EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Catherine Hayden	v	Care Fertility Group Limited

Heard at: Sheffield (by CVP) **On**: 19, 20, 21 and 23 June 2023

Before: Employment Judge A James

Representation

For the Claimant: Mr D Rogers, solicitor

For the Respondent: Ms O Dobbie, counsel

JUDGMENT

(1) The claim for wrongful dismissal is upheld.

(2) The claim for unauthorised deduction of wages is dismissed, that claim having been formally withdrawn at the commencement of the hearing.

REASONS

The issues

1. The two key issues which the tribunal had to determine are:

1.1. whether the allegations of misconduct occurred, which the respondent relies as amounting to a repudiatory breach; and if so, to what extent;

1.2. bearing in mind these findings of fact, was the claimant guilty of conduct so serious as to amount to a repudiatory breach of her contract of employment with the respondent, entitling the respondent (subject to issue 1.3 below) to summarily terminate that contract?

1.3. if so, did the respondent accept the breach before waiving the right to do so?

If the answer to both of issues 1.2 or 1.3 is yes, the claimant's wrongful dismissal claim will fail. If the answer to either of those questions is no, the

claim succeeds and the claimant is entitled to three months gross pay (less tax and NI).

2. An application is also made for an 'Acas uplift' on which it was agreed that case management orders would be made and written submissions would then be provided, if the claim is successful.

3. The respondent relies on an alleged breach by the claimant of the implied term of trust and confidence, as well as express terms of her contract relating to working hours etc, as set out below in the findings of fact.

The proceedings

4. Acas Early Conciliation commenced on 26 September 2022. The Acas Early Conciliation Certificate was issued on 18 October 2022. The claim form was issued on 18 November 2022. No time limit issues arise.

The hearing

5. The hearing took place over three days. Evidence and submissions on liability/remedy were dealt with on the first three days. Given the time the hearing adjourned on the third day (3.15 pm), judgment was reserved. A further day was arranged for deliberations in private, on 23 June.

6. The tribunal heard evidence from the claimant; Professor Adam Glaser, consultant paediatric oncologist; and Claire Goodman, former General Manager for the Women's Clinic Service Unit at Leeds Teaching Hospitals NHS Trust. For the respondent, the tribunal heard from Dr Victoria Sephton, formerly the respondent's Group Medical Director (UK – North Region); Mrs Judith Smith, Group Clinical Operations Manager; Mrs Victoria Rawnsley, Lead Advanced Clinical Practitioner at the Leeds Clinic; Mrs Claire Rutherford, Clinic Director; and Mrs Sarah Taylor, Clinic Liaison Officer. By the time of the hearing, there was an agreed hearing bundle of 179 pages. A training plan, and anonymised details of patient treatments on 13 July, were also added during the hearing.

7. The tribunal is grateful for the pragmatic view taken to the inclusion of additional documents at a later stage by the parties, both prior to the hearing commencing and during the hearing.

8. On the morning of the third day, an application was made to admit witness evidence from Mr David Burford. This followed the evidence of Dr Sephton who, contrary to what the respondent's legal advisers previously understood, did not make the decision to dismiss the claimant jointly with Mr Burford. The decision was in fact Mr Burford's alone. Ms Dobbie asked me to confirm whether or not I considered that it was necessary to consider what was on Mr Burford's mind, when he took the decision to dismiss. I confirmed that I did not. Sine this is a wrongful dismissal claim, the respondent can rely on any repudiatory breaches found to have occurred prior to termination, whether or not they were known at the time of the dismissal (**Boston v Deep Sea Fishing** – see below). I did not therefore consider that evidence from Mr Burford was going to assist me. On the basis of that reassurance, Ms Dobbie withdrew the application to admit witness evidence from him.

9. There was also an application by the respondent to admit nine further documents, relating to alleged misconduct by the claimant, between 2016 and 2021, prior to her employment with the respondent. Ms Dobbie explained that the respondent's legal advisers had previously taken the view that those documents were not relevant, because the respondent could only rely on allegations against the claimant which arose during her employment with the respondent, which commenced on 1 February 2022. Ms Dobbie explained that the application to admit the documents was subsequently felt necessary, because Mr Rogers had sought to question the credibility of witnesses the previous day, on the basis that there was no evidence of any previous complaints against the claimant. Further, it was submitted that the documents may also be relevant to decisions which needed to be made on the facts, as to whether or not, on the balance of probabilities, the more recent incidents of alleged misconduct had occurred.

10. Mr Rogers objected to the application. He pointed out that Ms Rawnsley's witness statement at paragraph 4 makes reference to allegations of past behaviour by the claimant; without providing any documents to support that position, despite those being available to the respondent before the hearing. I also note that Mrs Taylor's witness statement also refers to historic matters and that four of the nine documents were generated by or sent to Mrs Taylor. The respondent therefore had ample opportunity to disclose those documents and to include them in the bundle, before the hearing commenced and live evidence heard from all but two witnesses. Mr Rogers rightly submitted that were the documents to be admitted at this late stage, the claimant (and potentially other witnesses) would need to be provided with the opportunity to comment upon them.

11. I decided to refuse to allow the respondent to adduce the further documents and evidence at this late stage. I did not consider that admitting those documents was necessary, in order for me to fairly dispose of the issues in the case. The respondent relies on its defence of the claimant's wrongful dismissal claim on a number of alleged acts of misconduct during the claimant's employment. It is necessary for me to find, as a matter of fact, what happened in relation to the incidents relied on by the respondent; and whether, in relation to those matters which I find did occur, whether any of those incidents, either taken alone or in combination with others, amount to a repudiatory breach of contract.

12. It appeared to me to be an entirely correct position for the respondent's lawyers to have taken previously, that the respondent can only rely on alleged breaches of contract which occurred after the commencement of the claimant's employment with the respondent. It is those instance upon which I will be concentrating on my deliberations in due course. Notwithstanding the primary position, and to the extent to which the claimant's previous conduct was considered to be relevant to the issues before me, for the reasons put forward by Ms Dobbie on 21 June (and the fact that such conduct is referred to in the statements of Ms Rawnsley and Mrs Taylor suggests that it was considered relevant), the respondent had an opportunity to disclose those documents prior to this hearing commencing. It would not be fair and necessary in my judgment to allow them to be introduced at this stage.

13. As for the issue of credibility, I did not consider that issues of credibility are going to have any great bearing in relation to this case (and indeed that is borne out by the fact findings below).

14. I am content that there is sufficient factual information before me in relation to the incidents about which evidence has been presented, to enable me to fairly determine the issues. As for the probative value of the documents submitted, they amount to hearsay evidence of reports of alleged inappropriate behaviour by the claimant between 2016 and 2021 in her previous role. I will refer in due course to authorities to which Ms Dobbie has referred me, which confirm that hearsay evidence is admissible, although the weight to be given to that evidence in each case is a matter for the tribunal. I do of curse accept that. However, were I to allow the documents to be adduced, the claimant would need to be given the opportunity to provide witness evidence in relation to them and potentially, other witnesses as well.

15. Taking into account the other factors set out in the overriding objective, and in particular the need to deal with claims within a reasonable period of time, and saving expense, I remain unconvinced that the limited probative value of the documents would justify the determination of the issues in this case being delayed further, and the extra expense for both parties which would undoubtedly have to be incurred as a result. Whilst the further expense could, in relation to the claimant, potentially be mitigated by an order for costs (if an application were to be made and granted), it remains the case that in my judgment the documents lack any real probative value. Hence my decision to refuse the application.

