EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4109714/2021 and 4111220/2021

Final Hearing
Held on 14 - 18 March, 24-27 October and 21 November 2022

Employment Judge A Jones
Tribunal Member Ms Z Zwanenberg
Tribunal Member Mr R Martin

Ms C McCluskie	Claimant Represented by Mr S Smith, solicitor
Armadale Group Practice	Respondent Rfiprosianted by: Mr J Boyd, of Counsel Instructed by Gately legal, solicitors

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the unanimous judgment of the Tribunal that:

1. The claimant was unfairly dismissed by the respondent. The respondent is ordered to pay to the claimant a basic award of £2421, a compensatory-award of £35,079.20 (net) and compensation for loss of statutory rights of £500.
2. The claimant was not discriminated against by the respondent in terms of section 13 Equality Act 2010.
3. The claimant was not victimised by the respondent for having done a protected act in terms of section 28 Equality Act 2010

Reasons

Introduction

1. The claimant presented a claim that she had been unfairly dismissed from her role as a Practice Nurse with the respondent. The claimant also claimed that instigating an investigation against her and her dismissal amounted to acts of direct disability discrimination. The disability relied upon was Type 1 Diabetes although the claimant also suffers from anxiety and depression which is linked to her diabetes. The claimant then lodged a further claim in which she made a number of allegations of post-employment victimisation in relation to her treatment as a patient at the respondent's practice. Both claims were conjoined.
2. The respondent's position was that the claimant had been fairly dismissed for gross misconduct. Although initially the respondent did not accept that the claimant was a disabled person for the purposes of the Equality Act 2010 ('EqA') by the time of the final hearing that issue was no longer in dispute. However, the respondent denied that the claimant had been subjected to discriminatory treatment or that she had been victimised.
3. Parties agreed a chronology and lodged a joint bundle of documents. There was also an agreed list of issues.
4. The Tribunal heard evidence from the claimant, her own GP, Dr McGillivray (who is also a partner at the respondent practice) and Mr Young who accompanied her during the disciplinary and appeal hearings.
5. The Tribunal then heard from witnesses on behalf of the respondent. The Tribunal first heard evidence from Dr Dalgleish ('VKD') who had conducted the investigation into allegations made against the claimant. The evidence of Dr McLay (CM), whose evidence was 'relevant to the issue of victimisation in particular, but also gave other relevant evidence was interposed in VKD's evidence as she was due to be abroad the following week.
6. The claimant's solicitor was unwell on the sixth day of the hearing and therefore this day was postponed. A continued hearing took place between 24 and 28 October 2022. The claimant was unwell on 24 October and

although there was a delayed start to the hearing to allow the claimant to attend, in the event she was not able to attend. Subsequently a soul and conscience letter was received from her GP in relation to her ability to attend on that day.

7. As the next witness was the dismissing officer, the respondent did not object to proceedings being adjourned for the day to allow the claimant to hear the evidence of a crucial witness. Arrangements were made for the claimant to attend the rest of the hearing remotely by video. The Tribunal then heard evidence from Dr McRitchie (NM) who together with Dr Wilson (CW) formed the disciplinary panel. Evidence was also heard from Dr Barr-Hamilton who was a member of the panel formed to deal with the claimant's appeal against her dismissal; Mrs Conn, who was the respondent's practice manager and who had taken notes during the internal proceedings and Ms McGuire who was a practice nurse at the respondent's practice and had raised the issues which led to the claimants dismissal. Finally, evidence was heard remotely from Dr Ali to whom allegations regarding the claimant were said to have first been made. Dr Ali, who was on maternity leave from her role had only just returned from Turkey and gave evidence by video from London.
8. It was agreed that written' submissions would be made by the parties and then a hearing would take place on 21 November for parties to comment on each other's submissions and for questions from the Tribunal. Parties provided written submissions and authorities were also provided by the claimant's solicitor. The Tribunal was grateful to agents for their full submissions and the manner in which they had conducted the hearing.
9. Having heard the evidence, considered the documents to which we were referred, and the submissions made by the parties, the Tribunal found the following facts to have been established.

Facts

10. The claimant qualified as a nurse in 2010.

11. She commenced work at the respondent's practice which operates as a partnership on 4 April 2016 and worked as a Practice Nurse there until her dismissal with effect from 29 March 2021 .

12. The claimant worked Monday, Wednesday, Thursday and Friday from 9am** 5pm and on a Tuesday from 10am-6pm. Her gross weekly pay was £674.60 and net weekly pay £477.61. Her annual basic salary was £35,079.20.

13. The respondent is a GP practice with ten partners during the relevant period. The respondent also employed three practice nurses, one of whom was the claimant, a practice manager and a number of administrative staff.

14. When the claimant commenced work with the respondent, she was not given any training on ordering stock for use in the practice. During her previous employment the ordering of stock had been the responsibility of the Senior Nurse.

15. Stock used in the practice was ordered by filling in a stock order form which was then approved and signed by a GP. The respondent did not have any system in place which kept track of stock, who used it or what it was used for or when. Stock was simply reordered from time to time and no records were kept of stock which had to be disposed of because it was out of date.

16. The claimant suffers from Type 1 diabetes and has suffered from this condition since she was around 17 years old. Her condition is complex but is well managed by her and she is required to inject insulin 5 times a day in addition to taking extra medication to manage her insulin levels. She checks her blood sugar level through a FreeSyle Libra 2 machine which is attached to her arm and scanned by her iPhone. She also suffers from tong standing depression and anxiety arising from dealing with this condition.

17. The claimant recognises when she is about to suffer from a 'hypo' and takes evasive action by either taking a glucogel, which she is prescribed or other fast acting sugar products. Glucogel is a product which can be prescribed or bought online which is made up mainly of glucose and water.

18. In previous roles, the claimant made use of glucogel available in her workplaces when necessary and the appropriateness of this had never been raised with her.

19. The respondent did not at any time carry out an assessment of the claimant's needs while at work or indeed discuss the management of her

disability while at work. It did not recognise that the claimant was a disabled person for the purposes of the Equality Act 2010 until shortly before the Tribunal proceedings commenced. The claimant was also a patient at the practice and had been seen over the years by various GPs in the practice.

20. At no point prior to disciplinary proceedings being instigated was the claimant informed that she should not use any medicinal supplies from the practice for her own use during her working hours.

21. The claimant used glucogel from the respondent's stock on occasions when she felt that she was about to have a hypo and did not have any of her own supplies with her. Other members of staff were aware of the claimant's actions in this regard.

22. The claimant and other nurses completed stock order forms from time to time which sometimes included orders of glucogel. On occasion such orders would have replaced the glucogel used by the claimant. These were always signed off by a GP with no further enquiry, either from the GP or the nurse. The claimant never made any attempt to conceal her use of glucogel at work.

