# THE EMPLOYMENT TRIBUNALS

**Claimant:** **Lydia Edwards**

**Respondent:** **University Hospital Bristol and Weston NHS Foundation Trust**

**Heard at:** **Bristol**

**On:** **28, 29 and 30 November 2022**

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

***Representation:***

**Claimant:** **Mr Downey, Counsel**

**Respondent:** **Mr Caiden, Counsel**

## RESERVED JUDGMENT AND REASONS

The claimant's claim for unfair dismissal is not well founded and is dismissed.

## REASONS

1. These are written reasons provided to the parties following the request of the claimant dated 13 December 2022. The hearing of the claim took place between 28 – 30 November 2022 and oral reasons were promulgated on 30 November 2022. The tribunal apologises for the slight delay in providing these written reasons which was due in part to the end of year break and to pressure of work.

The claim and Issues

2. By a claim form dated 3 April 2021, the claimant brought claims of unfair dismissal and race discrimination. On 8 December 2021, EJ Smail listed the matter for a five day hearing. In a judgement sent to the parties on 7 February 2022, EJ Bax dismissed the claimant's claim of race discrimination upon withdrawal by the claimant and reduced the listing to a three-day hearing. The parties before me confirmed that the sole claim for determination was that of unfair dismissal.

3. In order to adjudicate this claim, the tribunal has had regard to a bundle of 578 pages and a witness statement bundle of 78 pages. The preparation and presentation of this claim has been impeccable and the professional cooperation of the parties has been obvious and has in large measure contributed to the tribunal being able to reach a prompt determination of the claim within the listed hearing dates.

4. The issues were discussed at the outset of the hearing and the parties were agreed that they were as expressed by EJ Bax on 5 October 2022, as further set out at [83] of the bundle. The Respondent says that the principal reason for the claimant's dismissal is a reason relating to conduct or in the alternative to her capability. The claimant challenges the fairness of the dismissal on the grounds that her alleged failings were not sufficient to justify dismissal and that suitable alternative employment was not considered prior to dismissal. The claimant contends that the decision did not fall within the range of reasonable responses. The claimant makes a number of challenges to be procedural fairness of the dismissal as further set out in paragraph 5 at [83] of the bundle.

Findings of Fact

5. The respondent adduced oral evidence (and each was cross-examined) from

    5.1. Miss Rebecca Russell (RR), the claimant's line manager from 16 September 2019 until the claimant's suspension from practice on 25 November 2019, and herself a Band 8A Registered Nurse Matron, Acute Medicine
    5.2. Mrs Samantha Burgess (SB), also a Band 8A Matron, who undertook the role of investigator from 6 December 2019 culminating in an investigation report dated 30 January 2020
    5.3. Mrs Shelley Thomas (ST), the respondent's Divisional Director for Nursing, who chaired the Disciplinary Panel at disciplinary hearings on 18 March 2020 and 8 September 2020 and which made the decision to dismiss the claimant
    5.4. Mr Mark Goninon (MG), the respondent's Deputy Chief Nurse, who chaired the appeal hearing panel on 10 March 2021, and which upheld the decision to dismiss.

6. The claimant, a Band 5 Staff Nurse, gave evidence and was cross-examined. There were 7 additional witnesses who provided evidence in the form of a written

witness statement in support of the claimant. Each was a former colleague of the claimant and each described their opinion of the claimant's skills and knowledge. The tribunal noted that these opinions were not provided in respect of the narrow timeframe with which this case is mostly directly concerned. Nor were the statements in front of the investigator or the decision maker in the course of the process (and no suggestion made during this hearing that they should have been). These factors necessarily impacted upon the potential relevance that the tribunal placed on evidence. Mr Caiden did not wish to cross examine these witnesses. They therefore did not attend the hearing but the tribunal has accepted the evidence and to the extent necessary has taken the statements into account. The statements do act as a salutary reminder that opinions as to performance may differ between colleagues and yet be genuinely held.

7. The tribunal makes the following findings of fact based on balance of probabilities having regard to all of the evidence it has heard.

8. Background: the claimant was an experienced Registered Nurse who is currently the subject of an ongoing fitness to practice process following the respondent's referral of her case to the NMC.

9. Registered Staff Nurses have obligations, as no doubt do medical professionals generally, to abide by their respective professional codes of conduct, such as the NMC code, and to undertake ongoing CPD. A key aspect of professional practice is to maintain insight into their own competence and skills, and take steps in addressing gaps in their knowledge or skill sets as may be evident to them.

10. The claimant has worked as a Nurse since 1990 initially in the country in which she was born, in Ghana, in hospital environments, until her move to the UK in 2004. At the time of events in 2019, the claimant had 14 years' experience in Ghana and a further 15 years' experience in the health environment in the UK.

11. In 2007 the claimant began work for the respondent as a Band 5 Staff Nurse. Between 2009 – 2019, the claimant worked in the Queen's Day Unit, a day surgery unit which was a theatre dependent role and entailed both pre-and post-operative care monitoring for example unconscious patients and managing their airways.

12. Thus, over approximately a 30 year period, the claimant gained extensive healthcare and nursing experience of "baseline skills", a term coined by the tribunal to refer to the foundation of nursing, namely, the task of discharging the necessary care and assessment of patients, which features across all disciplines of clinical practice.

