



# EMPLOYMENT TRIBUNALS

**Claimant: Mr Andrew William Pickering, *Deceased*, by his Brother and Personal Representative, Mr Richard John Pickering**

**Respondent: Yorkshire Ambulance Service NHS Trust**

**Heard at: London South Employment Tribunal (by Video/CVP) On: 14 and 15 February 2023**

**Before: Employment Judge Chapman KC (sitting alone)**

**Representation:**

**Claimant - Mr Richard Pickering, brother of deceased and Executor of his Estate (Personal Representative for the purposes of section 206(3) of the Employment Rights Act 1996).**

**Respondent - Richard Ryan, Counsel for the Respondent.**

## JUDGMENT

### INTRODUCTION

1. This is the judgment of this Tribunal in the case of Andrew Pickering (Deceased) v Yorkshire Ambulance Service NHS Trust. Case Number 2302220/2022.
2. This judgment is structured as follows. First, I will briefly set out and, for the record, summarise certain Preliminary matters which were dealt with by consent at the

commencement of the Hearing. Second, I will give my judgment in summary on the substantive matters raised by the Claimant's claim. Third, and finally, I will provide my reasons for this judgment, setting out: the issues raised; my findings of fact; the law that I have to apply; and, my conclusions on the issues.

### **PRELIMINARY MATTERS**

3. This matter arises out of the tragic death by his own hand of Mr Andrew Pickering. Andrew Pickering died on 3 February 2022. These Employment Tribunal proceedings were instituted by his brother and Executor, Mr Richard Pickering. Richard Pickering has provided this Tribunal with a copy of the grant of Probate, dated 5 May 2022, in which he is identified as Executor of the estate of Andrew Pickering. Mr Richard Pickering institutes these proceedings as Personal Representative of his brother pursuant to section 206(3) of the Employment Rights Act 1996. This Tribunal wrote to the parties, at the direction of Employment Judge Dyal, by letter dated 13 January 2022, acknowledging receipt of the grant of probate and directing that the proceedings be known as, "*Mr Andrew Pickering (deceased) by his personal representative Mr Richard Pickering v Yorkshire Ambulance Service NHS Trust.*" The title of this action (above) now reflects the direction of Employment Judge Dyal.
4. There is an additional preliminary matter with respect to the witness evidence which was raised on Application by the Respondent. This Application can be found in an email to the Tribunal, copied to Mr Richard Pickering, dated 10 February 2023. The Respondent indicated that Ms Clare Ashby, a witness that the Respondent was proposing to call and from whom it had served a signed written witness statement, dated 4 January 2023, was unable to attend the Tribunal Hearing as a result of ill health (for which she was, and remained, absent from work). The Respondent served a witness statement from Mr Christopher Dexter, dated 10 February 2023, which covered similar ground to the content of Ms Ashby's witness evidence. Mr Dexter's witness statement was served late; there is a Tribunal Order, dated 23 August 2022, in which the parties are directed to exchange witness statements on 14 November 2022 (although, in the event, such exchange took place in early January 2023). At the start of this Hearing, Mr Pickering stated that he had seen

and read the Respondent's email Application of 10 February 2023 and the accompanying witness statement of Mr Dexter. Mr Pickering had no objection to the admission of the late witness statement nor to the calling of Mr Dexter to give live evidence at the Hearing. In the circumstances, I stated that I would adopt the following course in accordance with my case management powers pursuant to rules 29 and 30 of the Employment Tribunal Rules of Procedure 2013 (having regard to the overriding objective contained in rule 2 thereof). I admitted the witness statement of Mr Dexter in evidence and permitted the Respondent to call him as a witness and for Mr Pickering to ask him questions in the usual way. I have also read the witness statement of Ms Ashby and I give her written evidence such weight as seems to me to be appropriate in the light of all of the evidence which was given at the Hearing, taking account of the obvious limitation that Mr Pickering has not had an opportunity to test her evidence in cross-examination.

5. The final preliminary matter that I record at this point relates to the manner in which this Tribunal Hearing proceeded within the time available. As will be evident from the remainder of this judgment, there was a lengthy Bundle of documents (with an index and pagination. The Bundle ran to some 1,246 pages), a Cast list, a number of written witness statements (of significant length and with cross-referencing to the documents) and I have heard detailed closing submissions from both parties, accompanied by written closing submissions from both parties which were provided to me (and exchanged) on the second day of Hearing. This matter was originally listed for one day: a Final Merits Hearing to commence on 1 February 2023. Sensibly, and on receipt of the Notice of Hearing, both parties made representations to the Tribunal that one day was an insufficient time estimate and the Tribunal therefore relisted this matter for a Final Merits Hearing commencing 14 February 2023 with a two-day time estimate. It was agreed that the two days allowed would enable evidence and submissions on the liability issue: that is, whether the late Mr Pickering was unfairly dismissed and that any issues as to remedy in the form of financial compensation ought, if necessary, to be dealt with on another day and with further directions. This was, therefore, the manner in which the Tribunal Hearing proceeded. In the event, after hearing evidence and closing submissions (accompanied, as I have indicated, by written closing submissions from both parties), I reserved judgment and I now provide the same in writing to the parties.