23. The respondent operates a disciplinary policy whereby counselling is recognised as the first step in the process and records "disciplinary procedures should not be viewed primarily as a means of imposing sanctions. They should also be designed to emphasise and encourage improvements in individual conduct." The examples of gross misconduct which are given are "Serious breach of confidentiality, theft and abuse of medicine" although this is not an exhaustive list.

24. The respondent does not have a policy regarding staff use of medicinal supplies (such as plasters, bandages, paracetamol or other supplies which can be purchased over the counter) during working hours and did not at any stage give guidance to staff on what might or might not be appropriate in such circumstances.

25. The claimant was absent from work due to depression from 25 June 2020 to 24 August 2020, when she returned on a phased basis.

26. The claimant sent an email to VKD on 12 October, when she made reference to 'having a nervous breakdown' and indicating that she was

'struggling'. No support was offered to her following this email to assist with her mental health.

27. Around this time anonymous allegations were made regarding the claimant to the Nursing and Midwifery Council that the claimant had been taking cocaine at work. The claimant believed that these allegations had been made by another member of the respondent's staff.

28. Around this time the respondent sought advice from the BMA regarding the management of the claimant.

29. On 9 November 2020, Dr Ali emailed VKD and another GP in the practice, Dr Little referring to the claimant stating "That sounds like a very supportive staff meeting. We must however discuss the other problems regarding her lack of attendance/not wearing mask/other issues Dorothy has kept a list of." The claimant was never informed there was a list being kept of issues concerning her and her attendance was never raised with her as an issue. The claimant in common with most other staff had on occasion forgotten to put on a mask during her working hours. This was never raised with her as issue.

30. The Tribunal concluded that such a list outlining 'concerns' about the claimant must have existed at some point and that the respondent had been looking for issues to raise with the claimant for some time before the issues for which she was dismissed arose.

31. On 18 December 2020 the claimant did not attend work and was found unwell in her home which resulted in her being taken to Accident and Emergency following a consultation with VKD.

32. Between 26 and 28 January 2021 an issue arose with a fridge at the respondent's premises containing vaccines to be administered at a child vaccine clinic. The issue related to the checking of the temperature of the fridge and resulted in some vaccines being destroyed.

33. On 2 February Nurse McGuire had a discussion with Dr Ali regarding the claimant. She informed Dr Ali of the issue regarding the fridge and said that it was in her view the responsibility of the claimant. She did not suggest that she or the other practice nurse who were involved had any responsibility for the issue. At the same time, she informed Dr Ali that she understood the claimant had used glucogel from a trolley which had been created by Dr Ali

containing medicines for use in an emergency. Nurse McGuire then had a conversation with VKD regarding these issues. No notes were kept of these conversations.

34. Nurse McGuire sent an email to VKD on 4 February stating "Discussing drug check and expired antibiotics GP10 order with C McCluskie and S Corry. C McCluskie had ordered cefortaxime and glucogel tubes as only one on trolley. I said there is a box in TR2 which C McCluskie commented she orders some to have in case she needs it. I advised its not for her use and suggested she orders her prescription and keeps in Treatment room. Discussed with Dr AH when chatting about resus trolley and how many of each item we should have of stock on the trolley. Dr Ali commented that this had been discussed with C McCluskie before/'

35. Dr Ali then sent an email to Mrs Conn and VKD on 5 February. "I am emailing you regarding the concerns raised by Susan McGuire. Susan approached me on Tuesday 2nd February with the following concerns. Clair has admitted to Susan that she has been taking glucogel from the emergency trolley. Last year, when I was undertaking work on the trolley and took glucogel from the treatment room, Claire was in the room and informed me that she uses this supply. I informed her at that stage that it was inappropriate to do so and that she should get prescriptions from her GP in case we did not have enough in the event of a patient with a hypo in the surgery. 3 weeks ago when I was creating a drug trolley list, there were 2 glucogel tubes in the trolley. This week, when Susan checked there was one left and Clair admitted to using it. Susan also informed me that recently Clair was asked to check the fridges used for vaccine storage. Clair identified a problem, but did not act upon it or follow it up. She was off the following day but did not hand over that this problem had not been rectified. As a result, the infant vaccination clinic was cancelled. This is a professionalism matter."

36. The claimant was then suspended by letter dated 9 February 'pending an investigation into the allegations of gross misconduct made against you'.

37. VKD then conducted meetings with various individuals at which Mrs Conn took notes. She took advice from the BMA as to the procedure to be followed.

38. A meeting took place with Nurse McGuire on 16 February. During the course of that interview, Ms McGuire stated "SA (Dr Ali) had a chat with CM (the claimant) last year about using Glucogel from the trolley." VKD responded "So CM was told last year that drugs on the Emergency Trolley was not for personal use ~ need to ascertain when that was". VKD went on to state 'There was Glucogel missing from the Emergency trolley according to the Emergency Trolley book in November 2020" and "Since January 2019, 10 boxes of glucogel have been ordered" VKD asked Nurse McGuire "Regarding the comment in the kitchen, what was this and how do you feel". No reference had been recorded in the interview to any such conversation. The interview with Nurse McGuire was not a fact-finding interview and VKD took an active part in directing what was recorded from the meeting.
39. The claimant was invited to attend an investigatory meeting on 24 February by tetter dated 18 February. The letter stated that the interview was not a part of the 'Practice's formal disciplinary procedure" and that as such the claimant did not have a right to be accompanied at the meeting. No details of the allegations against the claimant were provided.
40. A meeting took place between VKD and Dr Ali with Mrs Conn taking notes on 22 February. Dr Ali stated that in relation to the claimant's use of glucogel, 'she had already spoken to CM regarding this last year'. At this stage VKD intervened and indicated it could not have been last year as the claimant was working from home during covid. This was not recorded in the notes. Rather, it was recorded that Dr AHwas then asked 'roughly when did you speak to CM' to which Dr Ali is recorded as replying 'before summer 2019'. The notes then record Dr Ali as stating "I asked CM where the glucogel was and she said there are not many left as she was using them. I advised CM that they were not for her use but she dismissed the comment. I felt disappointed that this was still going on." Dr Ali was then asked about the issue concerning the fridge. She said "All of this was given to me by SM in confidence; she felt angst and did not have to say anything about the fridge incident. It is sad when a staff member has to deal with another staff member not following protocols or taking responsibility for problems they have identified. It appears that CM lacked insight into the importance of the fridge temperature and the consequences of it not being addressed." VKD

responded thus "we all work as a Team and SM obviously had concerns that she felt she had to bring this up. This opens us up to litigation." VKD did not act in a neutral manner during the interview. The notes of the meeting were inaccurate and misleading.