16. I did note from the documents which were put before me, that some of the matters referred to in Dr Sephton's 21 July 2022 timeline (see below), arose from an email sent by administrative staff in August 2021, before the claimant's employment commenced. Both representatives agreed that I could take judicial notice of that, when determining the matters before me. In particular, those are not allegations of misconduct which can be relied on by the respondent, as amounting on their own or with others to a repudiatory breach by the claimant, justifying her summary dismissal.

17. Finally, the respondent objected at the outset of the hearing to alleged without prejudice matters being referred to both in the claim form and in the witness statements of Professor Glaser and the claimant. Mr Rogers pointed out that this was the first time such matters were being raised; Ms Dobbie responded that rules of evidence must be considered by the tribunal, whether or not they have previously been raised, at any stage of the proceedings. I proposed a way of referring to the conversation which took place with the claimant on 8 July 2022, which did not involve making reference to any alleged without prejudice material. This suggestion was agreed, and the relevant parts of the witness evidence and pleadings were 'struck out' by agreement. Again, I am grateful to the parties for the pragmatic approach taken on this issue. I am entirely satisfied that the claimant has not been prejudiced in any way by the adoption of that approach.

Findings of fact

Background

18. The claimant has been employed in NHS consultancy work for Leeds Teaching Hospitals NHS Trust (LTHT) since 2010. In addition, the claimant carried out work with two businesses, Genesis Reproductive Health LLP which she had an interest in with others, and her own business C Hayden Gynaecology Limited, between 2017 and 31 January 2022. On that date, the claimant sold her interest in the two companies to Care Fertility Leeds Limited. As part of that transaction, the claimant entered into a Shareholders Agreement, whereby her and the other sellers of the respective businesses became shareholders within the business of Care Fertility Leeds Limited from 1 February 2022. The ability of the claimant to benefit financially from that shareholding depends on whether she was a 'good leaver'. This is one of the reasons why this claim is being pursued - the value of the claim is more than just the value of the claimant's contractual notice pay. That does not however directly affect the issues which the tribunal needs to determine in this case.

19. The claimant commenced employment for the respondent on 1 February 2022, in the role of consultant. The respondent is a fertility clinic based in the UK, with sites in London, Manchester, Nottingham and Leeds.

Terms of employment

20. The terms of the claimant's employment are governed by a contract dated 31 January 2022. The relevant clauses are as follows.

21. Clause 4.2 states:

> *4.2 During their contracted hours as set out in Clause 6 the Employee shall:*
>
> *4.2.1. unless prevented by Incapacity, devote the whole of their time, attention and abilities to the business of the Company;*
>
> *4.2.3. comply with all reasonable and lawful directions given to them by the Company;*
>
> *4.2.4. use their best endeavours to promote, protect, develop and extend the business of the Company.*

22. Clause 4.5 states:

> *The Employee shall comply with any rules, policies and procedures set out in the Staff Handbook, a copy of which will be provided to you during your employment. The Staff Handbook does not form part of this agreement and the Company may amend it at any time. To the extent that there is any conflict between the terms of this agreement and the Staff Handbook, this agreement shall prevail.*

23. Clause 6:

> *The Employee's normal working hours shall be 7 hours per week. However, the Employee may be required to work such additional hours as are necessary for the proper performance of their duties. The Employee acknowledges that [s]he shall not receive further remuneration in respect of such additional hours. A time in lieu system is in operation and the accrual and taking of time in lieu must be pre-authorised by the Employee's line manager.*

24. The respondent had control over 27 of the claimant's hours with the NHS, although as clause 6 says, she was only obliged to work 7 hours for the respondent, subject to the terms of that clause.

25. Clause 12.1:

> *If the Employee is absent from work due to Incapacity, the Employee shall notify [their] Line Manager of the reason for the absence as soon as possible but no later than 9.00am on the first day of absence.*

26. Clause 18.1 gives the respondent the right to terminate summarily for acts of gross misconduct.

Disciplinary policy

27. The respondent has a disciplinary policy. Under the heading 'Principles', it is stated:

> • *Informal action will be considered, where appropriate, to resolve any .problems.*
>
> • *No disciplinary action will be taken until the case has been fully investigated.*
>
> • *Before any decision is made at a disciplinary meeting, you will be advised of the nature of the complaint against you and will be given the opportunity to state your case.*
>
> • *At all appropriate stages, except at dismissal stage, you will be counselled and encouraged to perform or behave to stated acceptable standards within a stipulated period of time. You will also be advised of the action that will result if you fail to achieve these standards.*
>
> • *You will be provided with written copies of evidence and relevant witness statements in advance of a disciplinary meeting.*
>
> • *At all stages of the formal procedure, you will have the right to be accompanied by a trade union representative or work colleague.*
>
> • *You will not be dismissed for a first breach of discipline except in the case of gross misconduct, when you will be dismissed without notice.*
>
> • *You will have the right to appeal against any formal disciplinary action.*

28. Section 2.0 of the policy sets out the informal stage of the procedure. This records:

> *In most cases, issues relating to your conduct will be resolved through informal discussions between you and your Line Manager. If appropriate, Line Managers can issue a verbal warning and a note is kept on your personnel file for six months. The objective of the verbal warning is to identify and agree measures to resolve the issue within an agreed timeframe. Please refer to the verbal warning guidelines for further information. If there is no improvement, formal disciplinary action may be taken in line with the procedure below.* [Note, the tribunal was not referred to or shown the verbal warning guidelines.]

29. The disciplinary policy also sets out examples of gross misconduct which include:

> • *Deliberate refusal to carry out reasonable instructions given by management.*
>
> • *Rude or inappropriate behaviour likely to damage CARE's reputation. …*
>
> • *Serious act of insubordination.*
>
> • *Bullying, harassment or discrimination*

Training of new staff

30. The transfer of the fertility work to the respondent required new staff to be trained in the respondent's systems of working. Amongst other things, training was required in the respondent's patient record management system, CIS, which is used to record appointments and patient data. A training and integration plan was put into effect. Under the terms of the first phase of the integration plan, the claimant had a 1.5 hour session with Dr Sephton on 7 February; three such sessions on 10 February; one session on 14 February; and was due to receive two sessions on 15 February. The claimant was on leave during the week commencing 14 February.

31. The claimant's first clinic week for the respondent was not until w/c 28 February 2022; then w/c 14 March; and w/c 29 March. The next clinic week was during w/c 18 April. In May there were 4 clinic weeks booked in. The stop-start nature of this work meant that the claimant had forgotten some of the training, by the time she had to put it into effect.

32. The second phase of the introduction of new IT systems was implemented from the beginning of May 2022 onwards, including a move to the use of electronic patient records.

Frustration with the integration process

33. The claimant struggled with the use of the new systems. It is apparent that she struggled more than the majority of her colleagues. No criticism is intended of the claimant in saying so. The claimant found that stressful and frustrating, and that frustration negatively affected her behaviour in the workplace. On 30 March 2022, Diana Baranowski emailed Dr Sephton and others. She pointed out that she would not be able to attend one of the training meetings because:

> *I am at Leeds but need to go into Cath Hayden at 1pm. I was asked to see her this morning by Damien as she was struggling with cis and is on consultations all morning. She was very frustrated, angry, swearing and emotional. Can we arrange some urgent specific training for Cath with Vicky please?*

34. The respondent alleges that the claimant said to Ms Baranowski that she could '*fuck off with the rest of them'*. This is set out in Mrs Rawnsley's witness statement at paragraph 6. It was also the evidence of Mrs Smith before this tribunal, although it is not set out in her witness statement, despite her referring to the above email. I accept that this is the recollection of those witnesses of the respondent, at this stage. The use of those words is denied by the claimant. There is no direct evidence from Ms Baranowski, that such words were used towards her. Nor is there any evidence or suggestion that Ms Baranowski was so concerned by the claimant's behaviour that she considered it appropriate to make a formal complaint about it. I note that in evidence before the tribunal, Mrs Smith confirmed that she did not hear the claimant use the f-word herself; and that she heard the claimant expressing frustration towards the integration

process itself, not towards any particular individual. I also note that during cross examination, Ms Rawnsley maintained that there was no difference between swearing directly at someone, and swearing in a person's presence, where that swearing was not directed at them.