6. As I have indicated, the Claimant is represented by Mr Richard Pickering, brother of the late Mr Andrew Pickering. The Respondent is represented by Mr Richard Ryan of Counsel. I express my gratitude to both representatives for the care that they have evidently taken in their preparation for the Tribunal Hearing, their questions to the witnesses and their helpful submissions (both in writing and as presented at the Hearing). I record in particular that Mr Richard Pickering has dealt with the difficult and tragic circumstances surrounding this claim with admirable dignity, care and restraint. He has represented his late brother and the wider family's interests in a focused and careful manner which is a credit both to him and to the memory of the late Mr Pickering.

## **JUDGMENT**

7. In summary, my judgment is as follows: the Claimant's claim of unfair dismissal pursuant to the provisions of sections 95 and 98 of the Employment Rights Act 1996 is dismissed. The late Mr Andrew Pickering was not unfairly dismissed.

## **REASONS**

### *Issues*

8. This is a claim for unfair dismissal (only). Mr Pickering informed me that he seeks, as he put it, the "*overturning*" of the Respondent's decision to dismiss his late brother, Andrew Pickering. There is a claim for financial compensation arising out of the dismissal. At the commencement of the Hearing, I had the benefit of discussing a list of issues with the parties.
9. The issues are as follows and as agreed by the parties:
  - (1) It being admitted and accepted that Andrew Pickering was summarily dismissed by the Respondent Trust on 2 February 2022 and that the reason identified by the Respondent for such dismissal was gross misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the late Mr Pickering pursuant to section 98(4) of the Employment Rights Act 1996?

- (2) There are the following sub-issues in this regard (this Tribunal being mindful of the guidance provided in *British Home Stores v Burchell* [1980] ICR 303 (EAT)) –
- (a) Were there reasonable grounds for the Respondent’s belief that the conduct of Andrew Pickering was sufficient to justify dismissal?
  - (b) Whether, at the time of forming that belief, the Respondent had carried out a reasonable investigation?
  - (c) Whether the Respondent otherwise acted in a procedurally fair manner?
  - (d) Whether the dismissal was within the range of reasonable responses open to the Respondent?
10. I have been assisted by the summary contained in the Claimant’s ET1 in which the matters about which specific complaint of an unreasonable procedure and/or an unreasonable outcome (being, summary dismissal) are set out. These matters of complaint have been amplified by the witness statement of Mr Richard Pickering and his oral evidence (on which he was cross-examined by Mr Ryan), by his cross-examination of the Respondent’s witnesses and by his able closing submissions (as provided to me in writing and amplified by oral submissions at the conclusion of the evidence):
- a. There was no proper regard by the Respondent’s disciplinary process to the specific facts of Andrew Pickering’s case or to the extensive mitigation;
  - b. In summary, such mitigation can be found in: (i) a lengthy history of employment (both with the Respondent and other employers), with an unblemished record of employment; (ii) the fact of the late Mr Pickering’s marital breakdown at about the time of the events that are of relevance to these proceedings; (iii) the fact that the late Mr Pickering’s daughter was unwell and required medical treatment at about the same time; (iv) by Andrew Pickering’s acknowledgement of his actions and his expressions (to the Respondent’s investigating staff) of deep regret for what he had done; (v) the submission that he had acted in ignorance of Trust procedures and policies, rather than with malicious motives; (vi) the contention that no harm was done by Andrew Pickering’s actions;
  - c. In the course of the Hearing, Mr Richard Pickering indicated (in answer to a question from me) that it was his *principal* case that the Respondent had over-concentrated/focused on the aggravating circumstances of his late brother’s

conduct and had given little or no weight to the competing mitigating circumstances to which he refers (and which I have sought to summarise above);

- d. Further or alternatively, the Respondent is criticised by Mr Richard Pickering for:
- (i) failing properly to consider any alternatives to dismissal;
  - (ii) providing no adequate explanation of the rationale for its decision to dismiss and confusion over the timing of the same;
  - (iii) providing no explanation of the right of appeal against the first instance decision to dismiss; and for, (iv) the refusal to allow the appeal to take place in person, rather than on paper.