41. A meeting then took place with the claimant on 24 February at which Mrs Conn again took notes. The claimant said at an early stage in the meeting in relation to her use of glucogel "Looking back, I should have said to someone but I have never been told off before". She also stated "I've seen GPs taking paracetamol from the cupboard in the treatment room what is the difference?" The claimant also referred to the anonymous allegations which had been made against her in the recent past and said that in relation to current allegations 'it feels like victimisation and it feels personal'. When the claimant indicated that she believed a member of staff had made the anonymous allegations, Mrs Conn interjected "perhaps someone outwith the practice contacted the NMC as they had concerns'. The claimant then said "I'm sorry I took Glucogel but it was for a medical need. Its not as if it was opiod and I was selling it. I will always keep some with me if I keep my job."

42. The claimant provided notes in response to the notes of the meeting which were sent to her and in those notes stated in relation to her use of glucogel "It was common knowledge that I did this, just as it was known that doctors took paracetamol from the drug cupboard. "In general I feel that the tone of the minutes has been written in a manner that suggests I do not take these accusations seriously and that I do not manage my diabetes efficiently. I wholeheartedly refute both suggestions."

43. The claimant was then invited to attend a disciplinary hearing on 24 March by letter dated 18 March. The letter stated that the allegations against the claimant were: 'It is alleged that you have repeatedly been taking Glucogel from the Emergency Trolley and from the Stock cupboards to self medicate. It is alleged that you failed to follow due process to report a fault of the Vaccine Fridge and the Disruption in the Cold Chain, resulting in six children receiving Childhood Immunisations from vaccines that should have not been used, as the vaccines had been out of the clod chain and the stability of the vaccines had not been assessed. In the Practice's view these

allegations constitute an ad of gross misconduct." The letter went on to state "Since the Practice views the allegations against you as gross misconduct I must inform you that the outcome of this disciplinary hearing could result in your summary dismissal."

44. The letter of 18 March included a copy of an investigation report which had been produced by VKD. The report stated 'Susan McGuire corroborated that Dr Ali had spoken to Clair last year about using the Glucogel from the Emergency Trolley.' The report was not balanced. It did not make any reference to the claimant's apologies or seek to identify any evidence or information which might be supportive of the claimant's position. The report did not make any reference to any steps taken to investigate any of the issues raised by the claimant in mitigation during the investigation, such as GPs taking paracetamol, it being widely known she had used the respondent's glucogel during her employment, or having taken it in previous places of employment The report summarised the claimant's conduct in bold as theft, a Fitness to Practice Issue, a Professional Competence Issue a Probity Issue (in relation to the claimant's position that Dr Ali had not spoken to her In a previous year' about the glucogel). It went on to state (without having conducted any investigation) that 'by self prescribing and self-administering Glucogel off record, I believe that Clair McCluskie undermines the effective medical management of her own illness/ The report accused the claimant of dishonesty as there was no evidence she had asked permission to take the respondent's glucogel, even though the claimant had never suggested she had asked for permission. It suggested the claimant had 'self prescribed and self administered' which undermined employee-employer trust and Doctor- Patient trust. The report characterised the claimant's use of glucogel as 'pre-meditated, systematic and longstanding deception/ The report characterised the claimants involvement in the fridge issue as a Fitness to Practice Issue and indicated that there was a professional duty of candour to be answered.

45. The report then went on to make recommendations and concluded in relation to the claimant's use of glucogel that there was enough evidence to suggest gross misconduct and in relation to the fridge issue, misconduct. In that regard it recorded "there is no clear evidence to suggest, that Clair

McCluskie is solely responsible. The evidence suggests that it was the duty of all staff involved in the maintenance of the cold chain to report the disruption of the cold chain; Notwithstanding that finding, no investigation or action was taken against any other member of staff in relation to the fridge issue.

46. A disciplinary hearing took place on 24 March. The meeting was chaired by Dr MacRitchie ('NM') who together with Dr Wilson ('CW') formed the panel. VKD was present and Mrs Conn took notes. The claimant was present and a supporter Mr Young took part remotely by telephone as he was at the time working off shore.

47. After VKD had outlined the allegations, the claimant asked why all the evidence regarding the issue concerning the fridge pointed to her. VKD responded by saying she had been asked to investigate the allegations made by Nurse McGuire and that The investigation is only to do with these but other allegations would need consideration.' The claimant then said 'as long as its being investigated'. The claimant was entitled to conclude that there would be another investigation into the involvement of others regarding the fridge issue. However, no such investigation ever took place.

48. Mr Young indicated that as the claimant denied that Dr Ali had spoken to her the issue of probity was not relevant. VKD responded by saying 1 would need to look into this'. She then said "Dr Ali stated that she spoke to CM regarding Glucogel not being for her use and thought that issue had been resolved but I can investigate." Later in the hearing VKD also indicated she needed clarification from Dr Ali. VKD did not conduct any further investigation into this matter.

49. VKD stated that "Cm mentioned that it was common knowledge she took the Glucogel; this is not true. I spoke to each partner and no one knew of her taking it." There was no record kept of any discussions between VKD and each partner and the Tribunal concluded as a matter of fact, that no such discussions or investigations took place.

50. During the hearing the claimant stated in relation to her use of the gel "I genuinely thought it was ok, sorry if I was wrong".

51. During the hearing CW indicated that it was ok to take one paracetamol occasionally.

52. A letter dated 29 March was then sent to the claimant indicating that a decision had been taken to dismiss her for having taken glucogel. The letter stated "we feel that the breach of trust, probity issues and professional competency issues are so significant as to amount to Gross Misconduct and to cause a significant breakdown in the trust and confidence between the Practice and you as an employee.' The claimant was also advised that she was to be given a written warning regarding the fridge incident and stated "we found that there was evidence to uphold this allegations, but that fault did not lie solely with yourself. No other individual involved in that incident was ever subject to a disciplinary investigation.

53. The claimant appealed against her dismissal The claimant asked that VKD be present at the appeal hearing. VKD did not attend the appeal hearing and the claimant was not advised in advance of her non-attendance or any reason for that.

54. The appeal hearing took place on 23 April. Mr McEwan, Dr McLay and Dr Barr-Hamilton made up the appeal panel and CW and NM were present. The claimant was also present and was accompanied in person by Mr Young.

55. During the appeal hearing CW acted in a confrontational manner. She also indicated that "the frequent use of glucogel highlights how poorly controlled Clair's diabetes is. This could potentially have serious consequences for the care of our patients. She has never alerted us as her employers, to her problems, thereby prevent us from helping her." The practice was well aware of the claimant's condition and the claimant's colleagues were aware that she had been admitted to accident and emergency in December 2020 because of her condition, including VKD. CW was not in a position to say whether the claimant's condition was well managed or not, having failed to make any investigations into the management of the claimants condition. None of the partners involved ever asked for access to the claimants medical records or consulted the claimants own GP.

56. CW also indicated during the appeal hearing that she understood that the claimant had been given a verbal warning not to use glucogel again. The claimant was never given a verbal warning.

