EMPLOYMENT TRIBUNALS

Claimant: Mrs T Perez

Respondent: East Kent Hospital University Trust

Heard at: London South **On:** 20, 21, 22 April 2022

Before: Employment Judge Sekhon (sitting alone)

Representation
Claimant: In person
Respondent: Mr Campion, Counsel

RESERVED JUDGMENT

1. The complaint of constructive unfair dismissal fails and is dismissed.
2. The complaint of wrongful dismissal fails and is dismissed.
3. The complaint of breach of contract fails and is dismissed.

REASONS

Introduction

1. The claimant was employed as a nurse by the respondent from 20 March 2017 until her resignation on 9 December 2019. She resigned with immediate effect on 9 December 2019. Her resignation was formally accepted by the respondent on 10 December 2019. She was paid in lieu of notice until 29 April 2020.

2. She notified ACAS under the early conciliation procedure on 7 December 2019. The ACAS certificate was issued on 9 December 2019.

3. In summary, by a claim form received on 14 December 2019 the claimant seeks compensation for constructive unfair dismissal, wrongful dismissal and notice pay. The claimant relies on the respondent's breach of the implied term as to trust and confidence. The agreed list of issues summarises the actions of the respondent that she relies upon as being in breach of that term.

4. The respondent resists the claim denying that the claimant was dismissed or that the respondent was in breach of the claimant's contract of employment and asserts that the claimant had voluntarily resigned. In the alternative, the respondent denies that if it did breach the claimant's contract of employment that such breach was repudiatory, entitling the claimant to resign and claim constructive unfair dismissal. If it is found that the claimant was constructively dismissed, the respondent submits that the claimant was dismissed for some other substantial reason which is a fair reason for the dismissal. The respondent acted reasonably in treating that reason as a sufficient reason for dismissing the claimant and the dismissal was fair.

Claims and Issues

5. The agreed list of is set out in paragraph 4 of the Case Management Order of Employment Judge Sage dated 27 April 2020 and set out below. At the outset of the hearing, I confirmed with both parties that these were the issues that the Tribunal would determine and when asked neither party raised that any additional issues should be added to the list of issues.

Constructive unfair dismissal & wrongful dismissal

(i) Was the claimant dismissed, i.e.

(a) did the acts of the Respondent amount to a fundamental breach of the contract of employment, and/or did the respondent breach the so-called 'trust and confidence term', i.e., did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

(b) if so, did the claimant affirm the contract of employment before resigning?

(c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation — it need not be the reason for the resignation)? If the claimant was dismissed, they will necessarily have been wrongfully dismissed because they resigned without notice.

(ii) The conduct the claimant relies on as breaching the trust and confidence term is:

(a) conducting two disciplinary processes against the claimant within a short space of time which she stated was unfair and an act of 'harassment' against her. She also alleged that the investigation notes were amended and not signed. The first disciplinary process was in relation to a Facebook posting. She stated that she was not aware of the respondent's social media policy. The second was in relation to a cardiac patient; she stated that the patient was cared for by two other

nurses who were not interviewed. The claimant contended that in relation to this incident she performed her duties appropriately.

(b) The claimant stated that the two procedures had ruined her career and left her feeling that she could no longer remain with the Trust. She stated that even though she had moved departments she felt that they were starting to question her abilities and was placed on supervision. As a result of an accumulation of the above matters she resigned.

(iii) If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal (Not being considered at the hearing on 20, 21 and 22 April 2022)

(iv) If the claimant was unfairly dismissed and the remedy is compensation:

(a) if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed I have been dismissed in time anyway?
(b) would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2) and if so to what extent?
(c) did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Breach of contract

(v) To how much notice was the claimant entitled?
(vi) Did the claimant fundamentally breach the contract of employment by an act of so-called gross misconduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct; if so, did the respondent affirm the contract of employment prior to dismissal?

Remedy (Not being considered at the hearing on 20, 21 and 22 April 2022)

(vii) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

(a) if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?
(b) did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?
(c) did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

Procedure and Hearing

6. This case was listed for a 3-day final public preliminary hearing to deal with both merits and quantum. The main agreed bundle for the hearing totalled 734 pages and the witness statement bundle totalled 95 pages comprising of 6 witness statements from the respondent and a bundle of documents provided by the claimant at pages 2-45 of the witness statement bundle which the claimant had informed the respondent represented her statement.

7. At the outset of the hearing, it was apparent that it was unlikely that there would be sufficient time for evidence (totalling 7 witnesses), submissions, Judgment and remedy and I indicated that I would hear evidence and submissions in respect of liability only and hear evidence on the issues of Polkey and contributory fault. Further the claimant had not served an updated schedule of loss with any documentary support in relation to her financial losses or a statement setting out details that would be required for a remedy hearing.

8. The hearing commenced at 2 pm on the first day to enable the respondent to send the claimant further copies of pages 29a to 29m of the bundle, the Case Management Order dated 27 April 2020 and the bundle of witness statements to enable the claimant to prepare to cross examine the respondent's witnesses who by agreement would give evidence first. The claimant confirmed that she had seen these additional documents previously but had not received a paginated version.

9. On the second day of the hearing, the respondent made an application to add a document entitled Root Cause Analysis ("RCA") to the main bundle. The claimant had previously objected to this being include in the bundle but accepted that she had seen this document previously and following evidence given the previous day, it was now relevant to the issues that the Tribunal had to determine as the claimant alleges that the 2 nurses who cared for patient SW after her were not subject to disciplinary procedures and they did not write in the notes. On this basis, I agreed to this application and the RCA was added to the bundle at pages 722-743.

10. At the Hearing, the claimant was not represented and gave sworn evidence. There was no witness statement from the claimant in the bundle. When questioned further as to whether she had prepared a statement for the purposes of these proceedings, she stated that the information given as further and better particulars set out on pages 29a to 29m constituted her statement. It was agreed with both parties that this together with the evidence set out in her statement of case, namely the ET1 and the signed statement dated 4 Jan 2021 at pages 36 and 37 of the witness statement bundle would constitute as her statement for the purposes of these proceedings.

11. The respondent was represented by Counsel, Mr Campion, who called sworn evidence from Julie Gammon (ward manager on the Clinical Decisions unit at Queen Elizabeth Queen Mother, Margate and the claimant's line manager), Jaime Vergara (Charge Nurse on the Acute Medical Unit and acting ward manager between January 2019 and 18 February 2019 and the claimant's line manager during this time), Michelle Burrough (Senior cancer nurse and line manager of the cancer clinical nurse specialists and claimant's line manager from 2 September 2019), Ian Setchfield (Acute care nurse, Consultant and chair of the claimant's disciplinary meeting on 26 November 2019), Jenny Ray (Matron of the Acute medical unit and responsible for the investigation relating to Facebook posts) and Michele Mather (Employee relations manager who supported both investigations into the claimant's conduct). I was also referred to, and considered, witness statements from each witness who gave oral evidence and documents contained in the main bundle. Both parties directed me to the documents they considered relevant during the course of the hearing.

12. I also had the benefit of oral closing submissions on liability from Mr Campion and the claimant. Throughout this Judgment, where relevant, I have referred to page numbers in brackets indicating the page number of the document in the bundle to which I refer.

Finding of fact

13. I make the following material findings of fact, on the balance of probabilities, based on the documentation provided to me at the hearing and the witness evidence before me. The facts are largely not in dispute.

14. The respondent is an NHS Trust where the claimant commenced employment on 20 March 2017 as a band 5 nurse. She was promoted to a Band 6 Sister in December 2017.

15. At a one to one with Ms Gammon on 27 June 2017, the claimant discussed with her that she was struggling with night shifts due to her underlying health reasons. On the same day, Ms Gammon confirmed by email to the claimant that she has taken off night shifts and would try to minimise night shifts allocated to her and had taken into account that she would prefer, if possible, to be allocated single night shifts as this would not have so much of an impact on your health. Ms Gammon caveated this agreement by saying that she could only do so as long as the ward was safe in doing so.