### *Findings of fact*

11. My findings of fact as relevant to these issues are as follows. I will deal first with the parties (and I understand this material to be uncontentious).
12. The Respondent is an NHS Trust which provides emergency (ambulance) services across the Yorkshire NHS Trust region. It is perfectly clear from the evidence that I have heard that the Respondent Trust is a very substantial undertaking with a significant workforce.
13. Mr Andrew Pickering was born on 15 May 1964. It follows that he was aged 57 years at the time of the events that give rise to these proceedings and at the time of his death. Prior to his employment by the Respondent Trust, he was a member of Her late Majesty's Armed Forces as an RAF Policeman with 22 years' service, including active service in the Balkans and in Afghanistan. He joined the Respondent Trust as an Ambulance Technician on 17 August 2009 and was promoted to become an Emergency Medical Technician, Grade 1 from 17 June 2016 (being, the post that he occupied at the time of the relevant events). Andrew Pickering had, on 12 March 2021, received training in the matters of policy (as to IG and data security) which were of relevance to the disciplinary proceedings (see, print out at [1032]). As I have indicated, Andrew Pickering took his own life on 3 February 2022. Prior to the events with which these proceedings are concerned, Andrew Pickering's employment record was exemplary.
14. As indicated, I have been provided with a Cast List and with an indexed and paginated Bundle of documents comprising, among other matters: the ET1, presented on 4 July 2022, the ACAS Early Conciliation Certificate (Ref no R150418/22/58) with receipt of EC

notification on 26 April 2022 and date of issue of certificate by email on 7 June 2022; the ET3 with Grounds of Resistance; the Orders of the Employment Tribunal; relevant policy documents of the Respondent Trust; and, documentation relating to the procedures of the Respondent which preceded the decision to dismiss the late Mr Pickering (which documentation includes the transcript of a fact-finding interview with Andrew Pickering, the statements of case provided by the Respondent and Mr Pickering to a disciplinary panel hearing, the transcript of the disciplinary panel hearing, a file note recording the outcome of the disciplinary panel hearing, correspondence relating to appeal and the outcome of the appeal which was conducted on paper). I refer to these documents and materials in more detail in the findings of fact which follow.

15. During the course of this Hearing, I have heard from the following witnesses for the Respondent (in this order) and then from Mr Richard Pickering for the Claimant. These witnesses were all cross-examined. For the Respondent, I have heard from Mr Simon Butterworth, witness statement dated 5 January 2023, Ms Laura Young, witness statement dated 5 January 2023, Ms Pauline Archibald, witness statement dated 4 January 2023 and Mr Christopher Dexter, witness statement dated 10 February 2023. I then heard from Mr Richard Pickering whose witness statement is dated 6 January 2023.
16. As I have already indicated, I have also admitted in evidence and have read the witness statement of Ms Ashby with the qualification that, as also indicated above, Mr Pickering has been unable to cross-examine her.
17. As to the chronology, there is significant common ground and little in the way of real factual dispute (in the summary which follows page references [XX] relate to the Hearing Bundle):
  - a. In about May 2021 Andrew Pickering met the person that I will refer to (consistent with the papers for this Hearing) as patient A (see, Andrew Pickering's witness statement for the Respondent's disciplinary investigation [321]). Mr Pickering met patient A while walking his dog from time to time around Ripley. It appears that he spoke to patient A, having bumped into her on a coincidental basis, rather than by any prior arrangement. Mr Pickering and patient A did not exchange contact details during these conversations, but they did speak on occasions while walking their dogs (and, on such occasions, for about an hour at a time);

- b. On 29 June 2021 Andrew Pickering, in his capacity as Emergency Medical Technician, grade 1 and in the course of his employment by the Respondent, attended a private address in Harrogate. Mr Pickering was in company with another paramedic and with a female police officer. The ambulance service call-out to the Harrogate address followed a 999 call (see, timeline of events [337]). The (female) patient seen at the Harrogate address was patient A. Andrew Pickering's statement [321] suggests that the female police officer knew/was familiar with patient A and also states that he (Andrew Pickering) recognised patient A from dog walking in Ripley and that, on 29 June 2021, he spent some time at the address talking to her in order to "*safety net*" her (as he puts it), given that patient A refused to attend hospital and clearly had problems arising from the misuse of alcohol and a mental health condition;
- c. The Respondent's witnesses inform me, and I accept (in the absence of contradiction), that, in the period before 29 June 2021, patient A was well known to the Yorkshire Ambulance Service as the author and/or subject of a number of 999 calls (arising out of suicidal feelings and/or suicide attempts and in connection with an alcohol misuse and mental health condition);
- d. In his witness statement [321]ff Andrew Pickering states that, in the days following the attendance at the Harrogate address, he "*reflected*" that he would like to follow up his call-out visit by seeing how patient A was faring (with her condition); this was in part prompted by the fact that he had not seen patient A while walking his dog in the period following the June 2021 call-out. He therefore looked for patient A on social media platforms because he did not have her contact details. He states in the same witness statement that patient A's name "*came up*" on the *LinkedIn* social media platform and that he made contact with her by this means. However, it now appears to be common ground that this account of contact with patient A is, to put it neutrally, somewhat incomplete. On 24 September 2021, Mr Pickering was interviewed (a "*Fact-Finding Interview*", as it has been termed) by Mr Simon Butterworth, an employee of the Respondent who has given evidence to this Tribunal. In the course of this interview, Andrew Pickering volunteered (as Mr Butterworth put it) that, after the 29 June 2021 call-out, he had looked for patient