13. The immediate background to this case is that the claimant was the subject of a first written warning from the Deputy Head of Nursing on 26 April 2019; a conduct issue relating to an allegation of aggression shown by her to her line manager at

that time. The warning was upheld on appeal. The upshot was that her working relationship with her line manager was so damaged that the claimant requested, and was given, a transfer to another Unit so as to be removed from her former line manager.

14. It was in those circumstances that the claimant began working in the General Intensive Care Unit (hereafter ICU for convenience), reporting to RR. In terms of handover, there was unsurprisingly some interaction between the former line manager and RR. The claimant retained a sense of suspicion that the influence of her former line manager could still be exerted in the ICU, but there are no facts before me that indicated that RR was influenced. ST was subsequently to use this perception held the claimant as part of the reasoning for the later transfer of the claimant away from the ICU.

15. RR was ideally placed to manage the claimant's move into the ICU, given RR's skill set mix of both clinical and administrative responsibilities.

16. Supernumerary Training: when the claimant started in the ICU in September 2019, she embarked on a supernumerary training period. Taken literally this meant that she was an "extra person" and in practice it meant that the claimant could undertake "training on the job" whilst being supervised (but not, see later, "scrutinised" all the time) and would have the benefit of a structured induction programme.

17. The purpose of the supernumerary training period was for the claimant to be able to demonstrate competency in the tasks and the requirements of the specific area of medicine (in this instance, the ICU) and to allow that take place within the "safe space" of supervision.

18. The training period was therefore akin to an induction programme, and it was the same as that expected of new starters of which there were many. The claimant subsequently complained that this induction programme was "difficult" on account of a lack of consistency of support provided by senior nurses, i.e., not the level of support, but the fact that it was not provided by the same person.

19. The tribunal heard from RR and accepted that the model of ICU meant that such an approach was not feasible given the constant unpredictability of work and the ever-changing rota of shifts (for 150 staff). What the claimant had wished for, namely support from a consistent individual senior nursing member, was not practicable and was not in any event normal practice within ICU. The tribunal was satisfied that the ICU model was in short a team approach in which feedback was constantly invited and expected and was a 2-way process.

20. In terms, the claimant did not dispute this description of the ICU model but said that "we may not all be the same; we may need different levels of support for our own way of learning".

21. The tribunal was also satisfied that it was not the direct purpose of the supernumerary period to enable the claimant to demonstrate competency in her baseline skills of nursing. Her 30 years' experience no doubt embeds those essential skills but the training period may, notwithstanding, provide a safe space in which to practice those skills in the specific area. Ms Russell explained that the supernumerary period is a program run by Band 7 nurses to ensure that new nursing arrivals at the ICU work with experienced nurses at all times and learn/embed the specific skills and knowledge required in the specialist environment.

22. The claimant was placed on an informal performance improvement plan following a meeting on 25 October 2019. This plan was set up to deal with specific conduct issues, such as lateness and uniform. These issues do not play a material role later in this matter but are an indicator of the respondent's proactivity in performance management.

23. On 9 November 2019, Teresa Pogorzelska (TP), a senior nurse, raised feedback that the claimant appeared to be unable to complete an A-E assessment of a patient, and was proposing to use an intravenous infusion which contained bubbles of air such that, in TP's view, the procedure would have put the patient's safety at risk. Whether or not the claimant could prime the line or remove air bubbles was not the issue; it was her appreciation of the level of risk that the particular bubble(s) of air presented. These concerns were the subject of feedback to the claimant at the time.

24. RR had significant concerns about the claimant, and extended her supernumerary status on 19 November, which event also represented a further point of feedback to the claimant about her performance. At this point in time, the extension was imposed by RR because she was unable to be assured that the claimant was consistently safe in looking after patients. These two instances of feedback to the claimant, on 9 November and 19 November, formed part of the claimant's baseline skills, not ICU specific skills. The A-E assessment, identified in the respondent's policies at [86] of the bundle, was a standard operating procedure undertaken whenever a nurse took over the care of the patient in the ICU, and, in the words of RR it was a task that "any student nurse, ward nurse or theatre nurse would demonstrate".

25. Thus, by 19 November 2019, the claimant's supernumerary period was extended for further review on 5 December 2019. The tribunal infers that the claimant understood she was not achieving what the ICU nursing staff required of her. It was, as Mr Downey put to RR (and she agreed) that you might be able to, "deal with the problem with the plan to enable effective learning by extending the supernumerary period?".

26. The claimant was on sickness absence between 9 November – 19 November 2019. On her return from absence, the claimant received feedback and the

extension as set out above. The claimant worked a number of shifts after 19 November 2019, always supported by senior shift nurses including Band 6 and Band 7 practice educators.

27. On 25 November 2019, the claimant was suspended from work, a decision led by RR following feedback that she received as to "accumulating concerns" regarding the claimant's work. In her subsequent interview, RR described in graphic terms the dangerous issues that might arise when a Band 7 nurse might have to take their "eye off the ball" in order to supervise more closely the baseline skills of a supervisee nurse.

28. These accumulating concerns referred to 3 different dates, on 22, 24 and 25 November 2019, reported to RR by three different senior nurses, therefore over a short period of time, evidencing that the claimant appeared not to know her A-E assessment or normal blood pressure rates, and not to recognise a deteriorating patient or respond appropriately to alarms (the latter of which was the result of feedback from Rachel Brennan (RB) who supervised the claimant on an early shift on 25 November 2019).