16. Ms Gammon wrote to the claimant on 27 October 2017 (page 60) confirming that she had referred the claimant to occupational health as her sickness episodes had triggered the sickness absence management policy (4 episodes in 12 months). An appointment was arranged on 15 November 2017, but the claimant was unable to attend, and this was rebooked for 27 November 2017.

17. Following this appointment Ms Treadwell, Occupational Health Nurse Advisor, wrote to Ms Gammon with the patient's consent stating that the claimant had been diagnosed with diverticulitis and recently required hospital admission but that her symptoms had resolved save that she was experiencing sleep disruption. The claimant felt able to work one night shift at a time. Ms Treadwell suggested re referring the claimant to occupational health if she required further support.

18. Ms Gammon met with the claimant on 4 May 2018 to discuss her sickness episodes and the claimant had an appraisal on 8 June 2018 with Ms Gammon (page 69) and the claimant set out that the areas of her role she felt she could develop were management skills and to be more involved in the Clinical Decisions Unit.

19. In July 2018, Matron Hatfield Tugwell reported to Ms Gammon that she had witnessed poor practice from the claimant and a meeting took place with the claimant to discuss this.

20. The claimant wrote to the respondent on 19 October 2018 stating that she was experiencing difficulties with her shifts due to childcare issues for her grandson and on 5 November 2018 spoke to Ms Gammon, was visibly upset and stated due to personal issues she felt she could not cope. Ms Gammon referred the claimant to occupational therapy and advised the claimant to see her GP.

21. The claimant was signed off as unfit for work from 3 September 2018 to 10 September 2018, 7 November to 27 November 2018, 28 November 2018 to 2 December 2018.

22. The claimant met with Ms Gammon on 13 December 2018 following her return to work. Ms Gammon explained that she was not in a position to offer her a working pattern without nights due to vacancy levels and the requirement of needing a band 6 nurse on each shift. She booked the claimant to work the night shift on 25 December 2018 as the claimant had stated she would find one night a week achievable. Ms Gammon told the claimant that she would arrange another meeting to discuss her sickness episodes since the sickness policy had been triggered. An appointment with the occupational health team was arranged on 21 January 2019.

23. The claimant wrote to Ms Gammon on 16 December 2018 stating that she had been offered a position with better hours and would be handing her notice in. She formally handed her notice in by letter on 11 January 2019. Ms Gammon was absent from work from the beginning of January 2019 to 18 February 2019 and Mr Jaime Vergera took over as the claimant's line manager during this period.

Facebook

24. On 19 January 2019, Mr Vergera received a complaint about inappropriate postings on Facebook by the claimant. The claimant's Facebook status confirmed that she worked at the respondent's Trust and that she was in emergency Floor Nurse (page 122). After reviewing the Facebook postings which are at pages 122-131 of the bundle and speaking to Ms Mather, Employee relations officer, he decided to carry out a formal investigation.

25. The claimant was contacted on 23 January 2019 whilst on annual leave, requested to take down the posts and informed that this would be investigated by her line manager and HR. As part of his investigation, Mr Vergera asked staff to prepare statements on the posts and statements were received from Leanna Jell, Faye Bucceri, Clemmie Elias and Michelle Horn (pages 110 and 117-119).

26. On 3 February 2019, the claimant was sent a letter inviting her to an investigatory meeting and asking for her comments on the posts she had made. The claimant provided her comments in a letter dated 5 February 2019 (page 113-115). After completing the investigation, Mr Verdera wrote to the claimant on 18 March 2019 informing her that he would be referring the case to a formal disciplinary hearing (page 159). This letter stated inappropriate use of social networking sites is potentially an act of gross misconduct and that this could result in a dismissal.

27. Mr Verdhera prepared a management statement of case (pages 354-358] on 14 May 2019. He had limited availability to attend a disciplinary meeting as he was working nights for most of June 2019, and he had a high workload in August and September 2019. On 28 August 2019, the claimant was sent a letter inviting her to a disciplinary hearing on 20 September 2019 to address the Facebook comments (page 318).

28. The disciplinary hearing took place on 20 September 2019. Mr Vedhera presented the management case. The hearing was chaired by the senior matron, Susan Brassington. The claimant attended with her trade union representative, Gillian Mundy. Notes of the disciplinary hearing are set out on pages 372-379. A decision was made on 20 September 2019 and an outcome letter was sent out on 1 October 2019 (page 420-422). The panel accepted that the claimant had posted inappropriate items on social media and that members of the respondent Trust had been offended by those posts on a personal level and the Trust's reputation had potentially been brought into disrepute. The Panel issued a first written warning which would remain live on the claimant's file for 9 months. The claimant did not appeal the outcome

Datix clinical incidents

29. Two clinical incidents were reported through Datix relating to the care given to patients by the claimant.

Datix - 4 February 2019

30. The first related to treatment of a patient, SW, on 4 February 2019 who sadly died and the datix form is at pages 107-109. A Root Cause Analysis report was completed by Dr Jonathan Purdey, Consultant in critical care and Deputy Medical Director (page 721-735) and this received executive approval by 23 April 2020. This concluded that there were no actions that the respondent Trust could have taken to prevent the death of SW.

31. Ms Ray examined the medical records of the patient and she sought statements from the staff involved. Statements were obtained from Staff Nurse Clifford (page 111), the claimant (page 112), Ms Cook (Health Care Assistant) (page 116), Ms Waumsley (page 132) and Charge Nurse MacQuillin (page 133). Ms Ray noted that there was no nursing documentation for the period of time that SW was in the care of the claimant on 3 February 2019 and had concerns about the deterioration in the patient's condition during the period of time he was under the claimant's care and the failure of the claimant to escalate SW's condition.

Datix - 14 February 2019

32. The second Datix complaint related to the conduct of the claimant on the night of 14 February 2019 and complaints that the claimant failed to support colleagues who were working on the ward that night. The Datix (pages 134-142) was submitted by Kate Knight who was a band 5 nurse on the. The complaint referred to, *"multiple issues with nurse in charge support and doctors. Sick patients needing reviewing from those in charge and doctors, very little support for escalation of the acutely unwell".*

33. Ms Ray took initial statements from Rebecca Clifford (page 145), Kate Knight (page 146), Oliver Schrod (page 147-148) and Kate Sutton (page 149-150). Ms Ray was not involved with investigation of care given by doctors and instead she escalated her concerns about medical care to the Clinical Lead for the Acute Medical Unit (AMU).

34. Ms Ray wrote to the claimant on 15 March 2019 about the 2 Datix incidents and that there was to be a disciplinary investigation (pages 157- 158). Ms Ray decided to investigate the claimant's involvement with the patient SW as she had failed to keep records and her initial view was that the claimant did not escalate appropriately.

35. As part of the investigation, Ms Ray arranged to meet all the key witnesses to discuss the case. Interviews with the witnesses took place and Ms Mather took notes of these meetings. The notes were not taken ab verbatim. After the meetings, Ms Mather sent the draft notes of the meetings to each witness to approve these and to sign and return a copy to her.

36. The interview with Chris MacQuillin took place on 10 May 2019 (page 166-169). Ms Mather sent the draft notes of the meeting to Chis MacQuillin on 15 August 2019, and he commented on 25 August 2019 with one minor change

(page 304-305). He did however not return a signed copy of the meeting notes, but he agreed them (page 167-169).

37. The interview with Kate Knight took place on 10 May 2019 (page 176-179). Kate Knight's statement is unsigned and there is no record of her sending an email confirming they are accurate.

38. The interview with Kate Sutton took place on 17 May 2019 (page 180-185). Ms Mather stated that she returned the notes making changes but did not sign this.

39. The interview with Rebecca Clifford took place on 17 May 2019 (page 186-189). Ms Mather sent the draft notes to Rebecca Clifford on 9 August 2019, and she replied on 12 September 2019 (page 321- 323] with some changes to her statement which were made before they her statement was presented at the hearing. Ms Clifford did not sign a copy of the final meeting notes, but she had agreed them (page 186-189).