35. Taking all of the above into account, I find, on the balance of probabilities, that the words alleged were not used. There is nothing in Ms Baranowski's email to suggest that she was upset by the claimant's behaviour. Rather, her email was directed at ensuring that further training was provided to the claimant in the use of the respondents systems.

36. Having said that, I do accept that the claimant's behaviour would have been difficult to be around. On 31 March 2022, the claimant messaged Dr Sephton saying that she desperately needed help with administrative issues. Dr Sephton had a video call with the claimant on 1 April 2022, during which she raised concerns about the claimant's behaviour during the integration process. During the call, the claimant agreed to apologise to the individuals concerned, and agreed to behave in a more professional manner in future.

The claimant's job plan

37. Also on 1 April 2022, the claimant emailed Claire Goodman asking for a discussion about her job plan. Job plans are an NHS tool, which set out, amongst other things, the amount of patient appointments a doctor has during a working week. One of the motivations for the claimant selling her interest in her businesses to Care Fertility Leeds Ltd, was to try to achieve a better work-life balance. Prior to taking up employment with the respondent, the claimant had been working excessive hours. She was concerned this was adversely affecting her relationship with her family. Taking up employment with the respondent did not result in any immediate improvement in her work-life balance.

38. To the contrary, the claimant remained concerned about the number of patient appointments that she had been allocated to carry out in her job plan. She did not consider that the number allocated to her was sustainable. She complained to Ms Goodman that she had been carrying out more patient appointments, but at the expense of her family and herself and that she needed to 'reassess'. She asked for a conversation to help facilitate a better work-life balance. The claimant provided Ms Goodman with a number of possible dates to meet up during April.

Changes to weekend working hours

39. Prior to the move to the respondent, consultants typically worked until 2pm on Saturdays and 1pm on Sundays, with the option to leave earlier occasionally, if the necessary work had been concluded, and rostered nursing staff were sufficiently experienced to ensure patient safety in the absence of a doctor. In or around the beginning of April 2022, the respondent informed the doctors that they would now be required to work until 3pm on a Saturday and 2pm on a Sunday. The respondent sought to impose this on the doctors, and no evidence has been provided to the tribunal of any consultation with doctors beforehand. The imposition of the new hours appears to have arisen as a result of a harmonisation of working practices at the Leeds clinic with working practises at other clinics of the respondent in the UK. This involved experienced nurses being rostered more during the week, and less

experienced nurses (who were not qualified to write prescriptions) being rostered at weekends. This change necessitated for doctors working longer at the weekend. The claimant was not alone in feeling aggrieved about this change and the way in which the respondent sought to impose it.

40. It is relevant this point to note that although in principle, clause 6 provided for consultants to be given time off in lieu when they worked extra hours, in practice, it was impractical for the claimant to do so. The proposed change did nothing to improve the claimant's work-life balance.

41. On 4 and 6 April 2022, further messages offering support were sent by Dr Sephton to the claimant. The claimant confirmed on 6 April 2022 that she was making progress in being more able to input the necessary information onto the systems. She concluded her message:

> *I do think another chat w you will be useful at some stage but I can't see when just now. Can we keep in touch? Am really grateful for your Support. Cis is getting better. With practice I will get there*

42. On 10 April 2022, Advanced Clinical Practitioner Nichola Sugden emailed Anthony and Claire Rutherford. Her email included the following:

> *With regard to consultant working, Cath came in yesterday for the egg collection starting at 9 and left at 12.30. Today she arrived for transfers and left by 12.45. I spoke to Cath yesterday about the consultant weekend working as Id expected to be her 8-3 + 8-2 sat/sun as per her job plan (which she said she has never seen). She said this would never happen and she would be here around the theatre work and planning and would then leave. I have heard Harish has said similar.*
>
> *This really worries me with the changes we have made to Sunday working. Nurses start scanning at 7.40, which will be a busy list being done solely. If there are any queries, prescription top ups needed etc this would not be actioned until the consultant arrives for transfers which generally is 10am. Cath mentioned she would be available on the phone for 'verbal' orders which I do not thinks is appropriate at all. And its not acceptable that the patient should have to wait for the consultant to arrive to sign prescriptions.*

43. Anthony Rutherford subsequently called the claimant on the same day. Prior to the change being imposed, the claimant had arranged a social event on that day. She was travelling to that event, with her husband and children, when Mr Rutherford telephoned. The call came through on speaker phone, and could be heard by the claimant's husband and children. Recollections of that call differ. On the balance of probabilities, I find that voices were raised by the claimant, her husband, and Mr Rutherford. The claimant felt that it was inappropriate to continue the call in those circumstances, and ended the call. No follow-up email was sent by Mr Rutherford to the claimant and the tribunal was no shown any records of any further attempt to speak to her about that issue.

Meeting with Dr Sephton on 20 April 2022

44. Dr Sephton met with the claimant in Leeds on 20 April 2022. During that meeting, Dr Sephton raised concerns about the effect of the claimant's behaviour on others.

45. On 22 April 2022 a follow-up email was sent by Dr Sephton to the claimant. This stated:

> *Just a follow up email following our catch up on 20.04.2022*
>
> *1. You are doing well with CIS and we managed to go through a few patients and how to navigate the system ahead of your next clinic, so that you feel more confident using the system. I would say that you have really made significant progress and are doing well, it just needs more practice, and using it every day helps.*
>
> *2. During our meeting, we also discussed the recent issue of the weekend working hours. I had been made aware of the report that you had left the clinic 2 hours ahead of your contracted working time. Your line manager had discussed this with you, however you felt that you were not clear on your job plan or the hours that were meant to be delivered at a weekend. I explained that these weekend hours are part of the contractual 7 hours per week that are paid directly to you under your CARE contract of employment. …*
>
> *3. You have asked and arranged for a job plan meeting with the NHS CSU manager which is in place for next week, as you need clarity over your contracted hours for NHS and for CARE via the SLA.*
>
> *4. You think that the number of PA's is incorrect and so your hours have been calculated incorrectly.*
>
> *5. You have not yet agreed your final job plan.*
>
> *6. You felt that the whole transition had been poorly managed, and that many staff in the unit are not happy. I disputed this …*
>
> *7. You do not want to continue working a full 5 day week, and will be looking to reduce your hours.*
>
> *8. I advised you that you can reduce your NHS hours and your hours for CARE once you have clarity on the split. You need to decide and discuss with the NHS managers what is possible. …*
>
> *9. You describe your current working commitments as not sustainable, as the demands of the gynae on call and weekends on call alongside the weekend working for CARE, are impacting you and affecting 1:3.2 weekends*
>
> *10. You are keen to explore the possibilities in York, and are in the process of setting up a meeting with the CCG and GP hubs in York to further consolidate and expand the outreach service you already provide in York District Hospital. This is a really positive step and I have encouraged you to bring in Claire from a contractual point of view and Tony as your line manager. You have explained this is at a preliminary stage, but will aim to include all parties in the meeting.*
>
> *Next steps – you will meet with the NHS manager and obtain clarity on your PA's and the split for CARE via the SLA, you will need to then agree your final job plan with Tony. You have agreed that until the job plan has been finalised you will deliver the hours within your current job plan, including the weekend cover hours.*

I have encouraged you to also set up the ERA training that you have not yet been able to do due to leave and other commitments.

