which was out of date and did not show recent records relating to two new starters.

31. During the audit Ms Redford and Mr Bowen found a large number of deficiencies in training records, training compliance and session documentation [344] [362]. These resulted in the cancellation of around 30 donor appointments for emergency training of the two new Donor Carers. There was subsequently a complaint from a donor.

32. During the hearing the claimant said that this incident "didn't matter" and "made no difference" because there were always complaints, there had been no reduction in the number of collections made in the session and it was normal for training to occur on shift. The claimant said that several of the deficiencies in training records related to the new starters, whose training records were contained in workbooks which should have been available on the day of the audit. In her view these new starters should have been able to carry on working even if their training records could not be located because they were working under supervision.

33. I reject the claimant's evidence on these points. I was not taken to any documentary or corroborating evidence by the claimant. Her evidence displayed a lack of appreciation of the potential seriousness of the deficiencies and a refusal to accept her employer's concerns about safety and regulatory compliance. The respondent's witnesses' clear and credible evidence, which I accept, was that a significant number of important training records could not be found and that the respondent could not identify what training the team members had or had not undertaken.

34. The claimant also said that the missing training was only "update" training rather than amounting to a complete absence of training in a particular skill, and that it was not "business critical" training. Again, I do not accept this evidence. Mr Neill said in cross-examination that the new starters had had a complete absence of records to demonstrate their competency. He said that there were some cases in which staff may have been "trained to very old versions of those processes". He challenged the use of the phrase "business critical", saying that everything in the respondent's work is business critical. Some of the missing training was in skills like clinical waste management.

35. The claimant further said that the failure to maintain records and compliance was not her fault because the task of doing so had been removed from her by Ms Redford in a meeting on 26 April 2017 and given to Ms Guzman. She said that Ms Redford told her that she was "not allowed to go near" the training records. Her evidence was that this was part of a pattern of bullying by Ms Redford.

36. I find that the claimant's account of the meeting of 26 April 2017 is not true. I make this finding because there was no documentary evidence to substantiate it and the claimant's evidence on matters of recollection was not credible. The claimant tended to overstate and overdramatise her case, fail to check the facts and adopt unreasonable interpretations of words said by other people. Furthermore her evidence on some matters was contradictory. On this particular point the notes of the claimant's later disciplinary hearing show that she said that it had been "implied" to her by Ms Redford that she should "back off" and that Ms Guzman would oversee the training [527]. This was inconsistent with the account given by her in Tribunal as described in the paragraph above.

37. Furthermore I do not find it credible that the Area Matron would transfer a major part of the claimant's key contractual duties to her subordinate without a written record of this decision. I also do not find it credible that the claimant would accept such a diminution of her role without making a complaint which could be evidenced in writing. She gave evidence that her union representative had at some point told her to keep a record of the problems she said she was having with Ms Redford, but she did not do as advised.

38. I find that the failure to ensure that records were kept in order and that training was kept up to date was the claimant's fault, since it was her contractual responsibility to have oversight of these matters. Even if the Session Nurses had been asked to assist with some aspects of the training and compliance tracking, the claimant knew in light of the incident which had occurred the previous year and the training she had had in the interim that she was accountable in respect of these matters.

39. There is some evidence to suggest that Ms Redford bullied the claimant, and there is evidence to suggest that she did not. Despite saying that she made numerous attempts to complain about Ms Redford's treatment of her, the claimant showed me no contemporaneous documentary evidence to substantiate this. In particular she did not raise any written complaint, whether formal or informal, against Ms Redford. This is surprising in light of the fact that the claimant knew that she was on a FWW and claims to have felt that Ms Redford was preventing her from being able to fulfil her duties and was trying to get rid of her.

40. On 18 May 2017 the claimant was again removed from clinical duties. Thereafter a disciplinary investigation was carried out by Ms Liz Armstrong. Ms Armstrong reviewed the relevant documentation and interviewed a number of witnesses. In her disciplinary interview the claimant accepted that she was responsible for the training of the staff in her team [414].

41. In Ms Guzman's investigation interview she was accompanied by another Session Nurse, Hayden Spicer, who was then also interviewed separately.