A on the Respondent electronic patient record (“EPR”) (see, [1046] point 132ff). Mr Pickering stated that he had used the EPR to look for patient A “*post-incident*” and in order to assist him in reflecting on the manner in which the 29 June 2021 home visit had been dealt with. Mr Pickering informed Mr Butterworth that he (in common with other Yorkshire Ambulance Staff) had “*regularly*” made use of the EPR post-incident in order to check whether they had the full picture about a patient and to “*see what has happened*”;

- e. Having obtained *LinkedIn* contact details for patient A (apparently by Googling her name (see, fact-finding interview [1047] point 152ff)), Mr Pickering sent patient A a message introducing himself and including his telephone number;
- f. On 5 July 2021 patient A responded with a whatsapp message (see, fact-finding interview [1048] point 160). In the days that followed there were voice calls and text messages between Andrew Pickering and patient A and it is common ground that they formed a relationship;
- g. In his witness statement for the Respondent’s disciplinary investigation, Andrew Pickering describes forming a “*personal friendship*” with patient A in the period following 5 July 2021 [321]. He was subsequently asked by Ms Laura Young of the Respondent, who has also given evidence to this Tribunal, whether this was a sexual relationship with patient A and he initially replied that it was not (see, email from Ms Young, dated 17 August 2021 [331]). However, Andrew Pickering was asked about this aspect of the matter when he was interviewed by Mr Butterworth in late September 2021 and he stated that he had formed a sexual relationship with patient A and that, in the development of their relationship, both he and patient A had wanted their friendship to become intimate in that way [1049] point 185. It appears that, in the period of 1 or 2 months following 5 July 2021, Andrew Pickering and patient A had met on a number of occasions (in the “*teens*” according to the fact-finding interview answers provided by Andrew Pickering);
- h. The next key factual event occurred on 11 August 2021. It is common ground that, on this date, there was another 999 call-out to patient A’s home which was attended by the Respondent’s ambulance service staff: on this occasion by Mr Paul Dill and Ms Amy Inman. It is also common ground that this call-out was the result of further

concerns surrounding possible suicide attempt/mental health crisis and misuse of alcohol by patient A and that a further person was also present at the property: a friend of patient A called Emma. During the course of this call-out Andrew Pickering attended patient A's home. It is common ground that he was in uniform. Andrew Pickering's witness statement, provided for the purposes of the Respondent's disciplinary investigation, states that he was confronted by Emma who questioned his relationship with patient A (it appears, as a member of ambulance personnel who had attended a call-out in uniform) and also questioned his presence at the property [321] - [322]. Ms Inman states that Emma wanted to report Andrew Pickering for "*misconduct.*" [329] After the call-out Mr Dill and Ms Inman discussed the attendance of Andrew Pickering (who, Mr Dill states, they initially believed was attending the property in uniform by mistake). They decided – as a result of the anger expressed by Emma and the apparent vulnerability of patient A – to raise the matter "*discreetly*" with their clinical supervisor [327];

- i. The incident was referred by Mr Dill and Ms Inman to their supervisor. On 17 August 2021, Mr Andrew Pickering was redeployed from a patient-facing role to a role within the fleet. He was informed of the reasons for this in a letter of the same date [344] and was assigned a safety and welfare officer (see, timeline at [337]) and offered counselling;
- j. On 20 August 2021 the late Mr Pickering and patient A agreed to end their relationship by whatsapp messages;
- k. On 26 August 2021 Andrew Pickering sent patient A a whatsapp message containing a photograph of himself (he then sent a text message informing her that this had been sent in error). Andrew Pickering's account of this at interview in September 2021 was "*I mistakenly messaged her on 26<sup>th</sup> August, sent her a picture when I was at a match at Headlingley, but there wasn't any sort of relationship with that. She replied saying 'glad you are having a good time' and I said 'sorry, really pissed'*" [369] point 258;
- l. On 24 September 2021 Andrew Pickering was interviewed (a "*fact-finding interview*") by Simon Butterworth [357]ff (there were interviews with others, including Mr Dill);