40. The interview with Julie Gammon took place on 4 June 2019 (page 273-276) and she signed the meeting notes on 26 August 2019.

41. The interview with Oliver Schrod took place on 6 June 2019 (page 277-279). He attended with a workplace colleague. He signed a copy of the meeting notes on 16 August 2019.

42. The interview with Faye Bucceri took place on 6 June 2019 (page 280-283). She sent an amended version of the meeting notes on 19 October 2019 (page 280-282).

43. The Claimant sent her comments about the events on 30 May 2019 to Ms Mather which are set out on pages 195-209, but Ms Mather did not review these until 4 June 2019.

44. Ms Ray met the claimant and her trade union representative, Ms Dungey, and Ms Mather to discuss both Datix incidents on 4 June 2019. A typed note of the meeting on 4 June 2019 is at page 210-224 and the handwritten note of the meeting is at pages 249-272. Ms Mather sent the claimant the notes of her meeting on 15 August 2019. The Claimant replied seeking amendments to the notes and did not consider that these were an accurate reflection of what had been discussed.

45. Ms Mather made all the amendments sent to her by the witnesses that had responded and included the amended versions of the notes in the bundle of the meeting on 26 November 2019. Ms Mather also prepared draft statements for each witness and circulated these to the witnesses including the claimant. There was a delay in getting amended approved statements and signed statements. The claimant's amended statement was received in November 2019.

46. Ms Ray reviewed all the evidence and wrote to the claimant on 5 July 2019 to inform her that the two Datix incidents would be referred to a disciplinary panel (page 289-290].

47. Ms Ray prepared a management statement of case which is set out at page 359-371. On 18 November 2019, the Claimant was sent a letter to inform her that a disciplinary hearing would take place on 26 November 2019 (page 495-496).

48. The hearing then took place on 26 November 2019. The hearing was recorded, and the transcription of the hearing is at pages 512-525. Mr Setchfield, Acute Care Nurse Consultant, chaired the disciplinary meeting. He concluded that there was insufficient evidence to support the allegation that the claimant had brought the Trust's name into disrepute or that there had been gross negligence. However, he concluded that there had been a failure regarding a lack of documentation in the patient's medical records and that this was a breach of the Trust's Clinical Record Keeping policy and also article 10 of the NMC code of conduct. The outcome of the disciplinary hearing was the issue of a final written warning on the claimant's record for 12 months. The claimant did not appeal against the decision.

Claimant's new role

49. The claimant successfully applied for the post of Macmillan Lung Clinical Nurse Specialist and started in this role on 25 February 2019. She was managed by Jennifer Jewell and Tracey Spencer-Brown.

50. On 8 March 2019, Ms Ray had a telephone discussion with the claimant regarding the level of her sickness absence as the sickness absence policy had been triggered. She subsequently wrote to her about this on 15 March 2019.

51. Ms Ray contacted the claimant's new line manager by email on 14 March 2019, Jennifer Jewel, by email (page 310) and recommended she should be placed on supervised practice due to the potential concerns about the claimant's record keeping.

52. Toni Fleming, Macmillan Lung Cancer Clinical Nurse Specialist, contacted Jennifer Jewell on 8 July 2019 about the lack of attention to detail in the claimant's work including breach of patient confidentiality and a failure to follow instructions. Ms Jewell replied to Mr Fleming and confirmed that the claimant was on supervised practice and to contact her regarding any further concerns.

53. The claimant began a period of sick leave on 5 July 2019. She returned to work on 23 September 2019 on a phased return. Ms Burrough took over as the patient's line manager from Ms Jewell and met the claimant on her return. She agreed to implement the Occupational Health recommendations and for supervised practice to continue pending the outcome of the second hearing. Ms Burrough met the claimant weekly to review her progress. These notes are at pages 567- 578.

54. On 30 September 2020 (page 410/567), Ms Burrough received concerns about the claimant's work from Vikki Baker. The concerns included that the claimant had her personal mobile out when in consultation, there were difficulties with

her communication skills, there was a lack of focus and the claimant tended to flit between things.

55. Ms Burrough discussed these concerns with the claimant, on 1 October 2019 [567/568] and it was agreed she would book onto an advanced communications course. On 6 October 2020, Ms Burrough received feedback from Toni Fleming (page 568) with concerns that the claimant was not flexible with work times and continued to make inappropriate comments in clinic. Deniece Merrall [page 426/428, 568] provided feedback on 7 October 2020 and set out a number of concerns that she had observed with the claimant's practice. Ms Burrough discussed these concerns with the claimant on 11 October and on 16 October 2019 and short notes of these meetings are set out page 568.

56. Ms Burrough received more feedback about the claimant from Sharon Gill on 29 October 2019 (page 442/443) stating her clinical skills were not at the level required and concerns about the claimant working on her own at band 7 level Ms Burrough discussed these concerns with the claimant on 6 November 2019 and her note is at page 569. She discussed the possibility of extending the probationary period with the claimant and booking an advanced communications course.

57. On 7 November 2019 (page 457), the claimant asked Ms Burrough if it would be possible to work from QEQM in Margate and carry out some administrative work as her daughter was unwell.

58. On 8 November, Ms Burrough told the claimant that Toni Fleming was unable to continue to provide 5-day supervised practice because of the impact this was having on her workload and discussed carrying out some administrative work for two days. Ms Burrough emailed the work plan to the claimant on 8 November (page 462).

59. The claimant emailed Ms Burrough on 11 November 2019 querying whether she had misunderstood their previous meeting and stating that she had declined redeployment. She also asked what discussions had taken place with Toni Fleming. Ms Burrough replied suggesting this is discussed at their next meeting.

60. Ms Burrough met the claimant on 12 November 2109 (page 570/571) and further discussions took place about the claimant's work plan and the fact that the claimant would be carrying out non-clinical work which would include administrative work. There is a dispute as to what was agreed at this meeting. The claimant states she found it demeaning that she had to tidy a cupboard, However Ms Burrough states this took place at the claimant's suggestion as part of the "Lean November" project that all staff were involved with.

61. Toni Fleming found supervising the claimant's practice caused extra pressure on her professional time and Ms Burrough was informed of this by an email from Vikki Baker dated 12 November 2019. The email (page 474) from Ms Baxter stated that the claimant was leaving early or arriving late, and she was

unable to answer basic nursing questions. This email states, *"I have grave concerns for her ability to do the job she has been employed to do. Equally she appears to have no awareness that her behaviour is sometimes wholly inappropriate."*

62. On 15 November 2019, Ms Burrough emailed the claimant the agreed work plan for the following week and the claimant confirmed her agreement but requested to leave early one day (page 484).

63. On 19 November 2019, Ms Burrough received critical feedback about the claimant from Toni Fleming as the claimant did not inform her when the patient had arrived as she was requested to do which led to a difficult clinical appointment and poor patient experience (page 571). Ms Burrough spoke to the claimant on the telephone on 19 November 2019 and relayed Toni Fleming's concerns. The claimant stated that she had not been asked to get the patient.

64. Following the disciplinary hearing on 26 November 2019, the claimant contacted Ms Burrough by telephone (page 571/572) and was told that she had received a written warning for 12 months for not recording any documentation but that the other allegations had not been upheld. Ms Burrough asked whether any restrictions in terms of supervised practice had been placed on her and the claimant confirmed they were not. Ms Burrough agreed to meet with the claimant on Friday and that Ms Burrough would inform Toni Fleming that she was no longer on supervised practice and that she would be with working with her on Thursday (page 526]. As Toni Fleming was not available to supervise the claimant on Thursday, the claimant attended Dr Kadri's clinic.

65. Ms Burrough arranged a meeting with her manager and HR to discuss the support options which could be offered to the claimant. Due to the concerns raised by several colleagues, it was agreed that the claimant could not go back into fully independent practice as a Lung Cancer Nurse specialist in the immediate future.