57. A letter dated 3 May was then sent to the claimant indicating that her appeal had not been upheld.

58. The claimant remained a patient of the practice and booked a smear test to take place on 2 July 2021 but did not attend the appointment.

59. A further appointment was made for 17 August. Nurse McGuire was asked if she was comfortable conducting the smear and said she was not. The appointment was then moved to Dr McLay. When the claimant discovered that Dr McLay was to conduct the smear, she declined to attend.

60. Around 12 August, Dr McLay sent the claimant a leaflet with other locations which could provide smear tests. No covering letter was sent with that leaflet.

61. A further appointment had been made for the claimant to have a smear test on 24 August. Dr Robinson was due to conduct the smear that day but could not do so due to a personal issue. The claimant was given an incorrect reason as to why Dr Robinson could not conduct the smear.

62. The claimant emailed the respondent on 25 August raising her concerns that she had not yet had a smear test. The email was not initially treated as a complaint by Mrs Conn. The email was subsequently treated as a complaint and a response was sent to the claimant on 12 February 2022.

Issues to determine

63. The issues to be determined by the Tribunal can be summarised as follows:

Unfair dismissal

a. Was the claimant dismissed for a potentially fair reason and, if so, did the respondent act reasonably in all the circumstances? In particular was dismissal within the band of reasonable responses: did the respondent follow a fair procedure and did the respondent follow the ACAS code when dismissing the claimant?

Disability discrimination

b. Did the respondent discriminate against the claimant in terms of section 13 EqA by:

i. Subjectin g her to a disciplinary process, and/or
ii. Dismissing her.

Victimisation

c. Were the claimant's allegation of disability discrimination made in bad faith?
d. Was the claimant subjected to a detriment in relation to any of the four allegations made regarding the claimant's attempts to book a smear test?
e. If so, was the reason for any of the alleged conduct that the claimant had done the protected act?

Remedy

f. If the claimant is found to have been unfairly dismissed, did she contribute to her dismissal such that either her basic and/or compensatory award should be reduced?
g. If the Tribunal finds that the respondent failed to follow a fair procedure, would the claimant had been dismissed had a fair procedure been followed?
h. Should the claimant be award injury to feelings?
i. Has the claimant taken reasonable steps to mitigate her tosses?

Observations on the evidence

Witnesses

64. The Tribunal found the claimant to be a wholly credible and reliable witness. She gave her evidence in a straightforward manner and was clear when there were issues which she could not remember or could not comment upon. She appeared to the Tribunal to be an open and honest witness who made concessions in her evidence when appropriate. Dr McGillvray was also a straightforward witness who was both credible and reliable. Mr Young gave his evidence in a direct manner. The Tribunal found him to be credible and reliable. In particular, the Tribunal accepted his evidence that he had

not been aggressive or acted in anything other than a professional manner at the appeal hearing in relation to the claimant's dismissal and that Dr Wilson's conduct at the appeal hearing was inappropriate and unprofessional.

65. The Tribunal found VKD to be a wholly unsatisfactory witness. It appeared to the Tribunal that she remembered matters which she thought were in the respondent's favour (for instance that another nurse had retired in December 2017) but could not remember if she knew that the claimant was off work sick for two months in July and August 2020 despite being her de facto line manager. In addition, despite the Tribunal bringing to her attention that her answer to questions was often 'I don't believe I', 'I would have', or 'I must have' and that was of limited assistance to the Tribunal in concluding exactly what her evidence was, she continued to answer questions in this manner throughout her evidence. She appeared very unwilling to commit herself to answers and therefore the Tribunal found her not to be credible or reliable.

66. The Tribunal found Dr McLay, who gave evidence remotely as she was about to go on holiday, to be somewhat bemused as to why she should be required to give evidence to the Tribunal. At one point she indicated she thought her evidence would only take an hour and she did not appear to understand why she should be required to answer questions. Her evidence was of limited value.

67. Dr McRitchie was considered and deliberate in his approach to giving evidence. He was somewhat evasive at times and was clearly considering his answer carefully before speaking. The Tribunal formed the view that this was not on the basis that he wished to ensure his evidence was accurate, but that he wished to ensure he did not say anything which might be damaging to the respondent's position. He indicated that the claimant had been a valued member of staff, that the respondent would not have dismissed her unless it had no other option as it had been very difficult to find a replacement and that they had not found a replacement until recently. That was entirely inconsistent with Nurse McGuire's evidence who said that there had always been three practice nurses and the Tribunal preferred Nurse McGuire's evidence in that regard.

68. The Tribunal found Dr Barr Hamilton to be an honest witness who had felt out of her depth in terms of her role in the proceedings concerning the claimant.

69. The evidence of Mrs Conn was of limited value. She indicated that she could not remember much of relevance, and somewhat surprisingly, given the evidence of other witnesses that she had compiled a list of issues concerning the claimant, said that she knew nothing about any such list. The Tribunal did not accept that aspect of her evidence.

70. The Tribunal found the evidence of Ms McGuire regarding the claimant to be unconvincing. The Tribunal formed the impression that she was making her evidence up as she went along. In particular at one stage, she s< . t there were three occasions on which she had been involved in or witnessed a discussion regarding the claimant's use of glucogel with Dr All, yet at other stages in her evidence she indicated she could not remember what was said or when.

71. The Tribunal found the evidence of Dr Ali to be very surprising. It was entirely inconsistent with the content of the statement she was said to have given to VKD, despite her accepting she had checked and signed that statement and then confirming that the statement was accurate under oath in examination in chief. The Tribunal found her suggestion that the evidence she gave before it was either what she meant to have said or meant by what she had said during the investigation to be very concerning. Dr Ali was attempting to redefine the meaning of the words she had used in her statement. The Tribunal did not find her to be a truthful witness. Dr Ali indicated in evidence that she did not know that the claimant had used the respondent's supply of glucogel until it was brought to her attention by Ms McGuire. This was entirely inconsistent with the statement she was said to have given to VKD. The Tribunal also formed the view that Dr Ali had a very negative view of the claimant prior to the incidents leading to her dismissal. The Tribunal was taken aback at Dr All's description of the claimant's absence from work on grounds of illness, as 'not turning up for work', and 'not contacting her patients'. The Tribunal concluded that Dr Ali was frustrated at the absences of the claimant on grounds of illness and took the opportunity to escalate matters when she was approached by Nurse

McGuire in relation to the claimant. The Tribunal formed the view that she was looking for issues regarding the claimant which might give the respondent an opportunity to dismiss her.

72. There were a number of key factual issues in dispute.

Did Dr All tell the claimant she should not make use of the respondent's supply of glucogel?