- m. On 8 November 2021 Mr Andrew Pickering was invited by letter to a Disciplinary Panel Hearing [427];
- n. On 23 November 2021, by letter of the same date, Andrew Pickering was informed that the Management wished to add a further allegation to those (already notified) to be considered at the Disciplinary Panel Hearing [434];
- o. In the event, the allegations identified by the Respondent Management for consideration at the Disciplinary Panel Hearing were as follows:
- *“(1) At some point after 29th of June 2021, after attending detail 11526212, you made contact with Patient A via Linked-In, contrary to section 4.6 of the Yorkshire Ambulance Service NHS Trust Social Media policy.*
  - *(2) During July and August 2021 you have developed a social/personal relationship with Patient A, and have failed to recognise this as a potential conflict of interest and failed to declare this to your line manager contrary to section 10.5 of the Yorkshire Ambulance NHS Trust Relationship at work policy.*
  - *(3) During July and August 2021 you have taken advantage of your position of trust to build a social/personal relationship with a vulnerable patient (Patient A), contrary to section 4.1.1 of the Yorkshire Ambulance NHS Trust’s Disciplinary Policy.*
  - *(4) After you attended patient A on the 29th of June 2021 detail 11526212 you accessed her EPR records for personal gain, this is in contrary to section 3.10 of the Yorkshire Ambulance Service NHS Trust Data Protection policy, it goes against principle 4 of the Caldicott Principles and section 8.4 of the Yorkshire Ambulance Service NHS Trust Code of Conduct.”* This fourth allegation was added following Andrew Pickering’s fact-finding interview in late September 2021. Its addition is described as follows by the Respondent (in correspondence), *“I understand during the investigation carried out by Simon Butterworth you disclosed information in relation to the above and your responses given are sufficient to warrant an additional allegation being considered by the panel. I have asked that the disciplinary hearing organised for the 30th November 2021* [the original date of the Panel Hearing which was

later put back by several months] *is rearranged to notify you of this additional allegation, and allow the management statement of case to be added to reflect this additional allegation and the information gathered.*”

I note that the allegations and their connection to the Policies of the Respondent (as identified) were not contested by Andrew Pickering and have not been contested (factually) by Mr Richard Pickering (on the basis of the evidence available to the Disciplinary Panel). Instead, the central or primary complaint in these proceedings is that these allegations (and any aggravating factors) were focused on to the exclusion (in effect) of the mitigating factors to which I refer below;

- p. Mr Andrew Pickering was, after the institution of the Disciplinary Panel procedure and at the Hearing which followed, represented by an experienced Union official, Ms Jenny Stapley of UNISON;
- q. A Disciplinary Panel Hearing took place on 2 February 2022 by MS Teams (see, invite letter of 7 January 2022 at [508]). The Panel was chaired by Ms Pauline Archibald, who has given evidence before me, and she was accompanied by Mr Chis Daniel (“*Panel Manager*”) and Ms Suzana Sidelska (“*HR Support*”). Prior to the Panel Hearing, the Management and Andrew Pickering had each submitted written statements of case. As I have indicated, Jenny Stapley, of UNISON, represented Andrew Pickering at the Hearing;
- r. The Disciplinary Panel Hearing commenced at 1100 hours and concluded at 1627. The transcript is at [546] - [569];
- s. The outcome of the Panel Hearing, communicated to Andrew Pickering and Jenny Stapley at the conclusion of the day, was a decision to dismiss on grounds of gross misconduct [568];
- t. On 3 February 2022, tragically, Andrew Pickering took his own life;
- u. A File Note, rather than an Outcome Letter, records the Disciplinary Panel’s decision [575]ff;
- v. Mr Richard Pickering and the late Mr Pickering’s family were unaware of the disciplinary proceedings until after 3 February 2022. On 10 February 2022, Mr Richard Pickering wrote by email to Ms Rachel Pippin of the Respondent, enquiring, among other things, about the outcome of the disciplinary process [592];