29. In RR's view, these concerns indicated a lack of insight by the claimant into her own competence and presented a "genuine risk to safety", for example the failure to follow through with an appropriate A-E assessment might lead to a missed presentation and thus a missed deterioration. See example given by SB, relating to the E in A-E, which if performed competently would highlight potential bleeding issues.

30. RR participated in a discussion with senior colleagues which resulted in the Deputy Head of Nursing authorising the claimant's suspension. See [131], the allegation formulated so as to reflect the feedback that had been given.

31. By 25 November 19, the position had crystallised for RR. The claimant's conduct had given RR, "real concerns for [the claimant's] knowledge and skill as a Band 5 nurse; not as an ICU nurse". In other words, concerns about the claimant's baseline skills.

32. When asked why RR did not simply consider further "performance" procedures, she said that she had had discussions with colleagues about how to deal with concerns about risk and safety of patients and had considered simply whether to move the claimant to a different unit. Alternatives to suspension were considered but patient safety overrode those concerns.

33. An investigation process was instituted. On 6 December 2019, Mrs Samantha Burgess (SB) undertook a disciplinary investigation. See [136]. The claimant attended investigatory meetings on 12 December and 19 December 2019. These involved an extensive series of questions and answers; the claimant fairly understood the allegations which were in issue.

34. SB accounts for what she says was a short delay in her investigation by reference to the incidence of annual leave and the extent of witness interviews required. She says that the claimant or her representative were kept fully informed of the timeline. See [139]. By 30 January 2020, the investigation report was finalised.

35. SB had identified four elements/categories: [145]: in her words, “these are 4 areas you should be able to do in every nursing job”, and she considered evidence in relation to each category. Her conclusion was that in all four respects, there was evidence in support of the allegation that the claimant did not demonstrate basic nursing skills, and thus she recommended that there was a case to answer.

36. A separate decision was taken by the Head of Nursing, on 6 March 2020, that there was a case to answer and that the claimant should be invited to a disciplinary hearing. The claimant was in due course invited. She was provided with the investigation report and appendices and was fairly informed of the risk that her employment might terminate. The gist of the allegations that comprised the categories was that, in the words of SB, they were “examples of actions that could have resulted in patient harm but were averted due to the existence of supervision, preventing terrible errors”.

37. ST was appointed to chair the disciplinary panel. The panel had the investigation report and it held a disciplinary hearing on 18 March 2020, at which the claimant had RCN representation. There were extensive submissions made by the representative [188]. The panel adopted the same structure as the investigation report such that the four categories were in ST’s words, “on the table”. The task of the panel as ST understood it was to, “assess if the claimant had demonstrated that she met the basic requirements of a Band 5 Registered Nurse” which in other words (again, in the words of ST), was to ask whether the claimant was, “able to deliver safe patient centred care”.

38. ST was cross-examined extensively on those four categories but remained firm in reiterating the Panel’s conclusion that the claimant had not demonstrated the basic requirements of a Band 5 Registered Nurse role.

39. This conclusion was not a simple yes/no outcome. See [224], which in part reads, “… having considered the evidence available, on balance the Panel had significant concerns regarding your performance of core skills and knowledge as a Registered Nurse, however were not satisfied that this would be the case in a non-intensive environment” and so the Panel went on to, “adjourn a final decision in order to provide you with the opportunity to sustainably demonstrate capability at the required professional level of a Registered Nurse” and that it anticipated, “given [the claimant] identified that she would require 2 to 3 weeks to achieve competence, that this would be a 4 week plan from the point of commencing”.

40. It was, in terms, a further opportunity for the claimant. Objectives were set for that opportunity in conjunction with the claimant's RCN representative, and the Disciplinary Panel was set to reconvene at a later date to see if the claimant had met those objectives.

41. ST was challenged in a number of respects with regards to the Panel's decision at this point, and in the tribunal's view she provided compelling responses:

    41.1. That the claimant's complaint was that the claimant had not been given the time to demonstrate the skills that were needed to work within the ICU: in response, ST said this was in fact not the point; the point being that on a number of occasions the claimant couldn't demonstrate "safe and basic care as opposed to more refined ICU skills"

    41.2. that no actual harm came to patients because of the supervision period: in response ST said there was obvious potential for harm which in effect was prevented by senior members of the ICU team

    41.3. that the claimant was not well supported in ICU: ST replied that, by contrast, the claimant did have "consistent practice educator facilitation in ICU, and the claimant knew that the ICU system worked on the basis of different senior nurse supervises where no one else had struggled with that approach". ST felt that "maybe the ICU was not the right place for the claimant"

    41.4. that if, as at March 2020, the Panel's conclusion was that there was gross misconduct, then why was the claimant not dismissed in March 2020: ST gave 4 compelling reasons: (i) the claimant might fairly argue that she was in the midst of performance management which had not completely concluded: (ii) that the ICU might arguably not be the right place for the claimant, there being too much pressure with highly vulnerable and ventilated and sick patients; (iii) that there was the possibility (or at least perception) of a compromise in management attitude by reason of interaction with the previous line manager, (iv) the claimant herself asked for the further opportunity to demonstrate a basic skills and indeed ST considered that the Panel doubled the opportunity time that the claimant had asked for.