42. Ms Armstrong expanded her disciplinary investigation to include consideration of the relationship between the claimant and Ms Redford. This was because the claimant raised it herself, at length, as a mitigating factor. She specifically relied on it to explain why in her view she was not at fault and had not had personal responsibility for the training records at the relevant time.

43. Ms Armstrong's Management Statement of Case of 24 August 2017 (which was her investigation report) set out the allegations against the claimant as follows:

It is alleged that on 17th May 2017, a pre MHRA audit on the London

Middlesex Collection Team identified failures in the following areas:

• To maintain adequate training records.

• Ensure employee mandatory training was compliant for the team to safely carry out their job role.

• Session documentation was not adequate.

The above does not maintain standards and expectations regarding regulatory compliance.

The above areas of non-compliance are the responsibility of the Senior Sister for the team, Sheryl Sanderson [SS]. Following a previous similar incident which was investigated and concluded in September 2016, SS was issued with an uncontested Final Written Warning, a training plan was also created to ensure clinical competency and completed prior to the above occurring (Appendix 7). However, it appears that SS has continued to fail to maintain the appropriate standards and expectations, resulting in further conduct related concerns and loss of trust in SS to provide clinical leadership to the London Middlesex Collection Team. This is regarded as a serious matter under the Disciplinary Policy.

44. The Management Statement of Case concluded that training records, training compliance and session documentation were the claimant's responsibility and that she had failed to maintain the appropriate standards [465–467].

45. When she was cross-examining Ms Armstrong the claimant suggested that almost half of the alleged deficiencies in training records and compliance had been shown to be incorrect, and yet were still listed in the Management Statement of Case and were "upheld". She referred to the later letter of dismissal [545] which listed a number of alleged deficiencies in respect of which the disciplinary panel had accepted the claimant's explanation. It was not clear to me why the claimant put these to the witness as having been "upheld", and ultimately she did not pursue the line of questioning.

46. A disciplinary hearing took place on 20 and 29 September 2017 chaired by Mr Dean Neill. The claimant was accompanied by her union representative. The management case was put by Ms Armstrong. Mr Neill stated at the outset of the hearing that he was only interested in hearing about the relationship issues insofar as they were directly relevant to the allegations against the claimant.

47. In the disciplinary hearing the claimant accepted that she had ultimate responsibility for training on her team [527]. She also said:

I have no relationship with my band 6 nurses they do not communicate with me. I tried to put In a system to make it simple/easier for them. When there is a document change I print up e-copies, training plans and TBTRs

[Task Based Training Records] and send all the information needed to train out as a pack for the nurses. I also set a calendar invite for the document go live date as a prompt to have all the training done. They don't acknowledge receipt of the invite or even tell me who had been trained.

I have to email, "why have you not responded?" and be blunt, as say I need this to be trained on this day, I can be blunt and curt at times. [Trudy Redford] says that I have disempowered the Nurses, that it's my fault that they don't take any responsibility for training. [414]

48. This evidence is, again, inconsistent with the claimant's assertion before me that responsibility for the training records had been removed from her by Ms Redford.

49. The disciplinary panel concluded that:

    49.1. The claimant was responsible for training and compliance on her team and this was a fundamental aspect of her role. She had not raised concerns about it with her mentors or managers.

    49.2. The claimant had had a significant level of support.

    49.3. Although the deficiencies were not in fact as bad as the auditors had thought, they were still very significant and caused regulatory, safety and reputational concerns. If the respondent's regulator had identified the deficiencies it was likely that a 'major non-conformance' incident would have been raised.

    49.4. The claimant's live FWW had been issued for similar misconduct.

    49.5. The claimant had had a relationship breakdown with Ms Redford and some of her subordinates, but there was no evidence that she had escalated her concerns about this to a sufficient extent.

    49.6. They could not trust the claimant not to repeat the misconduct, so the potential alternatives were not appropriate.

    49.7. The claimant should be dismissed with 12 weeks' notice for serious misconduct.

50. The claimant was informed of the dismissal in a detailed letter dated 6 October 2017 from Mr Neill [545]. The letter does not specify serious misconduct as the reason for dismissal.