66. Ms Burrough met the claimant on 29 November 2019 to discuss the next steps following the conclusion of the disciplinary hearing. As sanctions had been imposed at the hearing and further concerns had been raised by colleagues about her practice and patient safety in relation to communication, nursing knowledge, attention to detail and documentation, Ms Burrough told the claimant that the decision had been made to continue to monitor her performance going forward and that she could not restart in the Lung Cancer Nurse Specialist role immediately. Ms Burrough outlined some support options that could be put into place for the next two months. This included a placement on a ward at the Canterbury site (or with the Palliative Care CNS team at Margate). Ms Burrough raised with the claimant whether she may have some form of dyslexia and offered an assessment and support with this.

67. The claimant refused and was unhappy and angry about not being able to restart in the Lung Cancer Nurse Specialist role and the requirement for an action plan. After a short break, further discussion took place with the claimant and Ms Burrough to identify any specific learning needs.

68. Ms Burrough wrote to the claimant to inform her that she had spoken to Susan Cook (Palliative Care Nurse Consultant, Cancer Services) who would support in assisting the claimant in her return from supervised practice. Ms Burrough confirmed that she would write to her formally to confirm the outcome of the meeting and the need to put into place a performance improvement plan (page 528).

69. Ms Burrough wrote to the claimant on 2 December 2019 to invite her to a stage 2 informal performance management meeting to take place on 11 December 2019 (page 531/532). This meeting was originally due to take place on 6 December 2019, but the claimant was on annual leave.

70. Ms Burrough prepared a draft performance improvement plan which addressed issues that she had discussed with the claimant (pages 584-588) and sent it to the claimant on 5 December 2019 (page 543).

71. The claimant sent a letter of resignation to Ms Burrough on 9 December 2019 to take place with immediate effect. Ms Burrough wrote to the claimant on 9 December 2019 accepting her resignation with immediate effect and confirming that she would be paid in lieu of notice as requested.

Relevant Legal Principles

72. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of complaint to the Tribunal under section 111.

73. The claimant must show that she was dismissed by the respondent under section 95. Where there is no express dismissal, then the claimant needs to establish a constructive dismissal. Section 95(1) states that an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if:

"95(1)(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

74. Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 set out the approach to be taken when considering whether there has been a constructive dismissal:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

75. In order to claim a constructive dismissal, the employee must therefore show that:

(i) there was a fundamental breach of contract on the part of the employer.

(ii) the employer's breach caused the employee to resign; and
(ii) the employee did not lose the right to claim constructive dismissal by delaying too long before resigning and thus affirming the contract.

76. Whether there has been a repudiatory breach is an objective test, the employer's subjective intention is irrelevant: *Leeds Dental Team Ltd -v- Rose 2014 ICR 94, EAT.*

77. A fundamental breach may either be a one-off breach or a course of conduct on the employer's part which cumulatively amounted to a fundamental breach (providing that the final act adds something to the breach): *Omilaju v Waltham Forest LBC [2005] IRLR 35 CA).*

78. In Woods -v- WM Car Service (Peterborough) Ltd [1981] ICR 666, EAT it was said:

> "The Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it". An employee is not therefore justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably.

79. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in Malik v BCCI; Mahmud v BCCI 1997 IRLR 462 where Lord Steyn said that an employer shall not:

"...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

80. The Employment Appeal Tribunal has held, in Croft v Consignia plc [2002] IRLR 851, that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. It is for the Tribunal to determine the gravity of any suggested breach of the implied term. In other words, whether a breach is fundamental is essentially a question of fact and degree.

81. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence — RDF Media Group plc and anor v Clements 2008 IRLR 207, QBD. As in that case, this will usually be the employee.

82. Where an employer breaches the implied terms as to trust and confidence that is inevitably fundamental: Morrow -v- Safeway Stores plc [2002] IRLR 9, EAT.

83. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in issue.

Whether an employee left employment in response to his/her employer's breach of contract is essentially a question of fact for the Tribunal.

84. If there is another reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, a Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation. However, the employer's breach will be an effective cause of the resignation if it is one of a number of reasons contributing to the decision to resign, it need not be the only effective cause. As Mr Justice Elias, then President of the EAT, stated in Abbycars (West Horndon) Ltd v Ford EAT 0472/07, 'the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon'.

85. The Court of Appeal in Kaur -v- Leeds Teaching Hospitals NHS Trust 2019 ICR 1, offered guidance to Tribunals, suggesting that it will normally be sufficient for the Tribunal to ask itself:

    (i) what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    (ii) has he or she affirmed the contract since that act?
    (iii) if not, was that act (or omission) by itself a repudiatory breach of contract?
    (iv) if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?
    (v) did the employee resign in response (or partly in response) to that breach?

86. If an employee has been dismissed, either constructively or expressly, then the Tribunal must go on to consider the fairness of the dismissal.

87. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment - see Berriman v Delabole Slate Ltd 1985 ICR 546 CA. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, a Tribunal is under no obligation to investigate the reason for the dismissal or its reasonableness - see Derby City Council v Marshall 1979 ICR 731 EAT.

88. Section 98 of the 1996 Act deals with the fairness of dismissals. There are 2 stages that the Tribunal must consider. Firstly, the respondent employer must show either that it had a potentially fair reason for the dismissal within section 98(2) or that it dismissed for some other substantial reason ("SOSR") of a kind such as to justify the dismissal of an employee holding the position which the employee held (s.98(1)). The burden of proving the reason for the dismissal is placed on the respondent.

89. Secondly, having established the reason for the dismissal, if it was a potentially fair reason, or some other substantial reason ("SOSR") the Tribunal has to consider whether the respondent acted fairly or unfairly in dismissing for that reason.

90. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question of whether or not the dismissal was fair or unfair, having regard to the reason shown by the employer:

    (a) depends upon whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and
    (b) shall be determined in accordance with equity and the substantial merits of the case.

91. There is a neutral burden of proof in relation to the general test of fairness.

92. What is reasonable within s. 98(4) depends on the particular circumstances of the case but will generally require a reasonably fair procedure to be followed (though not necessarily one which accords with the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") – see below).

93. In considering all aspects of the case, including those set out above, and in deciding whether or not the employer acted reasonably or unreasonably within section 98(4) of the 1996 Act, the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances.

94. It is also immaterial how the Tribunal would have handled events or what decisions the Tribunal would have made. The Tribunal must not substitute its own view for that of the reasonable employer – Iceland Frozen Foods Limited –v- Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23, and London Ambulance Service NHS Trust –v- Small [2009] IRLR 563.

95. Procedural reasonableness is usually assessed by reference to the ACAS Code and unreasonable failure to follow the Code may result in an adjustment of compensation under S.207 and s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992. Whilst the Code may not be applicable to all SOSR dismissals, where the substance of the dismissal falls within the intended remit of the Code (misconduct or capability) and in cases where the employer relies upon the breakdown of mutual trust and confidence (in particular where the employer had initiated disciplinary proceedings relating to conduct prior to the dismissal) the ACAS Code will apply but it may not be appropriate to impose a sanction for failure to comply (see Hussain -v- Jurys Inns Group Ltd EAT 0283/15 EAT, Phoenix House Ltd -v- Stockman 2017 ICR 84, EAT and Lund -v- St Edmund's School, Canterbury 2013 ICR D26).

96. In any event, the ACAS Code is be had regard to but is not a prescriptive list of actions which must be followed in all circumstances. The ACAS guidelines

themselves specifically indicate that that the Tribunal may take the size and resources of the employer into account and that it may not be practical for all employers to take all of the steps set out in the Code.

Discussion

97. Turning to the list of issues set out at paragraph 5 above. In the paragraphs that follow I have set out my findings of fact in relation to each of the agreed issues and my conclusions in relation to them having applied the law. I have referred to the parties' submissions if there was a dispute between them. Where relevant disputes did occur, I have indicated and made my own findings as to what occurred.