73. The claimant was adamant that no such discussion had taken place. She said that there was no way she would have continued to take the glucogel if she had been told by a doctor not to and the Tribunal accepted her evidence in this regard. During the course of the VKD's investigation, Dr AH indicated that a discussion had taken place last year' being 2020. This was recorded in an email sent by Dr Ali at page 286 of the productions. Dr AH is recorded as saying again during her interview with VKD that the conversation had been last year' (page 303). VKD's evidence was that she then spoke to Dr Ali and said the conversation could not have taken place in 2020 as the claimant was not at work then because of covid, although in fact the claimant was at work for a number of months in 2020. Dr Ali is then recorded in the statement given by her as indicating that the conversation took place 'before summer 2019' (page 303). VKD did not record this aspect of her conversation with Dr AH anywhere nor tell the claimant that she had this conversation. It is not recorded in the statement given by Dr Ali, which she accepted she checked and signed. While the issue of an investigating officer's intervention in relation to the evidence of a witness is dealt with further below in the context of the question of fairness, the Tribunal found as a matter of fact that Dr Ali had not at any point told the claimant that she could not use the respondent's supply of glucogel. She also said in her statement that when she told the claimant the product 'was not for her use, she dismissed the comment'. The Tribunal found this entirely unlikely. The Tribunal preferred the claimants evidence in this regard. It found,

regrettably, that Dr Ali had manufactured her evidence regarding her interactions with the claimant in relation to her use of glucogel during the investigation and in order to seek to justify disciplinary action against the claimant. The Tribunal found that her evidence before it. was inconsistent, misleading and untruthful

74. Finally in terms of witnesses, the Tribunal noted that it did not hear from Dr Wilson. There was no reason given for this and the Tribunal found this surprising given that her conduct at the disciplinary and appeal hearing was criticised by the claimant and Mr Young. The Tribunal accepted the evidence of the claimant and Mr Young that Dr Wilson did indeed behave unprofessionally at the appeal hearing, not least given that it was uncontested that at the appeal hearing when Mr Young raised the issue that he was finding her very hostile 'and very aggressive, she is noted as responding I'm not being very hostile. I'm just telling you the straight facts. End of." This contributed to the Tribunal's conclusions that the respondent did not approach the allegations against the claimant with an open mind.

Did the claimant apologise for using glucogel?

75. The respondent's position in evidence although not set out in the letter of dismissal was that the claimant had not apologised for her actions and that therefore she had a lack of insight' as they put it. It was said that if she had apologised she wouldn't have been dismissed. When it was pointed out in cross examination that the claimant was recorded as apologising on a number of occasions, both at the investigatory meeting and the disciplinary hearing (and again at the appeal hearing), NM's evidence was that he did not think the apology was genuine. It was not clear to the Tribunal what the respondent had expected of the claimant. She apologised a number of times. She made clear that she did not think at the time she was doing anything wrong. The Tribunal formed the view that it would not have mattered what the claimant had said in this regard as the respondent had determined to dismiss her from an early stage in the proceedings. It was notable that at no stage was it ever put to the claimant that this was the issue of concern until after her dismissal and that during the appeal hearing

Dr Barr Hamilton accepted that the claimant was genuine in her apology yet her appeal was not upheld.

Did members of staff at the practice use the respondent's supply of paracetamol?

76. The Tribunal concluded that members of staff at the respondent's practice did indeed take paracetamol from stock from time to time and that this was not an issue of concern. CW is recorded as recognising this during the disciplinary hearing at page 351, when she was recorded as saying "It is ok to take one paracetamol occasionally but CM seemed to think that Glucogel was her own private stock[1]. The Tribunal also found VKD's evidence that stock inconsistencies in paracetamol had been caused by it being thrown away as out of date unconvincing. She had not found evidence to substantiate this suggestion (because she did not investigate it at the time) and rather the Tribunal concluded that the respondent's witnesses who indicated that it was not acceptable to take paracetamol from stock at all, were misrepresenting the position. While at times it was suggested that no one ever took paracetamol, at others it was suggested that there was no 'widespread use of paracetamol'. This issue was relevant in that it was a matter the claimant raised to explain why she had thought that it was acceptable for her to have taken glucogel from stock and also that there were no clear guidelines for staff as to what could and couldn't be used. At one stage, it was suggested that a member of staff would have to consult a GP in order to make use of a plaster, which the Tribunal found to be wholly unconvincing. The Tribunal concluded that VKD did not conduct an investigation into this issue, and in any event did not put any evidence uncovered in any investigation to the claimant at any stage in the proceedings.

Referral to NMC

77. The Tribunal heard evidence from various witnesses regarding the possibility of the claimant being referred to her regulatory body, the Nursing

and Midwifery Council in relation to the matters which led to her dismissal. The claimant's position was in general that if the respondent had genuinely been of the view that the issues for which she had been dismissed had raised issues of probity, professional competence or fitness to practice they would have made a referral to her regulatory body. The evidence of the respondent's witnesses was that they had considered both individually and collectively whether to make such a referral but had decided not to do so at present. Their position, to the astonishment of the Tribunal, was that they would await the outcome of these proceedings and then take a decision. Their position was that they were concerned that if they made such a referral, the claimant might bring further proceedings of victimisation against them, and that if the Tribunal found in their favour, then they may then make a referral, albeit this could be some years after the events and they were aware that the claimant continued to practice as a nurse in the meantime. The Tribunal found this evidence extremely concerning and damaging to the credibility of their position. It seemed to be accepted (at least by VKD in answer to a question from the Tribunal), that the purpose of a referral was to raise concerns over whether a nurse should continue to practice. It was therefore not clear to the Tribunal why all the partners who gave evidence appeared to be of the view that the interests of their practice were more important than making a referral to a regulatory body. Their position was so surprising that it called into question whether their evidence in this regard was genuine.

Submissions

78. Parties provided written submissions and elaborated on these orally. The Tribunal accepted that the agreed list of issues produced by the parties was appropriate.

79. The claimant accepted that the reason for dismissal was conduct. However, it was said that the respondent had not formed a genuine belief that the claimant was guilty of gross misconduct, that they didn't have reasonable grounds for that belief and that the investigation had not been reasonable. In particular, reference was made to the inconsistencies in Dr All's

statement, the failure to investigate these, the way in which the claimant's apology was addressed, the respondent's approach to the issue of the claimant's alleged dishonesty, the approach to whether a referral should be made to the claimants professional body, the NMC; the failure to act consistently or to carry out necessary investigations.

80. Reference was made to A v B [2003] IRLR 405, Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 and ILEA v Gravett [1988] IRLR 497. .

81 Jn terms of the Equality Act claims, it was recognised that the investigation of the claimant was not of itself direct discrimination. However, it was said that dismissal of the claimant was direct discrimination because of the claimant's disability. It was said that the dismissal was inextricably linked to the claimant's disability and that the comments made by those who took the decision to dismiss the claimant in relation to the way in which she managed her condition were indicative of direct discrimination. Reference was also made to the evidence of the respondent's attitude towards the claimant's absences. It was said that 'the contradictions which we have drawn attention to could betray this a case of an opportunity being taken advantage of when it has arisen."