As you know, we had previously discussed on 1st April via starleaf that the integration had been challenging for you and at times this has led to you demonstrating workplace behaviour that was unprofessional and not in keeping with our values and expected behaviours at CARE. You have felt frustrated with the changes, particularly IT and CIS issues, and felt that they had triggered this display of behaviour, which you recognised was not appropriate and that you had apologised for your outburst to the staff involved.

You recognised that you have required more input and help on a one to one basis from the integration team and myself. Following that conversation at the beginning of April, you had agreed to behave in a professional manner at all times, respecting the challenges that your colleagues are all facing and that a positive attitude and respect towards all team members is always expected. This will be monitored and I had asked that any further issues were reported to me, hence why I was aware of the weekend situation. This will continue to be monitored over the next 6 weeks alongside overall performance in terms of clinical conversion and success rates. If there are any further issues reported, there will be further escalation to the CEO.

As you know I am happy to provide further support in terms of CIS, but would also encourage you to engage with your local superusers at Leeds, Your line manager is a super user and Adam has also a really good working knowledge of the system. Please let me know if you need anything further.

46. Dr Sephton asserted to the tribunal that by raising the matters set out in the penultimate paragraph, she was giving the claimant a verbal warning. The tribunal notes the following however. First, this email was not placed on the claimant's personnel file. Second, the claimant was not informed by Dr Sephton that this constituted a verbal warning under the informal stage of the disciplinary procedure. Third, Dr Sephton's email did not '*identify and agree measures to resolve the issue within an agreed timeframe'.* Fourth, it did it warn the claimant in terms that: '*If there is no improvement, formal disciplinary action may be taken in line with the [formal] procedure'.* Fifth, the meeting is described by Dr Sephton as 'a catch up' – not as in informal disciplinary hearing.

Ongoing discussion about NHS job plan

47. The tribunal notes that Dr Sephton's timeline of 21 July (see further below) states:

24th April CH in dialogue with NHS trust re Job plan. Vocal on the unit and creating tension amongst other consultant staff re job plans and alleged incorrect calculation of working hours - job plan remained un signed.

The tribunal notes that the claimant remained in dispute with the employer about her job plan. Ms Godman confirmed that this was not unusual. Further, that due to the pandemic, job plans had not been a priority for the Trust.

48. On 25 April 2022, the claimant messaged Claire Goodman about the attempts to arrange a meeting to discuss her job plan. On being told that Ms Goodman could not meet that morning, the claimant messaged Ms Goodman as follows:

Disappointed but not surprised. Was hoping to see you today. … Hope we can both do weds.

49. Kelly Cohen, who works in the same office as Ms Goodman, was made aware by Ms Goodman of the content of this message and emailed the claimant at 08:48 on 26 April 2022 as follows:

I'm disappointed to hear from Claire (Goodman) about your response to her rescheduling your job plan meeting yesterday. I've seen the text message and although it may not have been intentional, it's very disrespectful. I'd like you to apologise please. … I'd suggest you try to identify a time when you're not on GATU so that you have an uninterrupted slot to discuss your concerns. If they cannot be resolved informally with Claire then I will meet with you to determine the next steps. You've already met with Hamish and we listened to your worries and changed our ask about GATU. Your job plan must be signed off in this next month or I will have no option but to arrange a formal mediation.

50. Following receipt of that email, the claimant messaged Ms Goodman at 09:57 on 26 April at 09:57 to say:

I have come twice this morning to apologise in person for my text from yesterday giving the wrong impression of disrespecting you. I am very sorry that something I wrote whilst walking at pace between jobs has come across like that. I have just had 5 minutes with Kelly. I am crying for help …

51. Ms Goodman confirmed to the tribunal that her subsequent meeting with the claimant on 27 April 2022 was very positive. The claimant's apology was accepted and the claimant's message of 25 April was not seen as an ongoing issue. Ms Goodman informed the tribunal, and it is accepted, that the claimant was working constructively to try and resolve the job plan issues. At no subsequent point did LTHT consider it necessary to arrange a formal mediation to resolve the job plan issues, although they remained unresolved.

<u>Email to Mrs Rutherford – 25 May 2022</u>

52. On 25 May 2022, Mrs Rutherford sent an email to Leeds based doctors raising a number of issues, including that patients were being referred back to their GP for further investigations, which resulted in their treatment being delayed; and that incorrect or incomplete details were being inputted into CARE Pals post consultation instructions (with the same result). The claimant replied to this email, into which her colleague doctors were also copied in:

Training

Support

Training

Support

Training

Support

We can all do our best to do what we have been asked to do, if we have actually been asked, and shown how to do it.

53. The tribunal notes that the claimant argues that Mrs Rutherford's email is curt and aggressive. The tribunal does not agree with this characterisation. Rather,

this and other emails are brief and to the point and are directed at patient care. For example, Mrs Rutherford reasonably pointed out that if records were not completed properly post 1 May 2022, patient care would be compromised.

30 May 2022 incident – single lumen needles

54. On 30 May 2022 the claimant was conducting her first 7-day duty as 'hot week consultant'. This meant that the claimant was in overall charge of the clinic acute service. On the morning of that day the claimant had six egg retrieval procedures to perform. During her preparations for that morning's work, she noticed that instead of the usual double lumen needle being available to suck the air out of the ovary, a single lumen needle was available. The claimant was told by the nurse who dispensed the equipment that is what she was told to give to the claimant. The claimant was also told that there were no double lumen needles in stock.

55. During the first procedure, the claimant only retrieved three or four egg sacs out of a total of 14. She would normally expect to retrieve over 80% of the eggs, which would have meant over 10 eggs in relation to this patient. The claimant proceeded with the next patient and again only retrieved a relatively small number of eggs compared to what she would normally have expected. The claimant was extremely concerned about this and decided to break off the procedure list to seek help. She looked for the medical director Anthony Rutherford, but he was unavailable. In his absence, the only person the claimant was able to contact to try to resolve the matter was the clinic director, Mrs Rutherford. She therefore approached her office in order to speak with her about the issue.

56. What happened next is a matter of some dispute between the parties. The tribunal notes that in an email about the incident prepared by Mrs Rutherford around the time of the incident, she stated:

> *[Y]esterday morning … Charlotte our CAREpal's manager was in the doorway of my office introducing me to our new receptionist Lucy it was her first day. Cath came round for theatre barged past them and starting complaining in an aggressive manner that she only had single lumen needles and this would affect patient care … she went on for a few more minutes and then went. She could also be heard by any patients in the waiting room, Charlotte and Lucy were mortified …*
>
> *I went round to theatre Cath did by then have some double lumen needles. I asked to have a word and explained she was not to speak to me like again Infront of staff. [sic] [Judge's emphasis]*

57. Mrs Rutherford's witness statement states:

> *She began shouting at me, over the heads of the two colleagues, about the type of needles available in her clinic not being correct. She shouted that it was "ridiculous" and that it would affect patient care and she would have to tell patients that their treatment was being compromised. I have no doubt at all that the patients in the waiting room heard this*.

Mrs Rutherford accepted in cross-examination that she may have told the claimant, during the altercation in her office, that the single lumen needle may be Care policy.

58. Ms Rutherford also maintained during cross examination that because her desk was near the door, it made no difference whether the claimant was outside the door shouting over the heads of two members of staff, or in front of them, before her desk. Mrs Rutherford also told the tribunal that the waiting area was directly outside her office. She did however later concede that there was in fact a gap, consisting of a (relatively narrow) lino walkway, between the entrance to her office, and the patient waiting area.