98. The claimant resigned on 9 December 2018 and page 551 sets out in her letter the reasons for her resignation. The claimant agreed at the Case Management hearing that that she felt she had no other choice than to resign because the respondent breached the contractual team of trust and confidence term for the following reasons: -

In relation to the Disciplinary process for inappropriate face book posts.

99. The claimant acknowledged in her oral evidence that the outcome of a first written warning was fair and warranted as she accepted that after a period of reflection the posts she made on Facebook were offensive and bought the respondent Trust's reputation in disrepute. She stated that she took down the social media posts, apologised and accepted her error.

100. However, she stated that Mr Vergara's decision to raise this as a formal disciplinary issue was unfair and harassment against her as this could and should have been dealt informally through her line management. When questioned further, the claimant accepted that she would have considered the same sanction of a written warning to remain on her record for 9 months as fair if this had been given by her line manager informally. In support of this the claimant refers to her comments made by the chair of the disciplinary meeting, Ms Brassington, when she asked why this had been bought to a disciplinary meeting when the claimant had accepted culpability for her actions.

101. The claimant considers that she was unfairly targeted to be disciplined as Facebook posts made by Mr Vergara which she provided the respondent were not investigated and he was not disciplined for these.

102. Further although the claimant accepted that she could access the respondent's policies from her computer, she stated she was unaware of the social medical policy at page 677 or disciplinary policy at page 661. She therefore did not read or know the contents of the respondent's policies relating to social media.

103. Taking each issue in turn: -

(i) Decision to proceed to a formal disciplinary

104. Mr Campion referred me to the transcription of the notes of the disciplinary meeting on 20 September 2019 at page 373. I note that Ms Brassington stated in response to Mr Vergara's response that the case was not dealt with informally (line 67),

"That's ok, I'm not doubting the choices you made, I just want to know how we got here today, thank you."

105. My plain reading of Ms Brassington's comments from the transcription provided are that she simply was asking for the background to the complaint. I did not read any criticism into the decision to proceed to a disciplinary hearing although I accept this is the claimant's perception that this is what she was indicating.

106. Mr Vergara stated that it was his decision to proceed to a formal disciplinary hearing. He explained that as this was the first time, he had investigated incidents of this nature, he sought guidance from Ms Mather, Employee Relations manager. He stated that because of the serious nature of the allegations, that such conduct could amount to gross misconduct and the degree of the upset on the ward caused by the posts, he decided to proceed to a formal disciplinary hearing. I am persuaded by his reasons for doing so. I also accept that as this was Mr Veghara's first time at managing an incident of this nature he would have felt less confident to manage this informally and provide a sanction himself.

107. Further, Ms Mather stated at the time of the investigation in 2019, had Mr Vergera elected to manage the inappropriate Facebook posting informally, he would not have been able to sanction anything other than an oral warning. I note that as part of the disciplinary process the claimant received a letter dated 28 August 2019 (page 319) from Sinead Metcalfe (Employee Relations officer) which stated that as a result of the hearing, disciplinary action may be taken which may include dismissal, which is a possible sanction for gross misconduct under which the allegations made against the claimant fell.

108. The statement of case at page 355 prepared by Mr Vergara sets out extracts of the statements received from staff which highlight the upset caused by the posts made by the claimant. Mr Campion also referred me to the contents of the witness statements Mr Vergara obtained during his investigation which are in the bundle which highlight the level of offence that the posts had caused the claimant's colleagues. Extracts include (page 110),

"another member of staff was visibly upset and distressed regarding a Facebook picture and message that she had received" and that she felt "*very ashamed and disappointed"*.

109. At page 117,

"*It is very easy to take it personally and think that the post was possibly about me, which makes it very hard to work in such a close environment together and continue as before*."

110. At page 118,

"Many of us assumed this was directed at us and it caused an atmosphere in the working environment, as people then assumed they were being spoken about- behind their backs. I feel this was not acceptable, should never of happened and the individual needs to be aware of the negative feelings this action has given to her colleagues."

111. Another colleague stated,

"I feel extremely upset and offended about it as it feels that it is aimed at me personally as I am the Ward Managers Assistant and | work closely with Julie Gammon. It has made me feel disappointed that a member of staff has shown where they work and what position they hold within the trust on Facebook for anyone to see, has no respect for her manager or her colleagues on AMUA."

112. I therefore consider it was entirely reasonable and proper for Mr Vergara to consider that an oral warning may not have been a sufficient sanction based on all the circumstances of this case and to elect to proceed to a formal disciplinary hearing.

(ii) Posts made by Mr Vergera

113. The claimant alleges that the decision to proceed to a formal disciplinary hearing was unfair because she provided posts that Mr Vergera, the investigating officer, had made on Facebook which in her view bought the respondent Trust's reputation in disrepute and no action was taken against him. The posts to which she refers are at pages 206-209. When questioned by the claimant, Mr Vergera stated that he did not know which posts the claimant was referring to and it was not put to him by the claimant that they were posts that he had made these. Mr Vergera acknowledged that he had not taken action against any other employees about social media posts.

114. The claimant stated that the posts exhibit her humour, and she did not find her posts offensive, but she accepted that she now has a different perspective and understands it is how other people perceived her posts. When questioned the claimant maintained that her posts and Mr Vergera's posts were similar in that both referred to work and bought the respondent Trust's reputation into disrepute. She did not accept that her posts objectively were more offensive to others.

115. I have reviewed the posts to which the claimant refers from Mr Vergera. They relate to videos of reactions of people (crying, running away) when having to go to work or be asked to work for an extra 10 minutes/ hour. I do not accept the claimant's perception that these are similar to the posts she made. I find that there is a significant difference between these posts and those placed by the claimant which directly seeks to offend patents and colleagues and in fact did so as set out in the extracts of statements set out at paragraphs 108-112 above. The investigation in this case was commenced due to the staff being upset on ward about the claimant's posts.

116. The claimant's posts at pages 122-131 include alternative lyrics to jingle bells stating that the patient smells, the actor Mr Chan holding a very small piece of paper with the caption "the list of doctors/ co-workers I trust if I got admitted", a picture of Gordon Ramsay with a caption "When you've had a few too many at the works xmas do and start telling people what you think..and states "fuck yourself and fuck you" and a picture of two naked people with one person's face inside another person's buttocks with one person labelled employee and another manager, suggesting employees suck up to managers.

117. The Trust's Social Media Policy states,

"6.1.2 Social Media sites must never be used to access or share pornographic. Offensive or otherwise inappropriate material which may be deemed detrimental to the reputation of the Trust.

6.1.7 Staff, volunteers and contractors are ultimately responsible for their own behaviour online. Staff and contractors must take care to avoid posting online content that is inaccurate, libellous, defamatory, harassing, threatening or may otherwise be illegal. If not, they may be subject to civil proceedings or criminal prosecution.

6.1.11 When using social media, staff should respect their audience. As general rule, staff should be mindful of any detrimental comments made about colleagues while using social media, e.g., Failing to show dignity at work (harassment), discriminatory language, personal insults and obscenity. These examples are not exhaustive and will be considered a disciplinary matter."

118. I am persuaded by the evidence given by Ms Mather that she does not believe that the posts made by Mr Vergera are the same as the claimant's posts as they focus on the inconvenience of being asked to work additional hours and are not directly offensive to colleagues or patients. I find that the Trusts Social Media Policy (as set out in the extracts above) supports this view and seeks to draw a distinction on this point at paragraph 6.1.11. It is unclear whether Mr Vergara had posted his place of work on his account as no evidence was placed before me on this point. However, for the avoidance of doubt, I do not find that the posts at pages 206-209 made by Mr Vergara would fall into the categories set out in the Trust's Social Media's Policy (paragraphs above) and would therefore warrant investigation and /or possible sanction.