51. The claimant appealed against her dismissal on 13 October 2017 [554] [557]. Amongst her grounds of appeal was a challenge to the fairness of the FWW in 2016. She also complained that Ms Armstrong's investigation was flawed, dismissal was unduly harsh and there were factual errors in the dismissal letter. She provided statements from colleagues in support of her claim that she had been bullied by Ms Redford. For the first time

she mentioned that she had a diagnosis of dyslexia, and provided documents relating to this.

52. The claimant's appeal grounds also contained numerous allegations against Ms Redford. A decision was taken to separate these out and investigate them under the Dignity at Work policy. An investigation was undertaken by Ms Tracy White. She interviewed 10 witnesses, some of whom agreed that Ms Redford had bullied the claimant and others of whom did not. The claimant's evidence in paragraph 36 of her witness statement that eight witnesses had been interviewed and all had specifically stated that she had been bullied by Ms Redford was wrong and – at best – careless. The claimant had access to the documentation when she wrote her witness statement, as can be seen by the reference at the end of paragraph 36 to the respondent's list of documents. This was another example of the claimant's poor credibility.

53. Ms White's investigation concluded that the claimant had not been bullied by Ms Redford but that there was a personality clash [644]. The full report produced by Ms White on 20 December 2017 was not sent to the claimant at the time. She was only sent a letter summarising the outcome [649]. She was not initially offered a right of appeal.

54. At the hearing of the claimant's appeal against dismissal on 5 January 2018 she was accompanied by a union representative. The panel was chaired by Mr Mike Stredder (Director of Blood Donation) and included a Staffside representative. Mr Stredder did not give evidence in Tribunal because he had left the organisation. Evidence about the appeal was given by Mr Shane White, who was another member of the panel.

55. The appeal panel's task was to consider whether the disciplinary panel had reached a fair and reasonable decision to dismiss the claimant. Its task was not to rehear the disciplinary case. Nonetheless it heard evidence and the claimant was permitted to restate her case at considerable length. During the hearing:

    55.1. Ms White was called to give evidence about her Dignity at Work investigation and the claimant was permitted to ask her questions.

    55.2. The claimant said that she did not have any concerns about the way in which the disciplinary hearing had been conducted.

    55.3. The claimant said that her dyslexia did not affect her ability to practice as a nurse.

    55.4. The claimant said that "in an ideal model" she would be clinically responsible for the team, but she had been "given information that wasn't true". She also said that in an ideal model she would be accountable or overall responsible for the training records, but that she had not been working in an ideal model, and that the Session Nurses were also "responsible and accountable" for training

records.

55.5. The claimant acknowledged that she had accepted the FWW and understood that it could lead to dismissal. However she questioned the validity of the FWW on the basis that it was to stay on file for 18 months whereas she had been advised by ACAS that a warning should only stay on file for 12 months.

55.6. The claimant alleged that two of the Session Nurses in her team had dishonestly signed each other off as competent in the administration of local anaesthetic.

56. The appeal panel did not take account of the evidence produced by the claimant that she had a diagnosis of dyslexia, on the basis that the material had not been before the disciplinary panel.

57. The appeal panel concluded that the decision to dismiss the claimant should be upheld, of which they informed the claimant in a meeting on 9 January 2019 and in a letter dated 16 January 2018 [713]. The letter set out the panel's reasoning in detail and stated that the allegation made by the claimant against the two Session Nurses would be investigated.

THE LAW

Unfair dismissal

General principles

1. By section 94 of the Employment Rights Act 1996 ("ERA") an employee has the right not to be unfairly dismissed.

2. In a claim for unfair dismissal, the employer must show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason (s.98(1) ERA). One potentially fair reason is a reason relating to conduct (s.98(2)(b) ERA).

3. If the employer has shown that the dismissal was for a potentially fair reason, the Tribunal must determine whether the employer acted reasonably or unreasonably in treating that reason as sufficient reason to dismiss the employee. In determining this question the Tribunal must have regard to the circumstances of the case, including the size and administrative resources of the employer's undertaking and equity and the substantial merits of the case (s.98(4) ERA).

Misconduct dismissals

4. Guidance as to the correct approach to dismissals for misconduct is given in *British Home Stores Ltd v Burchell* [1980] ICR 303, more recently

summarised by Aikens LJ in *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] IRLR 759 CA as follows:

35... once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice.