42. Turning next to the four categories of allegations against the claimant that were identified by SB and adopted by the Panel in its decision making:

    42.1. A-E assessment: this was partially upheld. See outcome at [281] of the bundle. The claimant had been previously signed off as having undertaken recent training in August 2018 and October 2019 such that there was "some evidence" that she "can do on assessment" but, according to the Panel, could not reliably do so when in use. The Panel identified a number of examples, which the claimant accepted in cross examination showed that when "in use" she was not able to demonstrate her use of A-E assessment. Those examples included: (i) 9 November 2019 – TP; (ii) 22 November 2019 –

Siobhan Lanigan (SL), and (iii) Kathryn Pollock (KP), even when written guidance was available to her, the claimant agreed that she couldn't do it, (iv) 24 November 2019 – Sophie Hewer (SH). These examples formed part of the respondent's process of supervision and feedback

42.2. intravenous infusion: the Panel found that the claimant's actions were unsafe on 9 November 2019. See [282]. But for senior staff, the claimant would have attached a line containing bubbles of air which would have represented a material risk of safety to the patient. The claimant continued throughout the process to reject the version of events presented by TP, stating variously that the claimant had "done it that way in the past" and "I believe that [TP] was wrong" and even drew a picture in an attempt to visualise the amount of air bubbles present which of itself was an inappropriate action according to SB and also the Panel. In the event the Panel accepted the evidence of TP that the incident represented a real risk to the safety of a patient and the claimant was unable to explain why her proposed action was safe. The claimant showed no concern or insight into the fact that a senior nurse felt there was a dangerous situation

42.3. medication errors: for the purpose of the 18 March hearing, this principally allegation related to an incident on 22 November 19. The Panel received evidence that the claimant and SL had agreed a 5ml dose of painkiller (within a prescribed range of 5 – 10ml) but that when the claimant returned with a planned dose of 10ml, SL was "unhappy that this was doubling the dose" and that the claimant simply could not justify that to SL at the time. Although she was later able to explain the principle of pain scores to the Panel, that this was not backed up by contemporaneous evidence. She was in short unable to articulate her reasons for a different dose. There were other dates evidencing cardiac medication errors

42.4. recognising own level of competence: this was in the view of the Panel, a paramount consideration for any nurse at any time. The claimant had not shown insight and had failed to ask relevant or any questions. This was evidence received by the Panel from senior nurse feedback from the ICU.

43. Thus, the Panel had concluded by March 2020, that the claimant had not met the basic requirements of the role but also that the Panel was not satisfied that this would necessarily be the case in a non-intensive environment. As above, objectives were set for the claimant to undertake a further period of work in a different placement.

44. The appropriateness of the placement was also the subject of challenge in the cross examination of ST. Mr Downey suggested to ST that the claimant should have been placed back in ICU. Plainly that is something that the Panel had actively considered. The Panel concluded that the claimant needed a ward-based placement; to avoid vulnerable and high-risk patients; that Ward 805 (albeit the move was delayed by COVID) would provide the consistency of mentoring and supervision that the claimant had felt was missing. ST was challenged as to whether the duration of the further placement was not long enough: she

responded that it was at least as long as any other entrant and indeed was enough given the level and consistency of supervision and mentoring.

45. With the results of the feedback from the placement the Panel then reconvened. The claimant did not attend the reconvened hearing notwithstanding that OH had said that she was fit to do so and that ST had offered to her a number of different options in order to obtain her attendance on 8 September 2020.

46. The Panel proceeded with the hearing but, rather than reach an immediate decision, afforded the claimant an opportunity to provide answers to a number of questions and thereby to offer a balance in the decision-making process. That was a reasonable decision to take albeit that it added to the complexity and some of the resulting delay in the process.

47. The Panel reached the firm conclusion that the claimant had been afforded a reasonable opportunity within the placement but had made "zero progress" in respect of her baseline skills. At [285], the Panel rehearses the objectives that had been provided to the claimant and the fact that the placement resulted in continuing concerns for patient safety, primarily regard patient medication rounds.

48. The outcome of the disciplinary hearing was delivered to the claimant on 12 November 2020: the Panel had found that the claimant was guilty of gross misconduct as at March 2020 and that the claimant had been afforded further opportunity by reason of the further placement. In that placement however she had made zero progress. The claimant was dismissed.

49. The claimant's appeal was heard by Mr Goninon (MG). It was a review not a rehearing. The fairness of the further placement was assessed. The conclusion of the appeal was that there was no other realistic option. The appeal held that the sanction of dismissal was not disproportionate. See [338].

The Law

50. The law in relation to unfair dismissal is contained in section 98 of the Employment Rights Act 1996 (ERA). It requires the tribunal ask itself two questions: (i) the reason for dismissal, per section 98(1), and (ii) whether the employer acted reasonably, per section 98(4).

51. For the purpose of section 98(1) the burden of proof is on the respondent to establish the reason. What matters is whether the respondent has established the operative reason for the dismissal as operating in the mind of the decision maker. Abernethy v Mott [1974] IRLR 213.