- w. At the instigation of Andrew Pickering’s family, there was an appeal against the Disciplinary Panel’s decision to dismiss. Detailed grounds of appeal can be found at [787]ff. There was evidently opportunity for Appellant and Respondent to comment in detail and in writing on each other’s cases. The appeal was conducted as a paper exercise by a panel chaired by Ms Clare Ashby joined by Ms Lisa Elliott, HR Business Partner and Mr Christopher Dexter, Managing Director – Patient Transport Services;
- x. The outcome of the appeal was that the Respondent’s decision to dismiss was upheld: see, outcome letter, dated 21 June 2022, at [882]ff. On any analysis, I find that the manner in which the outcome letter is expressed suggests care and attention to the detailed matters of complaint raised on appeal by the Pickering family;
- y. During the course of the events that I have described above (and on dates which are unknown with precision, but which, it is common ground, broadly coincided with the events of May – August 2021 and, perhaps, thereafter), Mr Andrew Pickering was experiencing a number of difficulties in his personal life. These events may, in summary only (in deference to the privacy of the other persons involved), be described as follows: his marriage had broken down; his daughter was experiencing a period of ill health and had required medical treatment. I note that Andrew Pickering raised these matters at the fact-finding interview which account I read into this judgment (see, for example, [1051] point 202). He connected these personal problems to his judgement and decision-making around the time of the events that were the subject of the disciplinary proceedings. It is common ground that these events happened and, to put it neutrally at this stage, that they formed part of the background to the events which form the subject-matter of these proceedings;
- z. It is also common ground – acknowledged by the Respondent’s witnesses – that Andrew Pickering expressed his remorse for his actions and I have seen this in the fact-finding interview record and in the submissions of Ms Stapley at the disciplinary hearing.

18. As to the contested matters, my findings of fact are as follows:

- a. While the letter from Laura Young to Andrew Pickering (headed, “*Re Disciplinary Investigation*”), dated 17 August 2021, [1031] might or might not have inhibited the latter from discussing the disciplinary proceedings with his family (a matter on which, if relevant, I am unable to reach firm conclusions in the obvious absence of evidence from Andrew Pickering himself), I note that Mr Pickering did discuss the case (in evident detail) with an experienced union representative (Jenny Stapley) who provided representation to him at the Panel Hearing and, indeed, in the period before the Hearing. It seems unlikely to me that the 17 August 2021 letter inhibited Andrew Pickering or Jenny Stapley from presenting the case to the Disciplinary Panel both in writing and in oral submissions and this conclusion is reinforced by the fact that neither Andrew Pickering nor Ms Stapley made any suggestion/complaint of (such inhibition) at the time;
- b. I find that patient A was “*vulnerable*” (in the ordinary sense of this word) in the sense that she had made a number of 999 calls to the Respondent service in the period preceding June 2021 (she had at least threatened and might have attempted to commit suicide and she appears to have had a problem with alcohol. She was also living with a mental health condition);
- c. While patient A may well have been more vulnerable on some days and on some occasions than on other occasions, I find that she might accurately be described as vulnerable (on any sensible use of this term) during the period June – August 2021 and was certainly vulnerable on the occasion of the 999 call-outs on 29 June 2021 and 11 August 2021;
- d. I note that Andrew Pickering, in common with Paul Dill and Amy Inman, himself described patient A as “*vulnerable*” (see, Andrew Pickering’s comments during the fact-finding interview at [238] point 146);
- e. I find that there were inconsistencies in the factual account of the relevant events that were given by Andrew Pickering at various times during the disciplinary investigation: see, for example, that he told Laura Young in August 2021 that the relationship with patient A was not sexual [331], but he gave a different answer in this regard to Simon Butterworth at interview in September 2021 [233]. There was also a lack of clarity as to how Andrew Pickering contacted patient A after the call-

out on 29 June 2021, as to the manner in which he accessed her contact details and as to the number of occasions on which he (and, perhaps, other staff) had made use of the EPR system in order to access a patient record;

- f. I find that the evidence as to mitigation with respect to Andrew Pickering's home life and private/personal circumstances (as to his marriage and daughter) was in fact presented to the Disciplinary Panel on 2 February 2022 (see, the detailed submissions of Jenny Stapley in this regard [555] - [556]);
- g. Likewise, Andrew Pickering's remorse and his admissions as to the 4 allegations were brought to the Disciplinary Panel's attention;
- h. Critically, I find that the Disciplinary Panel did have regard to such mitigation in the course of its decision-making. This is clear from the file note (in lieu of an outcome letter) at [578] - [579]. The author of this portion of the File Note could not be identified by any of the Respondent's witnesses, but this seems to me a fair and reasonable summary of the mitigation presented to the Panel by the late Mr Pickering and his experienced union representative. It is good evidence that, as Mr Ryan for the Respondent submits, the Disciplinary Panel did give weight to the mitigation (and this would be consistent with the evidence before me of Ms Pauline Archibald in particular);
- i. I find that, at the conclusion of the Disciplinary Panel, Andrew Pickering and Jenny Stapley were clearly informed of the decision to dismiss. This can be seen in the record at [578]. I also accept the evidence of Ms Archibald that this prompted Andrew Pickering to get up and start to depart at which point Ms Stapley gently encouraged him to stay and said to him "*we will appeal*" and, again, "*we will appeal*". In the circumstances, I find that Andrew Pickering was aware of the right to appeal and that his experienced union representative advised him in this regard (at least to the extent of saying to him more than once, "*we will appeal*");
- j. I accept the evidence of Ms Archibald, presented to me at the Hearing, that the Disciplinary Panel did consider alternatives to dismissal and did so actively. Ms Archibald mentioned consideration being given to a redeployment, for example, to the Emergency Operations Department. The difficulty identified by the Panel in this regard was that there were few alternative roles which would not involve *some*