59. In her witness statement, the claimant said that it was not correct that when Mrs Rutherford spoke with her, she was working with double lumen needles. The patient records having been retrieved and those documents shown to the claimant, the claimant accepts that her recollection is wrong in that respect. The claimant accepts that Mrs Rutherford told her it was inappropriate to speak to her she in the way that the claimant had in front of the other people present. The claimant apologised. The claimant also accepted during cross examination that it would not have been appropriate if patients had heard the exchange. Other than the assertion by Mrs Rutherford, no independent evidence has been presented to the tribunal that patients did hear any of the exchange, or that the respondent's reputation had been damaged as a result.

60. The evidence in relation to this issue is finely balanced. There are clear differences between what the claimant says about the incident, and in particular the fact that double lumen needles then became available, and what we know actually occurred. There are also however important inconsistencies between Mrs Rutherford contemporaneous note, and what is set out in her witness statement. On the balance of probabilities, bearing in mind also the discrepancies between Mrs Rutherford's assertion in her witness statement as to what she told the claimant about the proposed meeting on 8 July, and what was actually said in the message sent to her at the time – see below, that the claimant's evidence is to be preferred, in relation to her location at the time that she spoke with Mrs Rutherford. In other words, the tribunal accepts that the claimant did move past the two individuals in the doorway, and was inside the office, when she spoke with Mrs Rutherford.

61. The tribunal also finds on the balance of probabilities, that the claimant's voice was raised, as result of her concerns about the low percentage of egg retrieval, having performed two egg retrieval processes on two patients, with a single lumen needle. The claimant was also annoyed, and she no doubt let Mrs Rutherford know that was the case, when Mrs Rutherford suggested that it might be Care policy to use a single lumen needle. The tribunal also notes the lack of any objective evidence that the respondent's reputation was damaged as a result of patients overhearing the conversation. Finally, it is noted that Mrs Rutherford did confront the claimant about this altercation, and the claimant saw fit to apologise at the time.

Weekend working – 4/5 June 2022

62. On the weekend of 4/5 June 2022 a further incident occurred. There is again, an important factual dispute as to what actually occurred. The incident arose because a nurse was off sick, and the claimant had been asked by nurse colleagues if she would carry out the scans on the Sunday.

63. Before making findings in relation to this incident, it is noted that statements were requested from the following staff during the week after (ie commencing 6 June) - Mrs Rawnsley, Gillian Cotton, and Karen Sewell. They were provided

to Mr Rutherford and they were later provided to Dr Sephton. Both mentioned them in their timelines (see below).

64. Ms Sewell's statement says:

> *Mrs Hayden and I did the planning when it was safe for us to do so and then she asked if she could leave for the day. I confirmed with Gill that the recovery area was now clear and all the patients had gone home so I was happy for Mrs Hayden to leave the department and she said we could contact her via phone.*
>
> *She informed us twice before she left that she did not want `anything escalating' to which I assumed she meant her leaving and she asked who was working on the Sunday. We informed her due to sickness the only qualified nurse to work at the moment was Gill to which she replied she did not want to start picking up work which was meant for the nurses. She reiterated twice that it would not be right for her to start picking up work which was meant to be done by a nurse just because of sickness. The second time she said this I informed her that recently we had picked up another consultant's reviews because he had double booked himself so it should be give and take. I don't remember if she replied anything and she left soon after.*

65. Ms Cotton's statement says:

> *She explained that she didn't want to do the scans as it was a nurse's job, and didn't want to set this as precedent. Karen Sewell explained that sometimes the nurses had to undertake Doctors jobs - for example to cover review lists (ACP's)*
>
> *Karen initially informed Vicki of the situation - as we needed an extra qualified nurse to work with me.*
>
> *The next morning I spoke to Vicki Rawnsley about it too as we were arranging how we would manage the lists / transfers. Vicki then spoke to Mrs Hayden about it - which I found out about when Mrs Hayden came into my scan room and asked angrily " Did you tell Vicki that I wouldn't do the scan list?" I was taken aback, and said no as I tend to freeze when confronted in situations in that manner. Mrs Hayden then said angrily as she left the room "well tell that to Vicki then". I had no chance to fully explain my answer - which is that we HAD to escalate it as I needed someone to come in to work with me …*

66. In the statement prepared by Mrs Rawnsley it is stated:

> *Karen spoke to me that evening to say there was no one available to come into the unit. She stated she had spoken to Cath Hayden who had said she didn't want to "get into helping the nurses when they were short". I told Karen I would come in and work the Sunday to cover the transfer list. …*
>
> *On Sunday [5 June], around 9.15am I went into the nursing office to see Cath had arrived on the unit and was talking to our healthcare assistant, Sarah. Cath was very pleasant and said to me "I am so sorry you have had to come in Vicki due to staff shortages". I replied I wasn't very happy with the feedback that I had received from the nurses working on Saturday and that Cath should never say that there were nurse's jobs that she wasn't willing to do. I stated I didn't feel this was team working and the only reason*

I came in on a Sunday was because she was unwilling to work as a team member.

Cath was very upset by this and stood up saying she never said this. She said she was willing to do anything and didn't want anyone to say she wasn't a team working (sic) and she was really offended that this was being said to her.

I replied that it was 2 different nurses that reported the same thing to me and I needed to address it. She turned to Sarah and asked her for verification that she hadn't said this as Sarah was also in the room. Sarah stated that it did come across that she did say it as was interpreted. Cath again reiterated she's happy to come into the unit and do whatever work is asked for her, she was just saying that if there is a list for the nurses then it should be the nurses that undertake it.

67. It is the claimant's case to the tribunal that what she told the nurses was that if a nurse was off sick, attempts should be made first by the relevant nurse in charge to obtain an alternative nurse, from the nursing staff. If those efforts were unsuccessful, the claimant said that she would of course have been willing to cover that work herself. Since no-one got back to her on the Saturday she assumed, following her conversation, that cover had in fact been found.

68. The tribunal finds in relation to this incident that despite the claimant's intention, the impression she gave to the nurses she spoke to on the Saturday that she was not willing to cover the work, and that Ms Rawnsley therefore had no alternative but to come in. It is clear that when Mrs Rawnsley told the claimant she was not happy about that and accused her of not being a team player, the claimant was upset, disagreed, and spoke first with Sarah Baines and then Gillian Cotton, to ask them to confirm that she had not said that she would not provide cover since 'it was nurse's work'. The tribunal notes that according to Ms Dobbie, the claimant admitted in cross-examination that when the claimant approached Ms Cotton, the latter did not want to engage and was frightened. The tribunal has not noted the claimant used the word 'frightened'. The tribunal finds that when the clamant challenged Ms Cotton, and Ms Cotton made it clear that she did not want to engage, the claimant left. The interaction was brief. When the claimant approached Ms Baines, both the claimant and Mrs Rawnsley agree that Ms Baines said she did not want to get involved and walked away. The appropriateness or otherwise of the claimant speaking with the members of staff will be considered in the conclusions section below.

<u>Email to claimant - escalation to CEO - 7 June 2022</u>

69. On 7 June 2022, Dr Sephton emailed the claimant as follows:

I have been made aware of a couple of further issues over the past week and weekend. These reports are of inappropriate workplace behaviour that is not in line with our values.

The first incident reported to me is that on 30.05.2022 you were aggressive and had a poor attitude in front of a brand-new member of reception staff and the Clinic Director, plus patients could over hear in the waiting room. There were 3 members of staff that felt your behaviour and attitude were inappropriate. I believe you apologised to the CD afterwards, however staff were upset and patients were within ear shot. This behaviour is likely to have a lasting impact on team relations and our reputation.