82. The submissions regarding victimisation did not appear to be made with much enthusiasm. There was no dispute that the claimant *did a* protected act, however it was suggested that the way in which the claimant was treated in relation to appointments regarding her smear test and the way in which her complaint was handled were detriments because she had done a protected act.

83. In terms of remedy, it was said that the claimant did not contribute to her dismissal and that there should be no reduction on the basis of Polkey as the flaws in the disciplinary process were fundamental and the Tribunal should not speculate as to what might have happened had a fair procedure been followed. Reference was made in that regard to Lambe v 186K Ltd [2004] EWCA Civ1045 and King v Eaton No 2 [1998] IRLR 68.

84. The respondent made reference in its submissions to Royal Mail Group v Jhuti and British Homes Stores v Burchell [1978] IRLR 379; Sainsbury's v Hitt; Foley v Post office' Midland Bank pic v Maddens

[20001 IRLR827 and Boys a • . Welfare Society v McdonaM [1997] ICR 693 in terms of the manner in which the Tribunal should approach the issue of the fairness of the claimant's dismissal.

85. Reference was also made to Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 in relation to any allegations of inconsistent treatment.

86. In considering any compensation which might be awarded, the Tribunal was directed to have regard to Eversheds v De Bell'm [20111 UKEAT 0352/10 and Software 2000 v Andrews [2001] ICR825 in relation to the extent to which it should speculate on what might have happened if a fair procedure had been followed.

87. It was said that the claimant was clearly dismissed for conduct, that the claimant had admitted to the conduct which had been alleged, and that in the circumstances the investigation and procedure followed were fair.

88. In relation to the claim of direct discrimination it was said that the claimant was dismissed for conduct and that there was no evidence to support an assertion that the claimant was dismissed because she had type 1 diabetes.

89. Turning to the allegations of victimisation, it was said that Nurse McGuire did not know that the claimant had brought a discrimination claim, that the allegation that an incorrect reason was given to the claimant for Dr Robertson not doing her smear was not part of her claim, that the leaflet had not been sent to the claimant because she had brought a discrimination claim and that the claimant had received a response to her cornplaint. It was said that allegation that the failure to provide a response was victimization 'was therefore bound to fail.

Discussion and decision

Unfair dismissal

Was the claimant dismissed for a potentially fair reason pursuant to s.98(2)[b] of the Employment Rights Act 1996 (ERA), namely conduct?

90. There was no dispute that the claimant was dismissed for conduct.

Did the Respondent act reasonably in treating the Claimant's conduct as a sufficient reason for dismissing the Claimant
in that;

a. Did the Respondent form a genuine belief that the Claimant was guilty of gross misconduct?
b. Did the Respondent have reasonable grounds for that belief?
c. Did the Respondent form that belief based on a reasonable investigation in all the circumstances?

Was the investigation fair?

91. In the first instance the Tribunal considered whether the investigation which was conducted was reasonable in all the circumstances. The Tribunal took into account that it was not for them to determine what the investigation ought to have involved, but to consider whether the steps which were taken fell within the band of reasonable responses. The Tribunal was very much conscious of not adopting a substitution mindset, but considering whether or not the respondent's actions were reasonable in all the circumstances. The Tribunal took into account that the respondent is a relatively small employer and that they had never had to deal with disciplinary matters in the past. They have limited resources as they had no internal HR function. They did take advice from the BMA both before the disciplinary action was raised against the claimant and in relation to the process and procedure which should be followed in relation to that action. There did seem to be some confusion as to whether there was a particular partner responsible for dealing with disciplinary matters relating to staff, but the Tribunal did not find that to be a relevant factor in its deliberations.
92. The Tribunal had little hesitation in coming to the view that a reasonable investigation had not been conducted. It did so for the following reasons.
93. VKD's approach to the investigation was not balanced. There was no effort on her part to find any evidence which might have supported the claimant's position such as

a. Contacting previous employers in relation to the claimant's position that her use of glucogel in the past from stock had never been criticised.

b. Taking statements from other members of staff both present and in the past, as to whether they were aware that the claimant used the respondent's stock of glucogel. While the Tribunal appreciated that the respondent's position was that it did not matter whether other staff were aware as the relevant issue was only whether the GP partners were aware, the Tribunal did not find this was a reasonable position to take in the particular circumstances. In any event, there was no investigation into whether the partners were aware of the claimant's use of glucogel.

c. Conducting an investigation into the use of paracetamol by staff and partners or putting any information obtained to the claimant. Even if any steps to investigate this matter had been taken by VKD (and the Tribunal had concerns about it, given that the issue was characterised by the respondent as 'widespread use' rather than 'use'), any such were not documented or communicated to the claimant to allow her an opportunity to comment.

94. The Tribunal took into account that the claimant had admitted using the respondent's supply of glucogel and considered the extent to which that impacted on the level of investigation required. The claimant's position was that while she admitted having taken it (openly and as soon as she was asked about it) and indicated that in retrospect she could see that she ought to have asked or let the respondent know about her actions, the respondent was still required to investigate matters which might explain why the claimant had acted in the way that she had or amount to mitigation. It did

not do so. It did not investigate the issue of the extent to which the claimant was entirely open about her use of glucogel and had never sought to hide this.

95. VKD's position as investigator was not neutral. She suggested to Dr All that she must be wrong in terms of the timing of the alleged conversation with the claimant. She suggested in the interview with Dr Ali in relation to the fridge issue 'SM obviously had concerns that she felt she had to bring this up. This could open us up to litigation" The way in which the report was presented was not balanced.

96. Rather than simply establish facts, VKD sought to characterise the actions of the claimant in the most serious terms as raising issues of probity, fitness to practice and professional competence. Even the way in which the report was presented (with these matters being in bold print) appeared to be intended to make the reader view the allegations as extremely serious rather than simply present facts.

97. There was no attempt to investigate the inconsistencies between Nurse McGuire, Dr Ali and the claimant in relation to 'whether and if so when the claimant had any discussion with Dr Ali re her use of glucogel or what was said. The statement which recorded Dr All's apparent position was not accurate. It did not note that VKD took an active part in the interview by telling Dr Ali that she could not have, spoken to the claimant in 2020 because of covid.

98. Despite VKD indicating during the investigatory meeting with the claimant and the disciplinary hearing that she would investigate this matter but did not do so. As pointed out in Salford at paragraph 57 "It is common experience that, if part of a story begins to unravel, other aspects may do so also."

99. The investigation was fundamentally flawed given Dr All's evidence under oath of an entirely different version of events than that set out in her statement.