5. See also *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 43.

6. The tribunal must only take into account what was known to the employer at the time of the dismissal (*W Devis & Son v Atkins* (1977) AC 931). The band of reasonable responses test applies both to the Tribunal's assessment of whether the decision itself was reasonable, and to the question of whether the process adopted was reasonable (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 CA).

7. Where there is a dispute about whether the misconduct has occurred, the employer must do as much investigation into the matter as is reasonable in all the circumstances of the case (*Burchell*). That is not to say that each line of defence put forward by the employee must be investigated; the Tribunal should look at the reasonableness of the overall investigation (*Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399 EAT).

8. The gravity of the charges and their potential effect on the employee are relevant factors in assessing whether the investigation was reasonable. Where the employee's reputation or ability to work in his chosen field is

likely to be affected by a finding of misconduct, the employer should take its responsibility to conduct a fair investigation particularly seriously (*Salford Royal NHS Foundation Trust v Roldan* [2010] IRLR CA).

9. In deciding on the appropriate sanction an employer may be faced with a range of possible penalties, each of which might be considered reasonable. Here the Tribunal must be particularly astute to observe the band of reasonable responses test. It should ask whether dismissal was reasonable, rather than whether a lesser sanction would have been reasonable: see *Securicor Ltd v Smith* [1989] IRLR 356.

10. It is permissible for an employer to rely on a live final written warning if it was issued in good faith, there were at least *prima facie* grounds for imposing it and it was not manifestly inappropriate to have issued it: *Davies v Sandwell MBC* [2013] EWCA Civ 135.

11. As a matter of principle employers should act consistently in relation to comparable acts of misconduct. However, the allegedly similar situations must be properly comparable: see *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 EAT per Waterhouse J at paragraph 25, emphasising that the focus should be on the particular circumstances of the individual employee's case and that a "tariff approach" is not appropriate. See also *Paul v East Surrey District Health Authority* [1995] IRLR 305 CA per Beldam LJ, in which it was said that in distinguishing between similar cases an employer is entitled to take account of mitigating personal circumstances and the attitude of the employee to his conduct. See also *Procter v British Gypsum Ltd* [1992] IRLR 7 EAT and *MBNA Ltd v Jones* UKEAT/0120/15/MC. If the employer has consciously distinguished between two cases, the dismissal may only be held to be unfair if there was no rational basis for the distinction: *Securicor Ltd v Smith* [1989] IRLR 356 CA; *Harrow London Borough v Cunningham* [1996] IRLR 256 EAT.

12. Appeals should be dealt with impartially (ACAS Code paragraph 27). Procedural defects in a disciplinary hearing may be remedied on appeal (*Sartor v P&O European Ferries* [1992] IRLR 271 CA). The process should be considered as a whole (*Taylor v OCS Group Ltd* [2006] IRLR 613 CA; *Sharkey v Lloyds Bank plc* UKEATS/0005/15 (4 August 2015, unreported)).

Polkey

13. The Tribunal may reduce compensation for unfair dismissal on the basis that the employee would have been dismissed even if a fair procedure had been followed (*Polkey v A E Dayton Services Ltd* [1988] ICR 142 HL, *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 EAT).

Contributory fault

14. A reduction to the compensatory award for contributory fault may be made by such amount as the Tribunal considers just and equitable if it finds that the claimant has, by any action, caused or contributed to his dismissal (ERA s.123).

15. The Tribunal may make a deduction if the claimant was "guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy" (*Gibson v British Transport Docks Board* [1982] IRLR 228). The Tribunal should take "a broad, commonsense view of the situation" in deciding both whether to make a reduction and if so in what amount (*Maris v Rotherham Corpn* [1974] 2 All ER 776, [1974] IRLR 147 NIRC).

CONCLUSIONS

What was the reason for the dismissal? The respondent asserts that it was a reason relating to conduct which is a potentially fair reason for the purposes of section 98(2) of the Employment Rights Act 1996.