A further incident, this weekend (3rd, 4th and 5th June) has been reported by 3 separate individuals and a witness to the exchange/discussion as to what you are and are not willing to do.

In acute sickness, especially at a weekend, we would expect, all of the team to pull together. The fact that the nurse manager had to come in to work extra hours on Sunday, is not ideal and risks depleting the service needs at another time when these hours are paid back. …

From my understanding, it would not have been unsafe levels of staffing. It would have required you to cover an overflow scan list of 4 scans.

You have signed your CARE contract of employment and we have already discussed your commitment to CARE and what is expected of every employee of the company.

I am disappointed that you are still struggling to display the positive behaviours that I previously set out as those expected from all employees, regardless of role or the challenges that they are facing.

I will be escalating this to the CEO and HR Director for further input as I am concerned about the impact of this behaviour on colleagues and patients. If there is anything that you wish to discuss in relation to the feedback given to me, then please contact me at your earliest convenience.

70. The claimant emailed Dr Sephton in reply to say:

I have been working non stop since 07.15 and just been through mail.

Please can we have a discussion about this and not an email exchange.

I have tried to call you just now but am not getting through.

The tribunal notes that this email was described by Dr Sephton in her timeline as 'terse'. The tribunal does not agree with that characterisation.

Escalation to the CEO/sick leave

71. Dr Sephton told the tribunal that her understanding was that there was a meeting between the Chief Executive Mr David Burford and the HR director Ms Regan following receipt of her email of 7 June 2022. The tribunal also notes that to the best of Dr Sephton's knowledge, there was no record of that meeting and no formal grievance had been raised.

72. On 8 June 2022 the claimant took sick leave. Her email, sent to her team at 11.31 states:

I am not fit to work at present and am sorry I will not be able to conduct consultations booked for this afternoon or tomorrow.

I had prepared CAREPALS discussions for all the patients 'in progress'. If someone else is available or wants to pick up the work, they might help. I am not asking anyone to do this, just mentioning it FYI. I am very sorry to let the patients down.

73. The claimant subsequently presented a fit note dated 15 June 2022, confirming that she was unfit for work between 9 and 22 June 2022. A further fit note was presented dated 23 June 2022, confirming that the claimant was unfit for work between 23 June and 4 July 2022.

Alleged disruptive behaviour

74. The respondent accuses the claimant of 'disruptive behaviour' at two consultant meetings whilst on sick leave. Dr Sephton's timeline states:

> *This was inappropriate as her colleagues were covering her workload and to join the call and want to discuss issues and raise concerns of her own about her job plan is insensitive to the rest of the team.*

Dr Sephton confirmed to the tribunal that the claimant had not been told she could not join online meetings whilst on sick leave.

75. The claimant's evidence to the tribunal on this issue, which has not been challenged, and which the tribunal accepts, is as follows:

> *I logged into the consultant meeting so as not to miss out on anything as, at that stage, I was hopeful that my absence would be short-lived. There was certainly no disruptive intent on my part. Mr Rutherford dictated that the consultant working hours had been changed to 3pm finish on Saturday and 2pm finish on Sunday. I simply reiterated that my job plan had not been finalised/signed/mutually agreed and it was not appropriate to assume that changes imposed without agreement would be automatically and willingly complied with, without any discussion or negotiation. No issues were raised with me at the time or subsequently in relation to my "conduct" at these meetings.*

Proposed meeting on 8 July 2022

76. On 29 June 2022 Claire Rutherford messaged the claimant, asking her to attend a meeting on 8 July 2022. Mrs Rutherford's witness statement states:

> *On or around 29 June 2022, I was asked by the Respondent's CEO, David Burford, to contact the Claimant and arrange a meeting between her, David Burford and Dr Sephton to discuss the ongoing issues with the Claimant's behaviour and her continued employment [pg 128]. I explained the purpose of the meeting and confirmed that the Claimant could be accompanied.*

77. In fact the initial message referred to did not explain the purpose of the meeting or tell the claimant that she could be accompanied. It was only after a number of further messages that the claimant was told that she could bring someone as support. At no stage was the claimant told the meeting was to discuss the potential termination of her employment or that it was a disciplinary hearing. A message sent by Mrs Rutherford on 1 July states:

> *With regard to the meeting that is proposed for next week, we're concerned how things are going in relation to your employment at Care, as you must be too. We urgently need to discuss this and have a conversation about your future with care. Dave Burford is in leeds on Friday 8th July and therefore there is an opportunity for a face to face meeting we hope that is convenient for you.*

78. Having taken advice, the claimant asked for further clarification about the meeting and in particular whether it was a disciplinary meeting and whether she should consider employment representation. The claimant was told in a reply:

> *The agenda is to discuss your performance within the clinic and how we all (you CARE and the clinic) proceed from this point forward. We appreciate*

this is a concerning situation for you and so are more than happy for you to bring whatever support you need to the meeting .

79. On or about 5 July 202, the claimant spoke with Ms Goodman. This is evidenced by the claimant asking to speak with Ms Goodman, in a text message, on 5 July 2022. The claimant asked Ms Goodman 'do you want to call me when you are ready?' Mi Goodman replied 'Sounds great. Speak soon'. During the conversation, the claimant talked about a possible return to work. The tribunal notes that the claimant did not have an appointment with her GP until a few days later, but accepts, on the balance of probabilities, that the claimant, as a professional, who was committed to the care of her patients, was keen to be able to return to work as soon as possible. Further, the tribunal accepts the claimant's evidence that her GP was being guided by her, as to when she felt fit to return to work, and on what basis.

The meeting on 8 July 2022

80. On 8 July 2022, a meeting took place between the claimant, Dr Sephton and David Burford. The claimant attended with a colleague, Professor Adam Glaser. During the meeting, Mr Burford and Dr Sephton made it clear to the Claimant that the Respondent could no longer tolerate her poor behaviour and that it was considering terminating her contract of employment on the grounds of her conduct.

81. Limited information was given to the claimant about the nine allegations they were said to be considering. Dr Sephton told the tribunal that the meeting was intended to be a formal disciplinary meeting; but accepted that at no time was the claimant told that was the case. Further, no formal notes of the meeting were made by either Mr Burford or Dr Sephton.

82. Reference was made during the meeting to previous 'formal warnings' given to the claimant, namely the emails of 22 April and 7 June. The claimant expressed surprised that they were being characterised as 'formal warnings'. The claimant made reference to the fact that she had arranged to be seen by a life coach. She accepted that her behaviour had been difficult, and was apologetic during the meeting about that.

83. Professor Glaser and the claimant had a joint NHS clinic planned at the Leeds premises on 13 July. Professor Glaser was anxious to talk about that, because if it couldn't go ahead, patients would need to be contacted as soon as possible. His evidence to the tribunal, which the tribunal accepts, is that the clinic was raised. It was agreed that the claimant could attend.

84. The claimant agreed to take paid leave during the following week. No follow up message or email was sent by the respondent to the claimant about what had been discussed. Nor was any email sent to Ms Goodman, regarding any restrictions on where or when the claimant could work.

85. A further fit note was obtained by the claimant dated 8 July 2022, and was sent to the respondent on 11 July 2022. The fit note advised that the claimant was fit for work on a phased return and amended duties during the period 8 July to 4 August 2022.