(iii) Trust policies

119. The claimant accepted that she could access the respondent's policies from her computer, but she never sought to do so. She accepted that she was ignorant of the respondent's polices on social media and that she did not know that the inappropriate posts that bought the respondent Trust's reputation in disrepute could amount to gross misconduct. She stated that she was never told to read the Trust policies. I am unclear how this supports the claimant's case as she does not dispute the sanction, she was given because of the inappropriate Facebook postings, only the fact that this was escalated to a

formal disciplinary process. Further she did not seek to appeal the disciplinary outcome.

120. The respondent's position is that the claimant as a Band 6 nurse and whose responsibilities would include being the Nurse in charge of a ward should have known her professional responsibilities. No evidence was put before me by the claimant or respondent setting out the training that the claimant had received on social media. The statement provided by Clemmie Elias (page 118) states,

"Throughout our training to gain our registration we are taught the importance of not posting on social media information regarding our work. To log on to social media and to see a post from a senior nurse, clearly talking about her colleagues and having another colleague tagged in the post was upsetting."

121. During cross examination, the claimant stated that she was aware that she should not post private information about patients as this would be a breach of confidentiality which suggested to me that she had some form of training. I find based on the Ms Elias' statement and the claimant's comments that some form of training on social media was given to the claimant, but it is unclear whether she was specifically referred to and requested to read the respondent's policies. However, I find that this is not relevant to the issues in this case.

122. I find that irrespective of the Trust's social media policy, the claimant should have been aware of her professional obligations as set out by the National Midwifery Council ("NMC"). The NMC code of conduct is at page 698 and paragraphs relating to social media at pages 715 and 716. An extract from The Code of Conduct states,

*"**20 Uphold the reputation of your profession at all times***
To achieve this, you must:-
20.1 Keep to and uphold the standards and values set out in the code
20.2 act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment
20.3 be aware at all times of how your behaviour can affect and influence the behaviour of other people
20.8 act as a role model of professional behaviour for students and newly qualified nurses, midwives and nursing associates to aspire to
20.10 Use all forms of spoken, written and digital communication (including social media and networking sites) responsibly. respecting the right to privacy of others at all times

For more guidance on using social media and networking sites,
please visit our website at www.nmc.org.uk/standards."

123. The NMC Code of Conduct provides a link for guidance on social media and networking issues and was available to the claimant if she needed further guidance.

124. The claimant raised that she was not aware of the respondent's policies at her disciplinary meeting on 20 September 2019 and she stated at the meeting that she, "hold my hands up for my lack of policy awareness". She did not seek to

present this as a defence. I am satisfied that this was therefore considered by the disciplinary team.

125. The claimant was given feedback at the disciplinary meeting on what the decision was based on which included,

> "If you check the NMC Code of conduct around that in it's purest form you've broke that code of conduct, ……When you are on the NMC register, you are on it 24 hours a day, so your behaviour has to be appropriate to remain on the register 24 hours per day but it's important and something that's hard to get your head around"

126. I find that it was reasonable and proper for the respondent to conclude that the claimant was in breach of her professional obligations under the NMC Code of Conduct, and I do not find that her lack of awareness of the respondent's policies is relevant to the sanction she was given. As set out above, in any event, the claimant does not raise as an issue the sanction she was given as a result of the disciplinary process.

In relation to the Disciplinary process for Datix incidents on 3 February 2019 and 14 February 2019.

127. Ms Ray sent the claimant a letter dated 5 June 2019 (page 289) which stated that that after an investigation the case was being referred to a formal disciplinary hearing. The issues raised by the Datix complaints related to care given by the claimant on 14 February 2019, when the claimant was the nurse in charge and staff reported that they felt unsupported by her and on 3 February 2019, there was a lack of documentation and care given to the patient in the claimant's care.

128. The claimant acknowledged that once an incident was reported through Datix, the respondent would have to investigate this in order to close the incident and it is therefore not her case that these incidents should not have been investigated. The claimant raised issues with the following: -
    (i) Following the investigation, this should not have been progressed to a formal disciplinary hearing, in relation to the allegation that there was a failure to escalate the patient's care.
    (ii) The statements taken from staff investigating these incidents were not accurate and there was a biased investigation
    (iii) The two nurses who cared for patient SW on 14 February 2019 were not disciplined despite the fact that they had not recorded in the medical records or escalated the patient's care.

129. Taking each issue on turn: -

(i) A formal disciplinary hearing was not necessary

130. The claimant acknowledged that there are no documented entries between 17.00 and 19.24 hours on 3 February 2019 when the claimant was in charge of patient SW's care, and she accepted that did not write in the medical records. The claimant stated that she had no issue with the final written warning on her record for 12 months that she was given as a sanction for this. She did not appeal the disciplinary outcome.

131. Under cross examination the claimant's evidence was that she did not have the patient's medical records to write in these but that she accepted that she should have written the care that she gave the patient on a piece of paper to be added to the notes and/ or had she been in hospital the following day she would have written in the notes retrospectively.

132. The claimant does not accept that she should have been referred for a disciplinary hearing for failing to escalate the patient SW's care. The claimant relies on the fact that the Root Cause Analysis investigating the care given to SW states that the care given to the patient did not cause his death and that he would have died in any event. There is no allegation that the claimant's care or lack of care caused patient's SW's death.

133. I am persuaded by Ms Ray's explanation of why it was reasonable and proper to investigate the care given to patient SW by the claimant and to escalate this to a formal hearing. Ms Ray explained that that this was a serious incident and she telephoned SW next of kin to inform her that the respondent Trust was investigating the care that SW was given in line with her duties under the duty of candour. The purpose of investigating patient SW's care was to be honest with the patient/ patient's relatives about what went wrong and to do this they had to investigate what happened and what should have happened and how the respondent trust could make improvements in patient care and learn from incidents.

134. I am persuaded by Ms Ray's explanation of the investigations that she carried out and her view that she had concerns of sub optimal areas of practice. Ms Ray was not seeking to reach her own conclusion on these matters by deciding the outcome but instead setting out her concerns from the evidence that she had received. I find that she had sufficient evidence to refer this to an independent panel to provide their view, which included there was no documentation in the medical records of the care the claimant provided SW. This was objectively correct and did not require any subjective view from Ms Ray. I find that if any potential sub optimal areas of practice are identified then it is proper to ensure patient safety and reasonable for the respondent to manage these through internal processes.

135. The claimant stated that she was unaware of the clinical records policy at page 678 or the disciplinary policy at page 61, but she accepted that she could access this through her work computer. I find that proper record keeping is a core requirement of nursing care to ensure patient safety and to ensure that practitioners have all the relevant information before providing patient care. The importance of this requirement is highlighted in the NMC Code of Conduct

which states at section 10 (page 708) that, keeping clear and accurate records relevant to your practice, you **must**

"10.1 complete records at the time or as soon as possible after an event, recording if the notes are written some time after the event
10.2 identify any risks or problems that have arisen, and the steps taken to deal with them, so that colleagues who use the records have all the information they need
10.3 complete records accurately and without any falsification, taking immediate and appropriate action if you become aware that someone has not kept to these requirements
10.4 attribute any entries you make in any paper or electronic records to yourself, making sure they are clearly written, dated and timed, and do not include unnecessary abbreviations, jargon or speculation
10.5 take all steps to make sure that records are kept securely
10.6 collect, treat and store all data and research findings appropriately"

136. Following the investigation, the disciplinary panel led by Mr Ian Setchfield, Acute Care Nurse Consultant, held on 26 November 2019 found that there was insufficient evidence to support the allegations concerning conduct that would bring the Trust's name into disrepute but upheld the allegations relating to the failure to keep records in line with section 10 of the NMC Code of Conduct (set out above).
.
137. The claimant was the nurse responsible for the care of this patient and there was no written evidence as to what care the patient had received from the time he was admitted until the end of the claimant's shift. I find that this was sufficiently serious to warrant a formal disciplinary procedure on this issue alone as this could be considered a serious breach of her professional obligations. I therefore do not find that it was inappropriate or unreasonable for the respondent to decide to proceed to a formal disciplinary hearing in all the circumstances of this case.