16. The respondent has shown that the genuine reason for the claimant's dismissal was a reason relating to her conduct, namely her failure to maintain standards and expectations regarding regulatory compliance by not maintaining adequate training records, not ensuring employee mandatory training was compliant for the team to safely carry out their job role and not maintaining adequate session documentation.

17. The claimant did not propose an alternative reason for the dismissal. She implied that Ms Redford's involvement in the matters which led to her dismissal was motivated by irrational personal dislike. However she did not suggest – and I have not found – that any animus on Ms Redford's part could be imputed to the disciplinary or appeal decision-makers.

Did the respondent hold its belief in the claimant's misconduct on reasonable grounds?

Was there a reasonable investigation?

18. In my judgment the investigation conducted by Ms Armstrong was well within the band of reasonable responses. She interviewed the relevant people, followed the proper lines of enquiry and gave the claimant a full opportunity to state her case. She then came to a balanced conclusion and recommendation.

19. The claimant suggested that Ms Armstrong should have proactively investigated whether there were other comparable cases in which a member of staff had failed to maintain adequate training records or to

ensure compliance. I find that Ms Armstrong was not obliged to do so in order to ensure a fair investigation. The claimant did not propose any specific comparators to Ms Armstrong. In Tribunal she suggested that there was at least one comparator in respect of whom the circumstances were strikingly similar. However she did not name the individual concerned or give details of the circumstances of the case. She had not ensured that documentation was contained in the bundle relating to this person. Furthermore she conceded that the person concerned had not had a live final written warning at the relevant time.

20. The claimant argued that Ms Armstrong should not have investigated the issues relating to her working relationship with Ms Redford and the Session Nurses, because the material which appeared in the Management Statement of Case about this was prejudicial. I do not accept this. The claimant herself raised these issues in mitigation and/or explanation of her actions and omissions. Ms Armstrong acted reasonably in investigating and reporting on them in a proportionate way.

21. As to whether Ms Armstrong acted fairly in allowing Ms Guzman to be accompanied at her disciplinary investigation meeting by another witness, I accept that this was not ideal but am satisfied that it was not outside the band of reasonable responses since it did not cause any unfairness. The claimant could not point to any evidence from the two nurses that showed collusion, and in fact put to Ms Armstrong that the they had contradicted each other in their interviews. The evidence of the two witnesses was tangential, since the conclusion reached by Ms Armstrong was based fundamentally on the claimant's own acceptance that she was responsible for the training records and compliance.

Following the investigation, did the respondent hold a reasonable belief that the claimant committed the acts complained of?

22. I find that the disciplinary panel considered the evidence thoroughly and reached a wholly reasonable and well-informed belief that the claimant had been responsible for the deficiencies as alleged.

23. I find specifically that both panels were capable of understanding the issues and the technicalities, contrary to the claimant's assertion that they did not understand the blood donation process. The panels contained more than sufficient expertise to understand the relevant matters, which were not in any case very complicated.

24. The claimant put to Mr Neill that she did not have a reasonable opportunity to rebut the evidence in the Management Statement of Case about her relationship with Ms Redford, because Mr Neill stated the at the beginning of the disciplinary hearing that he did not want to hear about it unless it was directly relevant. I find that Mr Neill's approach to this evidence was reasonable. The claimant was given a perfectly adequate opportunity to respond to the Management Statement of Case over two hearing days, in between which there was a break of nine days

during which she could have produced documents or witnesses to rebut the evidence if she had wished to do so.

25. If there was any flaw in the disciplinary hearing in this respect, it was remedied on appeal. By the time of the appeal hearing the Dignity at Work investigation had concluded, the investigator was available for questioning at the appeal hearing and the claimant had had the opportunity to adduce witness and documentary evidence (which she did). The failure to disclose to the claimant the Dignity at Work report was not unfair, since the claimant had a full opportunity to question Ms White on the matter. The claimant accepted that she was told that she had the right to appeal against the Dignity at Work outcome, albeit that she was not immediately informed of that possibility.

26. I find that, whether individually or as a whole, the disciplinary and appeal hearings provided an adequate and fair opportunity for the claimant to respond to the evidence about her relationships at work. This evidence was in the Management Statement of Case because she had raised it herself.