13 July clinic with Professor Glaser

86. The claimant messaged Claire Goodman on 11 July to check with her that it was okay to attend the clinic on 13 July 2022. The message states:

> *In principle, I hope you are ok w me planning for clinic weds w Adam...?? He was just asking me if I had 'clearance' ... I will proceed as if I have your approval unless you tell me otherwise.*

87. Ms Dobbie suggested that the contents of that email are inconsistent with the claimant and Professor Glaser already having spoken to the respondent about the 13 July clinic at the 8 July meeting. The tribunal does not accept that submission. It prefers Professor Glaser's evidence that it was he who suggested to the claimant that she obtain clearance from Ms Goodman too, given that she was still under a fit note, and the planned clinic was for her NHS employer. Ms Goodman agreed to the clinic going ahead. The claimant also asked Ms Goodman during this exchange if they could discuss and finalise her job plan.

88. The claimant duly attended the Leeds premises on 12 July, to prepare for the clinic on 13 July 2022. She prepared her own notes about the patients in readiness for the clinic. When she arrived at the clinic on the morning of 13 July, the claimant discovered that those notes, which had been left in her locked office, were no longer there. She went to check where they were.

89. Mrs Taylor's evidence to the tribunal was that the claimant 'demanded to know why her notes were not prepared'. Mrs Taylor stated in evidence that what she meant by that was that the claimant demanded to know where her notes were. The tribunal does not accept that is how those words would usually be understood. The tribunal also notes that in Dr Sephton's witness statement, she repeats the words used by Mrs Taylor as follows:

> *the Claimant attended the unit on … 13 July 2022, and demanded where her notes were for her clinic. This was understandably distressing for staff who had been informed that she was not going to be present on the unit for a period of time, and was a clear continuation of her unacceptable conduct. The Respondent therefore took the decision to terminate the Claimant's employment on the grounds of gross misconduct with immediate effect*.

90. The tribunal does not seek to suggest that Mrs Taylor (or indeed any other witness who gave evidence) has been dishonest in her witness statement. However, the reliability of Mrs Taylor's evidence is called into question by her suggestion during cross examination that demanding to know why notes had not been prepared, can be equated with demanding to know why the notes were not 'available'.

91. The respondent also alleges, in the evidence of Mrs Taylor, that the claimant demanded a clinic room. That is disputed by the claimant, who says that the appointments were by telephone, and that she conducted the consultations in her own office. Professor Glaser corroborated that evidence of the claimant. He confirmed that during the clinic which they both conducted jointly, they were both in the claimant's office. Professor Glaser was using another clinic room, in line with his usual practice. That would have had to be booked for him. Again, the tribunal prefers the evidence of Professor Glaser and the claimant in relation to that particular issue, noting the unreliability of Mrs Taylor's evidence, in relation to the alleged demand as to why 'her notes were not prepared'. The tribunal is unconvinced that Mrs Taylor's assertion that the claimant demanded that a room be booked for her, is any more reliable.

92. It is alleged by Mrs Rutherford that when the claimant attended on 13 July, she made no attempt to speak to Mrs Rutherford, and scowled at her. The tribunal accepts the claimant's evidence that when she saw Mrs Rutherford, she had a patient with her, and therefore did not attempt to say hello. In evidence before the tribunal, Mrs Rutherford sought to criticise the claimant for not saying hello to her; but then accepted that she did not attempt to say hello to the claimant herself. It is also noted that in her witness statement Mrs Rutherford states:

> *She did not make any attempt to apologise to staff or make amends with them as she had promised to do, instead her behaviour carried on in the same rude and disrespectful manner.*

93. Mrs Rutherford accepted during cross examination however that it would not have been appropriate on 13 July for the claimant to start apologising to staff. She conceded that would have needed to be carefully managed. Seeking to criticise the claimant in her witness statement for this alleged failure to apoligise, causes the tribunal to question the reliability of other aspects of Mrs Rutherford's witness statement, where there is a despite as to what happened.

Dismissal letter

94. The claimant's employment was formally ended on 17 July 2022. Dr Sephton told the Tribunal, and it is accepted, that the decision was Mr Burford's. Dr Sephton did not take part in the decision, but was told what the decision was, prior to the claimant being told. A letter was sent to the claimant on 17 July (but dated 15 July) in which Mr Burford stated:

> *I am writing to confirm that following our recent meeting on 8th July and in view of the seriousness of this matter and your conduct since, it has been decided that your employment with CARE Fertility should be terminated for gross misconduct without notice and without any warnings.*
>
> *The reason for your dismissal is that your conduct with junior colleagues is unacceptable despite it being made clear to you, the impact that it has on colleagues and on the reputation of the business.*

95. The claimant asked for a copy of the disciplinary policy and for the reasons for her dismissal. This presumably led to Dr Sephton being asked by Ms Regan the HR Director for a timeline of incidents leading to the claimant's dismissal. This was provided by Dr Sephton on 21 July 2022 and contained notes of various incidents, dealt with above. Mrs Rutherford also prepared a timeline, which include the statements by Ms Sewell, Ms Rawnsley and Gillian Cotton about the 4/5 June incidents.

96. On 22 July 2022, a letter was sent by the Group HR Director Angela Regan setting out specific allegations which had led to the dismissal. These were:

    96.1. the claimant's behaviour during the integration process;

    96.2. leaving early on 10 April, and then shouting at the medical director when he called the claimant to discuss that;

    96.3. the meeting on 20 April with Dr Sephton to discuss the unprofessional behaviour to date;

    96.4. the claimant's email of 25 May to Mrs Rutherford;

    96.5. the 30 May incident;

96.6. refusing to support the nursing team with scanning on 4/5 June;

96.7. joining two consultant meetings and being disruptive by 'raising concerns about your job plan';

96.8. on 8 July being advised to take the following week as paid leave but then attended the clinic on 13 July 'demanding an explanation as to why notes are not been prepared and not acknowledging staff who came into contact with you'.

Relevant law

97. Both representatives helpfully set out the relevant legal principles to be applied in this case. I gratefully adopt the following, which has been largely copied and pasted from the respective submissions, first Ms Dobbie's, and then Mr Rogers'.

98. Dismissing an employee without notice is lawful where the employee has committed a repudiatory breach of contract. In such a case, an employer has a choice whether to accept the repudiatory breach or affirm the contract. At common law, an employer can dismiss an employee "on the spot" without any warning, meeting or process whatsoever, where there is a repudiatory breach. Processes and the ACAS Code are only relevant to remedy in wrongful dismissal claims.

99. The tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is an objective test based on all the circumstances of a particular case (**Neary and anor v Dean of Westminster 1999 IRLR 288**), including whether that type of conduct is listed in the disciplinary policy as amounting to gross misconduct. A reasonable belief in repudiatory breach is not relevant in wrongful dismissal claims.

100. The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal. The original exposition from **Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 2 All ER 285 at 287**, is: *"whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service".* That is now somewhat archaic and applied at a time when any refusal by a servant to adhere to the orders of his/her master amounted to a repudiatory breach.

101. In the far more recent case of **Briscoe v Lubrizol Ltd 2002 IRLR 607**, **CA** the Court of Appeal approved the test set out in **Neary,** where Lord Jauncey asserted that the conduct *"must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment".*

102. The Court of Appeal in **Briscoe** stressed that the employee's conduct should be viewed objectively. Thus an employee can repudiate the contract even without an intention to do so.

103. Following **Mbubaegbu v Homerton University Hospital NHS Foundation Trust UKEAT/0218/17** it is plain that a series of acts of misconduct can, taken

together, amount to repudiatory breach in certain circumstances. At paragraph 32 in that case, the EAT stated:

> *"It is quite possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee. That may be so even if the employer is unable to point to any particular act and identify that alone as amounting to gross misconduct. There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely upon a series of acts, none of which would, by themselves, justify summary dismissal."*

104. The case of **Boston Deep Sea Fishing & Ice Co v Ansell (1888) 39 ChD 339** confirms that an employer may rely on acts discovered after the dismissal to justify a decision to dismiss.