100. VKD must have been aware of the potential impact of a finding of gross misconduct against the claimant given her position as a nurse in a regulated environment. No account of this whatsoever appears to have been taken during the course of the investigation. The claimant was being

accused of criminal conduct, in that she was being accused of theft and dishonest behaviour. The respondent therefore had a duty to investigate the motivations of the claimant and whether she had been dishonest. They did not do so and instead characterised her conduct as premediated and dishonest although there was no evidence to suggest that she had ever tried to conceal her use of glucogel.

101. In all these circumstances, the Tribunal concluded that the investigation was so fundamentally flawed as to render the dismissal unfair.

Was there a genuine belief?

102. The Tribunal then considered whether the respondent had formed a genuine belief that the claimant's conduct amounted to gross misconduct. The Tribunal noted that the letter inviting the claimant to the disciplinary hearing indicated that was a 'reasonable opportunity to consider your response to the Practice's position? And 'Since the Practice views the allegations against you as gross misconduct, I must inform you that the outcome of this disciplinary hearing could result in your summary dismissal." It is notable that this did not refer to the view reached by VKD but by the 'Practice'. The Tribunal was of the view that this was indicative of the outcome of the hearing being predetermined.

103. The Tribunal was also mindful that if the respondent had genuinely been of the view that the claimant's actions amounted to gross misconduct, or raised fitness to practice, probity or professional competence issues, they would have referred her to her regulatory body.

104. It was relevant that a list of issues had been being compiled in relation to the claimant in the months before her dismissal The evidence on this was so contradictory that the Tribunal concluded that the respondent was seeking to hide the fact that this had been done. It suggested to the Tribunal that the respondent was looking for an opportunity to dismiss the claimant rather than approach the allegations against her with an open mind.

105. The Tribunal also took into account that CW indicated incorrectly during the disciplinary hearing that the claimant had had a verbal warning in relation to her use of glucogel. That was entirely inaccurate.

106. Further, the Tribunal was of the view that the position of MM in evidence and at the appeal hearing and that of CW as noted in the notes of the appeal hearing were inconsistent with the suggestion that had the claimant apologised, she would not have been dismissed. The tetter of dismissal referred to 'breach of trust, probity issues and professional competency issues are so significant as to amount to Gross Misconduct'. However, the evidence of NM appeared to be that what that claimant had said in admitting having glucogel and the way in which in which she said it was the cause of her dismissal. This was not put to her at any time as being a relevant matter for her to address. The Tribunal therefore concluded that the respondent did not have a genuine belief that the claimant had committed gross misconduct but had predetermined the matter. This conclusion was reached taking into account the terms of the investigation report, the letter inviting the claimant to the disciplinary hearing and the confused way in which it was suggested in evidence as to why the claimant had been dismissed.

107. In any event the dismissal was said to be predicated on evidence from Dr AH which was not accurate and was deliberately misleading.

108. The Tribunal therefore concluded that the respondent did not have a genuine belief that the claimant had committed gross misconduct and therefore her dismissal is unfair.

Was the dismissal of the Claimant fair in all the GircHiristanoes? In particular, was the dismissal within section 98(4) ERA and the band of reasonable response available to the Respondent?

109. The Tribunal went on to consider whether it was wrong that the investigation rendered the dismissal unfair or that the respondent did not have a genuine belief that the claimants conduct amounted to gross misconduct, whether dismissal would have been within the band of reasonable responses.

110. The Tribunal again kept at the front of its mind that it must not substitute its own view for that of the respondent. The question for the Tribunal to answer is whether dismissal was within the band of reasonable responses. Although one employer may not have dismissed in these circumstances, that did not mean that dismissal was not within the band of reasonable responses.

111. The Tribunal noted that NM's evidence was that he did not take into account the claimants length of service or previous record when taking the decision to dismiss.

112. There was no effort on the part of the respondent to explore with the claimant whether she was genuinely sorry and understood why the respondent had concerns regarding her conduct. However, the respondent's evidence before the Tribunal was that this was why the claimant was dismissed. The claimant had apologised on a number of occasions and it was not at all clear to the Tribunal what more the respondent expected of the claimant.

113. In these circumstances, the Tribunal concluded that the dismissal of the claimant was not within the band of reasonable responses and was therefore unfair.

Did the Respondent follow a fair procedure when dismissing the Claimant?

114. For the reasons set out above in relation to the scope and manner in which the investigation was carried out, the Tribunal concluded that a fair procedure had not been followed. It was not suggested that the appeal hearing had rectified any procedural irregularity, or that the appeal hearing was a rehearing rather than a review of the decision to dismiss the claimant. Therefore, the question of the appeal was of limited relevance to the issues to be determined by the Tribunal. The Tribunal did however make findings in fact in relation to the conduct of CW at that appeal hearing and noted that no effort was made by the appeal panel to address her unprofessional conduct. Dr Barr Hamilton's evidence before the Tribunal was that it was a difficult meeting and that CW could be abrasive. However, the Tribunal was

of the view that CW's inappropriate conduct together with the lack of any attempt to challenge it by the appeal panel was indicative of the respondent simply going through the motions of an appeal hearing with no intention of properly exploring the issues being raised. For instance, while it was said at that hearing that the claimant had been dismissed for the lack of her genuine apology, Dr Barr Hamilton accepted that the claimant was genuinely sorry at the appeal hearing and understood the seriousness of the issues. That being the case, it is not at all clear why the decision to dismiss the claimant was not overturned.

115. Having found that the respondent did not follow a fair procedure when dismissing the claimant, it did not find it necessary to consider whether the ACAS Code of practice was complied with. This issue is considered further below in relation to the question of compensation.

Direct discrimination because of a disabilr y (s13 Eq|A)

Did the Respondent subject the Claimant to the following treatment?

a. Subjecting the Claimant to a disciplinary process: and
b. Dismissing her.

116. There was no dispute that the claimant had been subjected to this treatment. The issue for the Tribunal to determine was whether the claimant had been dismissed because of her disability. The claimant abandoned the allegation that subjecting her to an investigation and disciplinary proceedings was an act of discrimination.

If so, did t ■ spondent treat the Claimant as alleged less favourably than it treated or would have treated other in not materially different circumstances?

117. There was no comparator advanced in this case, and no facts were advanced to allow the Tribunal to construct a hypothetical comparator. Therefore, the Tribunal could not conclude that the claimant had been subject to less favourable treatment.

If so, was this because of the Claimant's disability?

118. Notwithstanding the above, the Tribunal considered the extent to which it could be said that the claimant's disability was an operative reason in the decision to dismiss her. While the Tribunal had concerns that the absences of the claimant had been relevant to the decision to dismiss her, (particularly bearing in mind the email making reference to the claimant's absences, apparently taking advice on this and Dr Ali's description of the claimant's sick leave as her not turning up for work), it was not the claimant's disability which was an operative cause of the decision to dismiss the claimant. While the decision to dismiss may have been influenced by the absences of the claimant (and the Tribunal goes no further than speculating in that regard) such allegation would not form the basis of direct discrimination but a claim in terms of section 15 Equality Act 2010. This is not how the claim was advanced so the Tribunal gave no further consideration to these matters.