27. In any event, the claimant accepted at the disciplinary hearing that she was responsible for the training and compliance of her team. That was the principal basis upon which the panel concluded that she had committed misconduct. Even if the Management Statement of Case did contain prejudicial material, the panel were careful to focus on the relevant issues in coming to their decision. In my judgment this approach was perfectly proper and within the band of reasonable responses.

28. As to the question of comparators, I accept Mr Neill's evidence that the panel was not told about any comparable cases, that he did not know of any and that fundamentally the circumstances and merits of the individual case must be considered in detail. He said that he would have reached the same conclusion in another case if the circumstances were truly comparable. The point was not put to Mr White in relation to the appeal hearing, and no evidence was before me to suggest that the claimant had put any documentation relating to comparators before the appeal panel or that the respondent had unfairly overlooked any proper comparators.

29. Both at disciplinary stage and at appeal stage the panels gave the claimant ample opportunity to put her case. At both stages she made a number of counter-allegations, tried to shift the blame on to both her line managers and her direct reports, sought to absolve herself of responsibility and accountability and downplayed the significance of the deficiencies. In both outcome letters the panels engaged with the claimant's case thoroughly and fairly and dismissed it with reasons which significantly exceeded the required standard of reasonableness.

30. I find that the appeal panel's approach to the evidence adduced by the claimant about her diagnosis of dyslexia was fair and reasonable. The claimant did not pursue an argument relating to this at Tribunal.

31. The claimant did not complain in Tribunal that the outcome letters did not state that she had been found guilty of serious misconduct (as opposed to gross misconduct). I have considered this matter anyway, and I have concluded that this was not outside the band of reasonable responses in light of the very detailed explanations given in the outcome letters, from which the claimant can have had no serious doubt as to the basis of the dismissal.

Was dismissal a fair sanction in that it was within the reasonable range of responses for a reasonable employer?

Was the final written warning to which the claimant was subject manifestly inappropriate, and by which it would be legitimate for a Tribunal to go behind, issued fairly?

32. In my judgment the FWW was issued in good faith, was well-evidenced and based on proper grounds, and was not manifestly inappropriate. The respondent expressly considered during the disciplinary process whether the FWW was valid, and acted fairly in concluding that it was.

33. I reject the claimant's argument that the FWW was manifestly inappropriate because Ms Guzman had been shown to have been incompetent in a disciplinary process later in the year. There was no documentary evidence to substantiate this allegation. Mr Neill said that it would be a "stretch" to say that Ms Guzman was incompetent due to a single Quality Incident, and that the claimant could have accessed other people for training if she had concerns about Ms Guzman's capability as she claimed to have. I note also that in the RCA meeting on 15 July 2016 it was observed that the Session Nurses had failed to seek clarification on the Change Notification (paragraph 21 above). I think it more likely than not that the disciplinary matter that the claimant referred to arose out of this observation. It does not in any way relieve the claimant of responsibility for her own failings as Ms Guzman's line manager or render the FWW inappropriate.

34. In any case the claimant accepted the FWW at the time, after having the benefit of union advice on the matter. She only sought to challenge it when later picked up for similar misconduct.

35. I also reject the claimant's argument the FWW should have been disregarded because Ms Guzman had a warning for fraud on her record and/or because Ms Guzman and Mr Spicer had dishonestly countersigned each other's training records. These allegations were entirely unevidenced and wholly irrelevant.

Did the respondent reasonably conclude that the claimant had committed serious misconduct?

36. I find that the respondent reasonably concluded that the claimant had committed serious misconduct. Mr Neill gave clear and credible evidence that the panel consulted the Disciplinary Policy and gave thought to which category of misconduct was engaged. They quite fairly decided that it fitted best under the heading of serious misconduct rather than gross misconduct. They then moved on to consider alternatives to dismissal, taking into account the FWW. Their conclusion on this point was unimpeachable and fair.

ACAS uplift, Polkey and contributory fault

37. It is not necessary for me to consider these points. For completeness, however, if I am wrong that the dismissal was fair, I would have found that the claimant contributed to her dismissal by 100%.

Employment Judge Reindorf

Date 28 June 2021

JUDGMENT SENT TO THE PARTIES ON
5/8/2021

FOR THE TRIBUNAL OFFICE