access to patient data: a matter of obvious and, in my view, understandable and reasonable concern to the Respondent in the light of Andrew Pickering's (admitted) breaches of the Respondent's policies;

- k. I find that the Outcome File Note inaccurately recorded that an appeal could not be brought by Andrew Pickering's estate or next of kin (see, [579]). However, in the event, an appeal *was* brought by Andrew Pickering's next of kin. This paper-based appeal process was exhaustive in the material presented (by the Pickering family and by the Respondent). The Appeal proceeded by way of review, rather than rehearing (and did so on paper), but the Appeal Panel clearly *did* consider the issue of mitigation and the evidence of the same (and its reception by the Disciplinary Panel): see, [889]ff where there is detailed consideration of the same;
- l. If it is necessary, and unsurprisingly, I find that the allegations presented to the Disciplinary Panel Hearing (and as admitted), were capable of amounting to gross misconduct within the meaning given to this term by the Respondent's disciplinary policy and were also at least potentially capable of resulting in the sanction of summary dismissal. I do not understand Mr Pickering to have suggested otherwise (his concern is, instead, that there was insufficient/inadequate consideration of any reasonable alternatives to dismissal).

### ***Legal framework***

19. As to the law to be applied to the issues that I have listed above, the starting point is section 98 of the Employment Rights Act 1996 which provides as follows;

*“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it—*



*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

*(b) relates to the conduct of the employee,*

.....

*(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.”*

20. It is common ground that the Respondent bears the burden of proving the reason for dismissal. If this reason was a potentially fair reason for dismissal then it is for me to decide whether the Respondent acted reasonably (objectively assessed) in dismissing for that reason. As I have indicated, there seems little doubt that this was a (mis)conduct dismissal.
21. As I have already indicated, I have been guided by the EAT judgment in ***British Homes Stores v Burchell*** [1980] ICR 303 (EAT), being mindful that the Respondent should have a genuine belief in the employee's guilt, held on reasonable grounds, after reasonable investigation.
22. I have also obtained guidance from the Court of Appeal judgment in ***Sainsbury's Supermarket Ltd v Hitt*** [2003] ICR 111 (CA) to the effect that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.
23. In accordance with the Employment Appeal Tribunal's guidance in ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17 (EAT), I am mindful, in reaching my conclusions, of the need not to substitute my own view of what the appropriate sanction should have been for that of the Respondent's, but, instead, that I should consider whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer in the particular circumstances of the case.

24. I think it also sensible to record at this point that an employer is not, as to its investigation, required by the criterion of reasonableness to carry out a quasi-criminal investigation or to extend to an employee subject to a disciplinary investigation the same safeguards that might be found in a criminal trial process (see for example, in this regard, **Sainsbury's Supermarket v Hitt** [2003] ICR 111). Instead, the focus is on the reasonableness of the belief that is formed as part of the enquiry into the reasonableness of the investigation which led to the formation of that belief. As to the question of mitigation – in the context of the **Sainsbury's/Hitt** decision and the broader issue of reasonableness – I have found some assistance from the recent Scottish EAT decision in **Tesco v S** [2021] 3 WLUK 672 where the following appears (at paragraph 42 of the judgment):

*“In relation to the second Ground of Appeal, we were unable to accept Mr Crammond’s submission that the Sainsbury’s band of reasonable investigation could never, as a matter of law, extend to the investigation of mitigatory factors. There is no reason in principle why the need to carry out a reasonable investigation should not apply equally to issues bearing upon the sanction for proven or admitted misconduct. As the Court of Appeal noted in Sainsbury’s (at paragraph [34]) the range of reasonable responses applies to all procedural and substantive aspects of the decision to dismiss a person from employment for a conduct reason. The degree of investigation required in relation to potential mitigation is inevitably fact sensitive and will vary from case to case. In considering whether a particular line of inquiry into mitigation was so important that failure to undertake it would take the investigation outside the Sainsbury’s band, Tribunals require to consider inter alia the degree of relevance of the inquiry to the issue of sanction, whether or not the employee advanced any evidential basis which merited further inquiry, and the extent to which resultant further investigation could have revealed information favourable to the employee.”*

25. I bear in mind that if gross misconduct is found, a decision to dismiss does not automatically follow: the employer has to consider what may be a reasonable sanction (see, **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854 (EAT)).