52. Conduct is a potentially fair reason. Conduct, for the purposes of section 98(1) does not mean "serious" conduct or "gross mis"conduct, such matters being

relevant to the second statutory question. Further, Mr Caiden reminds the tribunal that there is "no bright line" dividing conduct and capability; which the tribunal accepts as a matter of interpretation, so as not to put a gloss on statute. The primary focus at this point is what was operating in the mind of the decision maker the time of dismissal.

53. Turning to the second question, section 98(4) then sets out what needs to be considered in order to determine whether or not the decision is fair. It states "determination of the question whether dismissal is fair or unfair…. (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case".

54. The written and oral submissions of both counsel were extremely insightful and helpful to the tribunal. Each was considered carefully albeit not set out in full in these reasons. I pause to note the case of Sandwell and West Birmingham Hospitals NHS Trust UKAEAT/0032/09, referred to by Mr Downey, which stated that [§110], "the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal….". The characterisation of the conduct which is alleged to be gross misconduct is subject to analysis by the tribunal not only in terms of whether it is capable of amounting to gross misconduct but also, i.e. in addition, whether the respondent had a reasonable belief as to such misconduct and held a belief on reasonable grounds which in turn partly depends on the reasonableness of investigation.

55. For the purpose of section 98(4) the burden of proof is neutral in applying section 98(4). The tribunal reminds itself that it does not stand in the shoes of the employer and decide what it would have done if it were the employer. Rather the tribunal has to ask whether the decision to dismiss fell within the range of reasonable responses open to the employer judged against the objective standards of a hypothetical and reasonable employer. The case of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 makes it clear that the range of reasonable responses that applies to all aspects of the dismissal decision.

56. The tribunal is required to consider whether dismissal fell within the range of reasonable responses see Iceland Frozen Foods v Jones [1983] ICR. Here the question of whether an employer has acted reasonably in dismissing will depend upon the range of responses of reasonable employers. Some might dismiss others might not.

57. These cases have general application but "the touchstone would need to be section 98(4); the tribunal would keep in mind the need not to fall into the error of substitution, but would still need to review the decisions made and the process followed and determine whether each stage fell within the range of reasonable

responses". See Green v LB Barking UKEAT/0157/16, para 32-35 and 42. The tribunal has also reminded itself of the cautionary words in TNS v Swainson UKEAT/0603/12 to similar effect.

58. Turning to deductions from compensation, the Polkey principle established that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Thornett v Scope [2007] ICR 236 affirmed the obligation on an employment tribunal to consider what the future may hold regarding an employee's ongoing employment. Contract Bottling v Cave UKEAT/0100/14 described the Polkey principle as an "assessment to produce a figure that as accurately as possible represented the point of balance between the chance of employment continuing and the risk that it would not".

59. The principles of contributory fault empower a tribunal to identify whether there is blameworthy conduct on the part of a claimant, and if so whether it contributed to the dismissal in circumstances where it would be just and equitable to reduce compensation to reflect that contribution.

Discussion and conclusion

60. The claimant was dismissed by letter dated 10 November 2020. The letter is contemporaneous evidence of what was in the mind of the decision maker at the relevant time. There is no counter narrative suggesting that the Panel did not hold at least an honest view of the matters that it had set out in the dismissal letter.

61. Those matters establish that the claimant was the subject of an allegation, at [279], that she was "not meeting the basic nursing requirements of a Band 5 Registered Nurse. This was despite being in a supernumerary capacity with a full structured support and training plan. The letter states, at [280], that, "if upheld, you could be summarily dismissed for gross misconduct". Assertion alone does not, as Mr Downey reminds the tribunal, establish that the reason for dismissal was in fact "conduct"; otherwise it might be a case of reverse engineering. Whether or not conduct could be gross misconduct is more relevant in respect of the section 98(4) issue.

62. The tribunal finds that the facts in the mind of ST/the Panel were the adopted 4 categories of allegations as proposed by SB in her investigation report. That is clear from the content of the letter of dismissal and from the unambiguous evidence of ST. The tribunal accepts that each of those four categories and when taken together established a belief on the part of the Panel that the claimant's actions fell far short of what is expected in terms of the basic requirements of a Band 5 Nurse and further that such a situation put patient safety at risk.

63. The tribunal is satisfied that ST/the Panel held the belief that those facts arising from the 4 categories constituted negligence which threatened patient safety. The tribunal is satisfied that ST/the Panel in mind that this fell within an example of conduct of described in the respondent's disciplinary policy, at [114].

64. The tribunal is satisfied that this was an honest belief held by ST/ the Panel. The tribunal is also satisfied, having heard the evidence of ST, that this was a genuine decision making process and not a situation where the Panel utilised an end conclusion i.e., "negligence" and then proceeded to fill in the facts to meet that conclusion.

65. This was a genuine process in which ST/the panel were aware of the claimant's suspension and of the use and application of the disciplinary process. ST/the Panel had regard to facts in connection with the disciplinary policy including the option of finding of gross misconduct and applied that policy in the present case.

66. The tribunal then ask itself whether reason was not in fact "conduct" but "performance". The tribunal reminded itself of the dicta in the Sandwell case referred to above and in the course of submissions by Mr Downey. It is not a requirement of "conduct" that the claimant's actions need to be intentional or deliberate (notwithstanding that may well often the case). Case law which identifies the definition of "gross negligence" supports that approach. Mr Caiden makes this point in these submissions, for example at paragraph 5. The tribunal is also persuaded by ST's explanation that this was a nurse with many years' experience where on the face of it there were no prior competency concerns and yet they were at the forefront in 2019 and with such potentially significant consequences. Patient safety was at risk. In reality, as Mr Caiden submitted, it is not so much that the claimant cannot do it but that she is simply not demonstrating it or not doing so consistently, a concept which the tribunal finds is equally if not more apt to be described as "conduct".