(ii) Biased investigation

138. The claimant stated that all the statements taken required amendment by the respondent and that these were not all signed. These were taken by Ms Ray and Ms Mather to skewer what happened at the time or falsify facts to build a case against the claimant. She stated that there were complaints made by her colleagues to Employee relations that they did not agree with the investigators account of what was stated or implied. The claimant did not seek to appeal the disciplinary outcome of a final written warning for 12 months on her record.

139. The claimant did not serve any witness evidence to support that her colleagues felt pressurised to give evidence in a negative way against her and did not refer me to any documentation to support this. Ms Ray and Mr Mather denied that they had any complaints from the staff that they spoke to and there is a dispute of fact of what occurred. In the absence of any evidence submitted by the claimant, I do not find that there was any undue pressure placed on the claimant's colleagues to provide evidence in a particular way.

140. Turning to the process adopted by the respondent, statements were requested from the staff involved in the incidents / care given on 3 and 14 February 2019. Ms Ray and Ms Mather then arranged to meet with each member of staff. A note (albeit not ab verbatim) was taken of the meeting by Ms Mather. These notes were sent to the witnesses to sign and confirm it they were accurate. If any amendments were requested to the notes by members of staff, these were made, and the amended version included in the documentation submitted to the investigatory panel.

141. Mr Campion took the claimant to the documentation in the bundle relating to each member of staff involved in the investigatory process. I have set out above in my findings of fact the dates of the meetings with each member of staff. Oliver Schrod and Julie Gammon signed and returned the notes of their meeting. Chris MacQuillin, Rebecca Clifford, Kate Sutton and Faye Bucceri amended the notes and stated with their amendments incorporated they approved the version of the notes. Kate Knight that did not return a signed note of the meeting or respond to Ms Mather's correspondence after the meeting.

142. Mr Campion took the claimant to the versions of the notes of meeting that were summitted to the disciplinary panel and the claimant accepted that the amended versions of the notes of the meetings had been submitted. This does not support the claimant's allegations that Ms Ray / Ms Mather falsified facts.

143. I find that the process adopted by the respondent was fair. Each witness was given an opportunity to amend the notes of meeting / their statements. I accept that ideally it would have been preferable to obtain signed notes / statements from the members of staff but that it was reasonable to submit the final approved versions of these to the disciplinary panel. In any event I note the disciplinary panel led by Mr Ian Setchfield, Acute Care Nurse Consultant, held on 26 November 2019, gave less weight to any unsigned statements or notes of meetings. The claimant accepted that she felt that this was fair.

144. I do not accept the claimant's criticism that as all of the notes of meetings /statements were amended or required amendment that this provides evidence that the evidence that Ms Ray sought was to skewer the evidence or falsify facts. I accept Mr Campion's submission that the respondent would not have sought the members of staff input on the notes of meeting if this was the case.

145. I found the respondent witnesses to be genuine, convincing and very credible on this issue. They answered questions to the best of their ability, with clarity and detail and were not at all evasive. Their evidence was both internally and externally consistent and supported by the documentation in the bundle. I find no reason to doubt what they said and do not find any evidence of a biased investigation of falsification of evidence.

(iii) Two nurses not investigated

146. The claimant states that two other nurses who looked after patient SW after she finished her shift were not investigated, put through a disciplinary procedure, or put on supervised practice whilst this took place. They were both present when the patient SW had the cardiac arrest.

147. Ms Ray stated that this was not the case and the respondent therefore disputes this. It was not possible to review SW's medical records as these were in archive at the respondent trust and it was not possible to retrieve these for the purposes of the hearing. The notes of SW in the bundle were limited to a few pages (pages 101-106) and it was clear that these were an extract only of patient SW's notes as they did not include details the cardiac arrest that occurred.

148. Ms Ray's evidence is that once the Datix incident form was completed, a Root Cause Analysis took place. In preparing the Root Cause Analysis a chronology of the medical records was prepared and this is set out in the document. At page 733, there is a retrospective nursing entry note at 04.30 on 4 February 2019. This stated that the patient's blood glucose had been tested and glucose given to him was low. I mg of Lorazepam had been given to the patient to treat the patient's agitation. He remained aggressive and refused to have his neurological observations and vital signs recorded repeatedly. There were also retrospective notes made by a Healthcare Assistant at 02.20 on 4 February 2019 (for care given at 19.30 on 3 February). A Foundation year 1 on call respiratory doctor examined the patient at 19.24 on 3 February and on call Registrar examined the patient at 21.50 on 3 February as the patient was restless, which suggests that the nurses escalated this to the doctor to review the patient. In contrast, there were no medical entries made at the time or retrospectively by the claimant on 3 or 4 February 2019.

149. I find that based on this evidence, the other nurses and healthcare assistants wrote in SW's medical records and there is also evidence that they escalated concerns to the medical team. I accept Ms Ray's evidence that the fact that the record in the notes was written retrospectively is not out with normal practice as in an emergency situation, the patient's care takes precedence, and this is consistent with the contents of 10.1 of the NMC Code of Conduct set out in paragraph 130 above, which states that records should be completed at the time *or as soon as possible after an event*, recording if the notes are written sometime after the event.. The claimant also accepted that if she had written in the notes retrospectively setting out the care and the time that she gave this, this would have been acceptable practice.

150. I therefore find that it was reasonable and proper for the respondent trust not to investigate the other two nurses involved in SW's care.

Conducting two disciplinary processes against the claimant within a short space of time which was unfair and an act of 'harassment' against her.

151. I do not accept that the timings of the two disciplinary procedures provide evidence of harassment and I find that the timings are co-incidental in this case. Both relate to external complaints made to management and the respondent reacting to these complaints. The Facebook investigation related to staff being upset on the ward for posts made by the claimant, the latest of which was in February 2019 and the Datix complaints were made about care provided on 3 and 14 February 2019.

152. The claimant does not dispute that these incidents should not have been investigated but that they should not have progressed to formal disciplinary matters. I have set out above that I find it was reasonable and proper for the respondent to elect to progress both these issues to a formal disciplinary process in light of the possible sanctions that the claimant may face, including dismissal, and as the only sanction that an informal procedure could give would have been an oral warning. I appreciate that it must have been a difficult time for the claimant whilst these issues were investigated, and the outcomes were awaited. However, there is no evidence before me that these investigations were motivated for personal reasons by the respondent. Both investigations were carried out by different lead investigators and different disciplinary panels and the claimant does not take any issue with the sanctions that she was given by each disciplinary panel.

The Claimant stated that the two disciplinary procedures had ruined her career

153. The claimant has not expanded on this allegation from the List of Issues in any detail and I set out below the issues that she raised that may explain her perception of why this was the case. The claimant's letter of resignation dated 9 December 2019 stated,

"After being put through the disciplinary process which was highly stressful, but now complete I then had a meeting with my Manager.

At meeting which I felt was to discuss progressing into my job role, addressing learning needs moreover which due to clinical supervision was never able to progress in the learning programme.

At the meeting it was raised concerns around my ability to do my job, one I had never been granted the chance to complete training for or do. This leaving me feeling yet again that my reputation and abilities were being unjustly questioned.

I did express that I did have leaning needs to complete the programme of taking on a new role, that being sent to do admin or asked to take annual leave at points was not conducive to my learning, while also learning to manage the huge amount of stress and psychological damage the disciplinary process was putting me through.

I am now left feeling like yet again bullied harassed and feeling like I have to prove my competencies in a job role I did not get a chance to learn or do."

154. The claimant stated that all she could do was follow people about due to being supervised and she was fed up with being in a job she could not do. The respondent disputes this. They submit that the claimant was put in a positive environment to learn and that to ensure patient safety they had no alternative. The claimant does not dispute that it was reasonable to place her under supervision pending the outcome of the disciplinary processes. I am

persuaded by Ms Burrough and Ms Gammon's evidence that the claimant's supervisor needed to know about the fact that the claimant was on supervised practice to ensure that she was not asked to do anything that put her in an uncomfortable position and to ensure patient safety.