## *Conclusions*

26. Reminding myself that it is not my role to substitute my view of what was reasonable and focusing instead on the range of reasonable responses open to a reasonable employer in the particular circumstances, I have found that the Respondent *did* conduct a reasonable investigation upon which it founded a reasonable belief that the late Mr Andrew Pickering's conduct amounted to gross misconduct which reasonably justified summary dismissal:

- a. The allegations which formed the subject-matter of the disciplinary proceedings were, in essence, admitted by Andrew Pickering and constituted clear breaches of the Respondent's policies (as identified in the allegations);
- b. These allegations and the breaches of policy to which they related were (assessed reasonably) *potentially* capable of amounting to gross misconduct and might – at least *potentially* – reasonably justify a decision to dismiss;
- c. There was a careful and detailed investigation into these allegations (while there might have been lessons learned from this exercise, as candidly acknowledged in the course of evidence by Mr Butterworth and Ms Young in particular (for example, as to follow-up questions/more probing with respect to personal mitigation), this does not mean that the investigation that did take place was unreasonable. To the contrary, the investigation (the interviews and written materials presented to the Panel) exhibit reasonable care and attention to relevant detail. I do not accept the submission that clause 9.5.1 of the Respondent's Disciplinary Policy [1088] was breached by Mr Butterworth or any other investigating employee. I have instead concluded that mitigation was reasonably placed before the Disciplinary Panel, not least by Ms Stapley on Mr Pickering's behalf);
- d. Reasonable care was taken by the Respondent to take account of the mitigation to which I have referred and which I have set out, in summary, above (this is clear from the Disciplinary Panel Hearing transcript and from the Outcome File Note);
- e. I do not conclude that any further probing or questioning (perhaps from Mr Butterworth) would have elicited any more information as to personal mitigation beyond that which was undoubtedly presented to the Disciplinary Panel by Andrew Pickering/Ms Stapley;

- f. If necessary, I find that it was reasonable not to send an Outcome letter at a time of grief for the Pickering family and for the Respondent's staff (immediately on or after 3 February 2022). In any event, the outcome of the Disciplinary Panel Hearing was communicated to and known by Andrew Pickering and Jenny Stapley;
  - g. Andrew Pickering knew that he had a right of appeal. His union representative was also aware of this;
  - h. The Pickering family have pursued an appeal. I find that it was reasonable to conduct this appeal on paper; it was a review not a rehearing (I so conclude, not least so that the Pickering family would have an opportunity to comment in detail and in writing on all of the written materials submitted to the Appeal Panel which opportunity they utilised);
  - i. I conclude that there was a detailed and careful appeal process in which, by review, the disciplinary processes were comprehensively revisited and reviewed. It was, therefore, a reasonable appeal process and a reasonable outcome was again reached.
27. I have already indicated that the principal complaint of Mr Richard Pickering is that there was an over-focus on the allegations (and aggravation) and not enough focus on the mitigation. I have rejected this contention. However, matters of weight to give to various factors and pieces of evidence – in considering conduct which, if proved, could reasonably amount to gross misconduct and could reasonably justify a summary dismissal – is a matter for the Respondent employer provided that, as I conclude, its investigation and its decision-making falls within a range of reasonable responses (to the admitted conduct).
28. Applying the *Burchell* principles to all of the matters which I have found; the Respondent did form a genuine and reasonable belief that the late Mr Pickering's conduct was gross misconduct and, further, it was within the reasonable range of responses for the Respondent summarily to dismiss Mr Andrew Pickering.
29. In the light of my conclusions, and my dismissal of this claim for unfair dismissal, it is not necessary for me to consider the Respondent's alternative submissions on *Polkey* (section 123(1) of the Employment Rights Act 1996) or contribution (section 122(2) - (3) of the Employment Rights Act 1996).
30. I conclude this judgment by expressing in writing (as I did at the Hearing) my own condolences for the Pickering family's loss.

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Employment Judge Chapman KC

Date **22 February 2023**

JUDGMENT SENT TO THE PARTIES ON  
Date **23 March 2023**

FOR THE TRIBUNAL OFFICE

**Note**

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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