67. It is also relevant that ST knew and understood that the Panel was undertaking a disciplinary process which was focused on serious actions, but which in fact ran alongside a separate performance management and was distinct from it. This was evidenced in part by the Panel decision to defer its determination in March 2020. The tribunal rejects the analysis put forward by Mr Downey that the actions of the Panel to defer in March 2020 meant that the right to terminate summarily was thereby lost. Whether that is a correct statement in contractual terms is not an issue for this tribunal: it is not helpful in determining the statutory questions of unfair dismissal.

68. The tribunal concludes that there was no counter narrative to undermine ST/the Panel's stated reason for dismissal, and further that the genuine and extensive disciplinary process involving alleged facts (as proposed by Mrs Burgess) placed by the Panel into 4 categories, were applied by the Panel to consideration of an allegation of negligence threatening patient safety.

69. The tribunal finds that the respondent has established that its reason for dismissal was capable of amounting to conduct and did in fact amount to the potentially fair reason of conduct.

70. In any event, if it were necessary to do so, the tribunal would have found that the respondent has established that the facts operating on the mind of ST/the Panel were capable of amounting to performance issues going to the capability of the

claimant and thus the respondent would have established its alternative reason relied on, namely capability, as the facts can be said to relate to the skill and aptitude of the claimant to undertake the role of a Band 5 nurse.

71. The tribunal then turns to the second statutory question, arising under section 98(4).

72. Dismissal was based on the Panel's conclusion, at [287], that, "all 4 of the alleged areas of concern being upheld", that the investigation had established that, "the claimant failed to demonstrate she was capable of meeting the basic nursing requirements of the Band 5 registered Nurse "and in particular, that the claimant, "had been unable to demonstrate she was capable of working safely without supervision". The Panel's conclusion was that this, "represents practice that fell so far short of what the respondent considered acceptable for a Registered Nurse, that this risks undermining public confidence in the trust and threatens unacceptable loss, damage or injury".

73. Were there reasonable grounds for this belief at the point of dismissal?

74. First, in respect of the allegation that the claimant could not consistently undertake an A-E assessment this was partially upheld in what was evidently a reasoned process. There was "some evidence" that the claimant could show her use of the assessment and had been signed off in that respect. However the claimant could not demonstrate this skill set consistently. Four different senior nurses on four different occasions supported the conclusion that the claimant could not achieve a consistent (or safe) A-E assessment. The claimant herself agreed she "couldn't always do it", a concession which she repeated in cross examination, and that she needed more support. The Panel found this to be so, notwithstanding that the claimant had been consistently offered levels of support that were at least the same if not greater than a new joiner, and all that despite the claimant having many years "baseline skills" experience.

75. Secondly, in respect of the intravenous infusion, the Panel were entitled to and did accept the evidence of TP, a senior nurse, which supported its finding that the claimant had been prepared to act in what would, but for the fact that she was prevented from doing so because she was under supervision, have been an unsafe infusion The Panel fairly understood the merits of the claimant's position and expressed concern that the claimant's response to the allegation was to "show no concern that the experienced critical care staff working with you have been sufficiently worried about the amount of air in the line to have raised it as a concern" and in fact the claimant had responded that she had, "connected lines with similar amounts in the past". There was no need for any investigation how the claimant might have primed another line or might have obtained an alternative kit: the Panel accepted, and was entitled to accept, that the senior nurse's intervention was because she was trying to stop what otherwise would have been a dangerous procedure.

76. Thirdly, decision-making regarding medication doses, the Panel found that on 22 November 2019, a different senior nurse, SL, had agreed with the claimant that the patient would have a 5ml dose of a prescription drug, but that the claimant

returned with a “double dose” and was unable to explain her reasoning at the time and nor could the Panel verify the rationale which the claimant later provided. The Panel took account of numerous other cardiac medication errors, noted on no less than 5 occasions between 13 June 2020 – 2 July 2020, and in respect of which in cross examination that claimant said, “I do accept these errors; the ward I was in was new and it was stressful”. Had the claimant not been working with direct supervision, the outcome for the patient(s) may been poor or even fatal.

77. Fourthly, insight into own level of competence, the Panel had regard to a series of specific examples. Feedback from senior nurses supported its concerns, at [285] in this respect, that the claimant had little to no insight that she is unable to consistently demonstrate an ability to complete medication rounds in a timely or consistent manner, posing a risk to patient safety: all that notwithstanding that she did consistently have feedback but did not speed up. Additionally, there was a series of medication errors, including missing several drugs and administering an incorrect dose: itself with the potential to risk injury to patients. The claimant showed a consistent inability to implement the SBAR mechanism, communicates critical information enabling appropriate escalation and increased patient safety. The claimant in fact said she was “getting it”, i.e., that she simply needed 2-3 weeks more to enable her to demonstrate skills. This was, as set out above, part of the reason for the further opportunity in cardiac ward. Notwithstanding, the Panel found that the level of basic standards shown by the claimant was inconsistent with this assertion and supported its finding that the claimant did not have a real awareness of her standard of care.