119. The Tribunal concluded that there was simply no evidence before it to suggest that the claimant's disability rather than absences arising from her disability was a cause of her dismissal.

Post-employment Victimisation

Did the Claimant do a protected act?

120. It is accepted that the claimant did a protected act by bringing her claim of unfair dismissal and disability discrimination.

Insofar as the protected act relied on constitutes alle gations made by the Claimant, were those allegations false and made in bad faith? If so, is the Claimant prevented from relying on those allegations? .

121. There was nothing to suggest that the claimant had made the allegation of discrimination in bad faith. While the claim of direct discrimination did not succeed, the Tribunal as sei out above did have

concerns as to whether matters related to her condition were relevant in the decision to dismiss her.

Has the Respondent subjected the Claimant to a detriment because she had done a protected act?

122. The Claimant relies on the following alleged detriments:

a. Nurse Susan McGuire refused to fulfil or undertake the Claimant's appointment on 17 August 2021;

b. Louse Thompson gave the Claimant an incorrect reason for Dr Robinson not carrying out the Claimant's smear test on 24 August 2021;

c. Dr McLay sent a letter to the Claimant re smear tests being carried out at other locations, because of the protected act; and

d. The respondent did not reply to the Claimant's email to the Practice Manager Dorothy Conn, sent on 25 August 2021 re the Claimant's concerns about her smear appointments.

123. The Tribunal concluded that the claimant was not victimised for having done a protected act. The Tribunal was mindful that the claimant raised proceedings of unfair dismissal as well as of discrimination. The Tribunal did not accept that Louise Thompson or Susan McGuire were aware of the nature of the claim lodged by the claimant. While they may well have been aware of 'a' claim being raised, there was no evidence to suggest that they were aware that the claimant had done a protected act. Therefore, any detriment to which the claimant was subject by them (and the Tribunal was not convinced that the claimant had been subjected to such detriments) could not amount to victimisation.

124. In terms of the letter sent out to the claimant by Dr McLay, while the Tribunal was of the view that the Dr McLay sent this with a view to encouraging the claimant to go elsewhere for her smear test, this was not because she had done a protected act but because there had been difficulties in organising the smear test and that there was conflict of a more general nature between the claimant and the respondents staff. Therefore, the Tribunal concluded that this did not amount to victimisation.

125. The Tribunal accepted that Mrs Conn would have been aware that the claimant had raised discrimination proceedings and therefore she was aware that the claimant had done a protected act. However, it concluded that the reason Mrs Conn did not initially treat the claimant's email as a complaint is that she did not initially recognise it as such. Therefore, even so far as this could have amounted to a detriment (and the claimant did receive a response to the complaint) the Tribunal was of the view that this did not amount to victimisation.

126. In these circumstances, the claimant's claims of victimisation fail.

Remedy

127. The claimant is entitled to a basic award of £2421 on the basis of her age and length of service. Her net weekly basic pay was £477.61 and her employer contributed 20.9% of that sum to her pension which is a weekly amount of £140.99. There was no dispute that as at 18 February 2022, taking into account the claimant's income during that period, her tosses amounted to £15,324.85. This was on the basis of that being 43 weeks' losses. The claimant had obtained alternative employment albeit at a lower number of hours. On the basis of the information provided (which was not challenged by the respondent), the claimant had an ongoing weekly loss of £398.10. The Tribunal heard that the claimant had continued to apply for jobs but gave evidence that she is hampered by the fact that she has in the past not been able to drive because of her condition and relied on her daughter providing transport for her. Between 12 February and 25 November 2022 is a period of 40 weeks during which period the claimant suffered a loss of £15,924. The Tribunal was of the view that the claimant would have a reasonable prospect of obtaining alternative employment which might provide a similar salary to that when she was employed by the respondent within a period of a further 12 weeks. On that basis the claimant would have ongoing losses of £4,777.20. Therefore, the Tribunal was of the view that the following tosses had been suffered by the claimant:

Dismissal to 12/2/22	£15,324.85
12/2/22 to 25/11*122*	£15,924

Ongoing losses for 12 weeks £4,777.20

Total £36,025.05

128. It would also be appropriate to make an award of loss of statutory rights of £500.

129. The Tribunal then went on to consider whether the compensation awarded to the claimant should be reduced.

Did the Claimant's conduct contribute towards her dismissal such that the basic or compensatory awards should be reduced?

130. Section 123(6) ERA states that: Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding;

131. The Tribunal considered first of all whether the claimant's conduct caused or contributed to her dismissal in order to establish whether there was contributory conduct, the conduct must be culpable or blameworthy, the conduct must have actually caused or contributed to the dismissal and it must be just and equitable to reduce the award by the proportion specified, (see Nelson v BBC (No.2) 1980 ICR 110.

132. The Tribunal did not accept that the claimant's conduct had been blameworthy. The claimant had not intended to do anything wrong, and had made no attempt to hide what she was doing. The Tribunal accepted that the claimant had genuinely thought the respondent would not be concerned at her using glucogel from stock on occasion.

133. Moreover, the Tribunal concluded that the respondent had been looking for a reason to dismiss the claimant as was evidenced by the list created, the clear lack of support provided to her in relation to her mental health issues and the way in which the claimant's conduct was characterised.

If which is denied, the Respondent failed to fol tow a fair procedure, would a fair procedure have resulted in the Claimant's dismissal in any event such that the compensatory award should be reduced?

134. The Tribunal then considered whether if a fair procedure had been followed then the claimant would have been dismissed. The Tribunal considered that even if a fair procedure had been followed, the claimant would not have been fairly dismissed. The Tribunal reached this conclusion for the following reasons.

a. The Tribunal was of the view that the investigation into the claimant's conduct was fundamentally flawed.

b. Dr All's evidence before the Tribunal was entirely inconsistent with that given during the investigation

c. The decision to dismiss the claimant had been predetermined.

Has the Claimant undertaken reasonable steps to mitigate her toss?

135. The respondent accepted that the claimant had taken reasonable steps to mitigate her losses.

136. Therefore, applying the statutory cap of a years gross salary to the claimant's losses, the Tribunal concluded she is entitled to a compensatory award of £35,079.20 which is equivalent to a year's salary.

137. The Tribunal gave consideration to the claimant's submission that there should be an uplift in compensation on the basis that there was a failure to comply with the ACAS code of practice. The Tribunal was not satisfied that there was such a failure and in any event did not consider an uplift was appropriate in the circumstances.

138. In summary therefore, the respondent is ordered to pay to the claimant

Basic award	£2421
Compensatory award	£35,079.20
Loss of statutory rights	£500
Total	£38,000.20

Employment Judge: A Jones
Date of Judgment: 09 December 2022
Entered in register: 13 December 2022
and copied to parties