155. The claimant's evidence was that her learning experience in her new job as a MacMillan Cancer nurse was halted whilst the disciplinary outcomes were awaited. It was clear from her cross examination of Ms Burrough that the claimant's perception was that the respondent was doing this by removing her off a course in advanced effective communication. I find from the email correspondence in the bundle (pages 476-478) that the patient was on the waiting list for the course for 4 November 2019 but that as there were not enough places and her paperwork could not be processed in time that she was then put on a course in April 2020. No further evidence was put before me to suggest an alternative reason for the cancellation of the course.

156. The claimant stated that even though she had moved departments she felt that the respondent was starting to question her abilities, and this was because she was placed on supervision. The respondent disputes this and referred me to emails in the bundle from those supervising the claimant who raised issues with her conduct and level of knowledge of clinical practice. I have set out in my findings of fact above the concerns raised about the claimant's work from Ms Baker, Toni Fleming, Deniece Merrall and Sharon Gill between 30 September 2019 and 19 November 2019. Ms Burrough discussed these concerns with the claimant at their one-to-one sessions and Ms Burrough's notes of these discussions are set out in the bundle commencing at page 567. The content of these notes was not challenged by the claimant.

157. I do not accept that these issues were raised simply because the claimant was on supervision. I find that the nature of the concerns raised about the claimant are such that they are likely to have been made even in the absence of supervision and particularly as she was new to the job and so her work would have been monitored to some degree. The concerns relate to the claimant looking at her personal mobile when in consultation with patients, her interaction with staff members, making inappropriate comments in clinic, issues with making hospice referrals and arriving late and going home early. These are all types of issues that would have been escalated by those working with the claimant and then would have been raised with her by her manager. Further the concerns have not been raised by one individual but by several people that worked with the claimant.

158. The claimant's evidence is that she believed that once the outcomes of the disciplinaries were over that she would be taken off supervisory practice and would return to orientation in her new job. However, she was called into a meeting with her manager on 29 November 2019 and was then told that she would be put on a Performance Improvement Plan ("PIP").

159. An extract from the letter to the claimant on 29 November 2019 from Ms Burrough states,

"Further to our conversation on 29th November 2019, I am writing to invite you to a Stage 2 informal performance management meeting in line with the Trust's Performance Improvement Policy. The purpose of this meeting will be to discuss my concerns regarding your current performance and for us to explore potential reasons behind this. At this meeting we will agree a performance improvement plan with set targets and ways we will be able to support you to achieve this. I will forward you a copy of the proposed performance improvement plan prior to the meeting that we will discuss."

160. The respondent states that based on the concerns raised by several the colleagues that worked with the claimant that these raised concerns about the claimant's ability to do her job and as both disciplinary outcomes upheld complaints about the claimant's conduct that the PIP was to be put in place to get the claimant in the position, she needed to be to carry out her role.

161. There is a dispute as to whether the claimant saw the PIP. The claimant states that she did not receive or see the plan. The respondent refers to an email sent from Ms Burrough to the claimant on 5 December 2019 enclosing the plan (page 543). Mr Campion referred the claimant to the Performance Improvement Programme Form on page 584. This sets out the following objectives: -

(a) To adhere to the standards for record keeping set out in the Clinical Record Keeping Standards Policy and standards set by the Nursing and Midwifery Council (NMC)
(b) To adhere to the standards set out in the Social Media Policy
(c) To demonstrate clinical nursing knowledge expected of the Band 7 Macmillan Lung Cancer Clinical Nurse Specialist
(d) To demonstrate effective communication skills.
(e) To demonstrate behaviour in line with the trust values at all times

162. Having reviewed the Performance Improvement Programme Form, the claimant accepted that she had no issue with objectives (a) and (b) but did not provide an explanation as to why (c), (d) and (e) were controversial other than to say that she had been halted from progressing in her new role and her orientation should have started from the beginning.

163. I do not agree with the claimant's explanation for this. Objectives (c), (d) and (e) were simply requirements necessary to carry out her role as a Band 7 Macmillan Lung Cancer clinical nurse specialist, the role for which she was employed. These were also consistent with the concerns raised by several members of staff between 30 September 2019 and 19 November 2019 (set out at paragraph 153 above) and discussed with the claimant by Ms Burrough. The respondent had set out the objectives, the measures for accomplishment and the support that they would put in place to assist the claimant to achieve these. I find that objectives (c), (d) and (e) was essentially an orientation programme identifying support for the claimant to carry out her new role and reasonable in all the circumstances.

164. In any event, the claimant did not attend the meeting with her manager to discuss the PIP because she resigned before this took place. The claimant states she did not see the Performance Improvement Programme Form before resigning and this document cannot have therefore formed part of her reasons for her feeling she had no option other than to resign. I find the real substance behind the claimant resigning lies in her perception of what was going to happen at the meeting on 11 December 2019. The claimant told the Tribunal that she felt that if the respondent "could not get her for one thing they were going to get her for another". This perception was perhaps based on a culmination of the events that are discussed above. However, from the claimant's evidence there is no specific act/ omission by the respondent that the claimant referred the Tribunal to setting out how the respondent had breached the implied term of trust and confidence other than being invited to a meeting on 11 December 2019 to discuss a PIP which she had not read.

Legal Issues and Conclusion

165. As set out in the legal issues above, I must consider whether the acts of the respondent amount to a fundamental breach of the contract of employment, and/or whether the respondent conducted itself in a manner that is likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant. On the basis of my findings and conclusions set out in detail above, I conclude that the acts of the respondent do not.

166. I find that the respondent acted in a reasonable and proper manner in all the circumstances in determining whether to proceed to a disciplinary procedure for the Facebook incident and the two Datix incidents and there was nothing inappropriate, unreasonable or objectionable about the manner in which the respondent conducted the disciplinary hearings or that there was sufficient evidence to suggest that other members of staff should have been investigated and disciplined by the respondent in addition to the claimant. I do not find that the timings of the two disciplinary procedures provide evidence of harassment and put simply the timings of are co-incidental in this case based on the time that the complaints were made. These acts could in no way be considered to be acts which breached the implied term of trust and confidence or sufficiently serious as to amount to a repudiatory breach of contract entitling the claimant to consider the contract to be at an end justifying her resignation and a claim for constructive dismissal.

167. In respect of the allegation that the "two disciplinary procedures ruined the claimant's career", in so far as the allegations that I have identified and discussed above, I do not find that any aspect of the respondent's conduct amounted to a fundamental breach of the contract of employment, or breach of an implied term of trust and confidence between itself and the claimant either as a one-off act or cumulatively.

168. I have set out above that I find it was the claimant's perception that by arranging a meeting to discuss a PIP this breached a term of trust and confidence between her and the respondent. I do find that the claimant resigned at least

partly in response to this action by the respondent as her resignation letter clearly sets this out as a reason for doing so. However, considering all the circumstances which I have discussed above, objectively, I do not find that this could be considered such a serious event as to destroy trust and confidence between the parties and did not amount to a repudiatory breach, particularly as the claimant stated that she had not read or engaged with the Performance Improvement Programme Form and whether it was reasonable in the circumstances and therefore could not have known how the meeting on 11 December 2019 was likely to turn out.

169. I therefore do not find that there were any acts of the respondent which, either individually or cumulatively when taken as a whole as part of a course of conduct, were objectively serious enough to damage or destroy the relationship of trust and confidence between the respondent and the claimant when judged reasonably and sensibly.

170. I find that the claimant was not unfairly dismissed by the respondent. Further, as the claimant resigned with immediate effect and I have not found that she was dismissed by the respondent, she was also not wrongfully dismissed and her claim for breach of contract also fails. It follows from my findings above that I need not consider the other issues relating to liability, namely whether the claimant affirmed the contact of employment before resigning or issues relating to remedy (Polkey or contributory fault).

Employment Judge Sekhon

Date: 22 May 2022