78. The tribunal finds in respect of each of the four categories of allegations and also when taken together that the Panel had reasonable grounds for its belief.

79. Were those conclusions reached by the respondent after a reasonable investigation? The tribunal reminds itself of its task to examine the respondent’s actions and at the same time of the need to avoid substitution of its views for those of the employer.

80. The claimant was at all times in a supernumerary position, the whole purpose of which was supervision in a professional context, i.e., a 2 – way feedback with a senior nurse or educator. RR had set up a scheme involving practice educators and, regardless of the identity of the advising nurse, this was a robust model enabling the claimant to give and to receive feedback and gain an understanding of the required standard of care. The Panel fairly investigated the circumstances in which the events took place and the relevance of the supernumerary position that the claimant held.

81. There is no substance to any suggestion that the Panel failed to have regard to or to investigate further in respect of the prior disciplinary warning which the claimant had received in respect of conduct amounting to aggression toward her previous line manager or in respect of the early initial “improvement plan” in 2019 regarding discrete issues conduct, such as lateness and uniform. They have no direct relevance albeit that the latter indicates that respondent had active methods of managing performance.

82. The claimant understood initially verbally but in any event by 19 November 2019 of concerns around her not meeting some basic requirements of the role. The suspension came as a result of careful consideration by RR and her superiors whose priority can fairly said to be patient safety. Nor was supervision a sufficient alternative to suspension. Supervision could not amount to "scrutinising" the claimant at all times: supervision did not provide a "100% safety net", leaving aside the additional consequence of errors that senior staff might make when they took their "eye off the ball" because of their attention to the claimant. The Panel fairly understood the circumstances of suspension and the respondent satisfactorily explained why the claimant was suspended and the fact that the claimant understood those reasons.

83. The claimant faced a disciplinary process from 6 December 2019, involving interviews on 12 December and 19 December 2019. This was not the simplest of investigations, but to produce a report by 30 January 2020 would not naturally be a cause of criticism for delay. Furthermore, the tribunal sees no grounds for criticism of SB or of her investigation in that regard not least because claimant and her RCN rep were kept up to date with the timeline of the investigation.

84. At the heart of the claimant's case was that in material respects the findings of the Panel were unfair as the investigation should have been wider in scope and in addition the claimant should have been given more time, i.e., time to prove herself.

85. First, as the tribunal has already concluded, the allegations were clear to the claimant and she understood them, if not by the point of suspension then plainly during the course of the interviews with SB and in any event upon receipt of the investigation report dated 30 January 2020.

86. The primary task of the decision maker is to examine the evidence and see if the evidence meets the threshold. The Panel had a sound understanding that the claimant had, for example, completed many shifts over the years and without incident, as would have been obvious from the fact of her 30 years' experience with no prior issues under consideration.

87. What is also obvious is that the Panel did not see this situation in terms of a binary outcome. To use the A-E assessment as an example, there were elements suggesting that the claimant was able to carry out the assessment but the claimant did not demonstrate this consistently. As stated, the Panel took into account the proposition that the claimant was no doubt able to did work shifts without incident.

88. It is relevant to consider, as suggested by Mr Caiden, the claimant's "defence" to the allegations. There was no representation by the claimant she was relying on other evidence from other staff that did/would undermine the evidence of senior staff or otherwise demonstrate that the claimant was consistent and reliable. The other witnesses proffered to the tribunal relate to a previous period of time.

89. The Panel fairly examined all of the feedback available, none of which was challenged in terms of the genuineness or its motivation. It did not cast its net into the wider population of nursing or clinical staff because it had no compelling reason to do so, but nor was it asked to do so. The tribunal finds that scope of the investigation was within the range of reasonable action by a reasonable employer.

90. Should the claimant have been offered "more time" as part of the investigation and decision making process? The claimant had been aware of concerns by reason of feedback consistently afforded to her in the workplace and as a result of the disciplinary process which from the outset clearly identified the concerns to the claimant. This was an issue which therefore focussed not on the timing of the investigation but on the timing/location of the claimant's further opportunity.

91. The Panel had considered the issue of "more time", as can be demonstrated by the Panel's decision to adjourn an outcome in March 2020 as a direct alternative to the potential of dismissing the claimant at that point given its finding of misconduct. It was an invitation to the claimant to take the opportunity to demonstrate that with more time she could establish that she was capable of working safely without supervision. In those circumstances, in March 2020 and after consideration and consultation with the claimant and her RCN rep, the Panel arranged a cardiac placement for the claimant which, in the view of ST was entirely appropriate as it was a non-intensive ward with the stability of consistent mentoring and support.

92. What the claimant complained of was that she needed familiarity; described in the hearing by the claimant and Mr Downey as "acclimatisation". However the respondent had reasonable grounds for its view that the ICU was not the right place for claimant given that it would inevitably have involved the claimant working in a team that entailed unpredictability and/or different supervisors, thus not meeting the claimant's need for consistency. That leaves to one side all the additional complications that were presented by the COVID pandemic which would inevitably make the ICU even less suitable for the claimant.

93. The respondent provided sufficient explanation why the cardiac placement was the appropriate opportunity (in fact it was thought to be the only available opportunity at that time) afforded to the claimant to be able to demonstrate her basic Band 5 skills.

94. Was the time on the cardiac ward adequate? The Panel concluded that despite the time afforded to the claimant she had shown "zero progress". The claimant had senior nurse supervision. The Panel were provided with numerous examples of basic errors made by the claimant. The Panel were entitled to conclude that the claimant had not been able to demonstrate consistently and safely the key basic requirements of her role. The placement had stopped one week early on account partly of the claimant's illness but also patient safety concerns [285]. The tribunal finds that the Panel was entitled to the view that sufficient time had elapsed and further that another week or so would have made no difference. In short, the Panel had asked and answered this question and its decision was reasonable.

95. The tribunal finds that suitable alternative employment was considered prior to dismissal. The claimant had reasonable opportunities to demonstrate that she could work safely and consistently.

96. The tribunal turns then to the question of whether the decision to dismiss fell within the range of reasonable responses. The tribunal found that it did for each of the following reasons:

    96.1. these were the core duties expected of the claimant. Several senior nursing staff described the dangers/risks that were represented by the claimant's actions, which had the capacity to threaten patient safety. The Panel was entitled to the view that these actions fell within the example of gross misconduct provided for in the disciplinary process

    96.2. The response that the claimant was still being supervised and that she was still a supernumerary did not detract from that conclusion. The supernumerary period is designed to enable competence in specific skills, such as in ICU, and not designed to permit the breach of basic nursing requirements which threaten patient safety. Further, supervision may have prevented the consequence but did not abate the severity of her actions

    96.3. Alternative outcomes were fully considered, including the non-intensive ward environment. The conclusion remained however that the claimant could not undertake the basic requirement of the role which in turn exposed the patient to risk of danger or injury

    96.4. all of which was despite Panel acknowledging the claimant's 30 years' experience and of the existence of high levels of supervision in ICU and in the cardiac ward by experienced nursing staff and practice educators.

97. The process adopted by the Panel and the decision which it reached in respect of each of the four categories had been further informed by the opportunity afforded to the claimant of working under supervision in the cardiac ward. It enabled the Panel to reach the clear conclusion that the claimant was unable to demonstrate basic skills of a Band 5 nurse, with the consequent risk to patient safety. The claimant's failings in demonstrating the she could consistently discharge basic skills were sufficient to justify dismissal. Some employers might have been able to reach an alternative conclusion. This employer did not. The tribunal cannot substitute its view but instead must analyse the decision-making of the respondent. The decision to dismiss the claimant fell within the band of reasonable responses.

98. The respondent followed a fair procedure in reaching its decision to dismiss the claimant. The claimant understood what the allegations were and what was expected of her in terms of discharging her role and in terms of her objectives in the cardiac ward. Her actions were well-documented and formed part of contemporaneous feedback with her consistently in any event. There was a proper investigation with the result that the Panel genuinely believed that the claimant was not able to consistently demonstrate that she could do her job safely. There is clear evidence that the claimant was throughout able to access supervision and feedback; at least as much if not more than a new joiner. She worked alongside senior nurses and had access to high levels of support and

guidance. The tribunal has found that the claimant clearly understood the allegations that she faced and of the risk of dismissal. At times, she has acknowledged that she did not demonstrate what was expected. At no time did she contend that she did not understand what was required. The nature of supervision and the duration of her periods of work in the ICU and cardiac reflected a reasonable opportunity to demonstrate her baseline skills. Despite being afforded reasonable time, there remained significant concerns as to patient safety being put at risk and these concerns were raised by a number of different experienced nursing colleagues [269].

99. Consequently, the tribunal finds that the claimant's dismissal, both substantively and procedurally, was fair. Her claim for unfair dismissal is not well founded.

100. Having regard to the respondent's alternative case that dismissal was by reason of capability, the tribunal would have concluded for the reasons set out above that the claimant understood what was expected of her and that reasonable and understandable performance measures were set. Further, that the claimant was provided with reasonable opportunity and reasonable time in which to improve. The level of support and guidance provided to the claimant was significant and more than adequately provided the claimant with opportunity to learn and to improve. The respondent had sufficiently considered alternative employment but was inevitably restricted by the concerns which the claimant's performance raised. Dismissal in all the circumstances by the alternative reason of capability would have been fair.

101. As to Polkey, the tribunal would have found that the claimant had, through the supernumerary process, received proactive feedback and had consistently been informed of the views and advice of her experienced colleagues. She had clearly been set appropriate improvement plans. She had clear and understandable objectives set for her in respect of the cardiac placement and the tribunal has found that the cardiac ward placement was the (only) appropriate further opportunity for her to demonstrate her skills.

102. In evidence she emphasised her complaint that the cardiac placement was not a "familiar" ward and thus she needed more "acclimatisation". She asserted that "if she had been given an extra 2-3, max 4 weeks, there would have been no complaint" from her. The disciplinary investigation and decision making process also had strong elements of a capability process. The tribunal finds that even if the claimant had been given more time, given the depth of the findings of the Panel, the outcome of dismissal would have been the same albeit after an additional 4 weeks.

**EMPLOYMENT JUDGE BEEVER**
**Date: 21 January 2023**

**Judgment sent to the Parties: 31 January 2023**

**FOR THE TRIBUNAL**

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