105. The tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts (rule 41 of the ET Rules 2013). Thus, the tribunal should consider hearsay accounts of events obtained, for example, in the course of an internal investigation or internal communications.

106. Indeed, a tribunal fell into error when discounting witness statements obtained by the employer in the course of a disciplinary investigation in **Hovis Ltd v Louton EA-2020-000973** (22 November 2021, unreported). The tribunal concluded that it could not find as a fact that the claimant had committed the act alleged (smoking whilst driving) because the witnesses to that act did not attend the tribunal in person to give evidence. The EAT held that the tribunal erred by concluding that, in the absence of either witness giving evidence in person, it was precluded from making such a finding and by failing to evaluate the hearsay evidence of the statements that had been gathered in the internal investigation. The appeal was allowed. It was stated that (at paras 23-27):

> *A distinct legal proposition, however, is that it is an error of law for the trial judge to fail to consider at all, evidence of a particular type, such as documentary or hearsay evidence, simply because it is of that type, unless it falls properly to be excluded from consideration because of the application of some rule of evidence or other established exclusionary legal principle.*
>
> *As to that, rule 41 Employment Tribunals Rules of Procedure 2013 provides that employment tribunals are not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. So, hearsay or documentary evidence, or other types of evidence, of whatever nature, are not, as such, inadmissible, and if such evidence is sufficiently relevant to what the tribunal has to decide, then it should be considered. But the assessment of the evidence, and what weight to attach to it, is, of course, a matter for the tribunal.*
>
> *…The fact that a hearsay statement has not been given under oath, or tested in that way at trial, are considerations that may of course inform the judge's assessment of its reliability or credibility, or otherwise of what weight to attach to it, but that is a different matter. They are also not necessarily the only considerations that may affect the evaluation of hearsay evidence. The tribunal needs to consider all the relevant circumstances in the given case, such as the particular circumstances in which the statement was made, the nature of the record of that statement, and so forth.*

> *Nor, Mr Webb also accepted, is there any rule that oral evidence given, and tested, at trial, must or will always, as it were "trump" opposing documentary or hearsay evidence. The credibility and reliability of the oral evidence must itself still be subject to some evaluation; and it may also, in a given case, be outweighed by a determinative document, or a hearsay account, which, in all the circumstances, the judge finds more reliable or compelling.*

107. Similarly, in **Leicester City Council v Chapman [2022] EAT 178** (9 December 2022, unreported), the employer only called the dismissing and appeals officers to give evidence. They did not call any direct witness evidence about the employee's behaviour which led to his dismissal. The tribunal had CCTV footage of the incident and witness statements obtained during the internal investigation. The tribunal was held by HHJ Eady to have fallen into error by simply disregarding other forms of evidence than that of live evidence from witnesses. It was observed that it is open to a tribunal to attach such weight as they see fit to indirect evidence. However, it is an error to simply disregard evidence which may be logically probative of an issue without providing reasons for doing so. The matter was remitted for a rehearing.

108. Mr Rogers adds the following. First, when considering wrongful dismissal, the Tribunal is only concerned with the factual question: was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract entitling the employer to summarily terminate the contract (**Enable Care & Home Support Ltd v Mrs J A Pearson UKEAT/0366/09SM**). The tribunal notes that questions of waiver may also be relevant.

109. In **Laws v London Chronicle (Indicator Newspapers) Ltd 1959, the Court of Appeal** said that in order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract. As Ms Dobbie asserts however, this needs to be read subject to the rule in the more recent case of **Briscoe** that a repudiatory breach can be committed without an intention to do so. It is noted that the same point is made in the **IDS Handbook on Contracts of Employment**.

110. I have also been referred to and take account of the EWCA's decision in **London Borough of Waltham Forest v Folu Omilaju [2004] EWCA Civ 1493**, especially paragraphs 14 to 22 which set out an invaluable summary of the law. In particular, in relation to a 'final straw', the final straw relied on may be relatively insignificant, but must not be utterly trivial, or innocuous. There is however no requirement that the final straw should itself be a breach of contract, or amount to conduct that is blameworthy or unreasonable.

Conclusions

111. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above. The Tribunal will not repeat every single fact, in order to keep these reasons to a manageable length. The issues are dealt with in turn.

The allegations of misconduct (Issue 1.1)

112. As noted above, the first task is to consider the factual findings made in relation to the allegations of misconduct relied upon by the respondent. The matters

upon which the respondent relies and the factual findings upon them can be summarised as follows.

Behaviour towards the integration team during the integration process (including alleged comment to Diane Baranowski)

113. I have found that the claimant was stressed and frustrated by the integration process, and frequently swore and expressed her frustration and anger in front of colleagues, including members of the integration team. For the reasons set out above, I have not found that the claimant said words to Ms Baranowski, to the effect that she could: '*fuck off with the rest of them'*.

Left work early on 9 and 10 April

114. I have found as a fact that the claimant left work two and a half hours early on the Saturday, and one hour 15 minutes early on the Sunday. I have also found that this was in the context of the imposition of changes to weekend hours on the claimant without her agreement; and the claimant's ongoing concerns about having to work excessive hours in order to get the work done. Whilst clause 6 of the claimant's contract with the respondent provided that she could take time off in lieu, with prior agreement, the reality was that she was unable to do so.

Shouting and then ending the telephone call with A Rutherford on 10 April

115. I have found as a fact that the claimant did raise her voice during the telephone call with Mr Rutherford, but so did he and the claimant's husband. The claimant subsequently ended the call, but this was in order to defuse the situation, when the call was through the car's speakerphone and could be overheard by the claimant's children. Had he deemed it necessary to do so, Mr Rutherford could have messaged, emailed, or called the claimant again, in order to discuss the issue further. He did not do so.

The meeting on 20 April

116. This is set out as a heading, because it is mentioned in Ms Regan's email. However, the discussion appears to have been a positive one, the claimant was contrite about her behaviour, and it was agreed by the claimant that until her job plan was finalised, she would continue to work the weekend cover hours set out in her job plan.

25 May email to Claire Rutherford

117. The contents of that email are a matter of written record and have been set out above. As for the other emails sent by Mrs Rutherford to Leeds Doctors around that time, I have not accepted the argument put forward on the claimant's behalf that the content of those emails was inappropriate. Mrs Rutherford expressed herself succinctly; and she was entitled to raise the issues that she did because patient care was being affected.

30 May incident in Claire Rutherford's office

118. I have found that on the day in question, the claimant was extremely concerned that she was not able to carry out a medical procedure effectively with the equipment that had been provided to her, and rightly sought to discuss that with Mrs Rutherford. The claimant was agitated during that discussion, and raised her voice. Her manner was inappropriate and witnessed by two junior members of staff. The claimant subsequently apologised for the way she

spoke to Mrs Rutherford. There is no evidence of any damage to the respondent's reputation or of any complaint by any patient about the incident.

4 June, refused to support the nursing team with scanning

119. I refer to the findings of fact above. I have found that the claimant did not intend what she said to be interpreted in the way that it was by the nursing staff, but that interpretation was not an unreasonable one, in all the circumstances. The claimant did not make it clear that if a replacement nurse could not be found, she would carry out the necessary work in relation to the scans on the Sunday and Mrs Rawnsley would not need to cover the shift. As a result, Mrs Rawnsley had to come in to cover that work. Understandably, Mrs Rawnsley was unhappy about that.

5 June, challenged VR about the suggestion that refused to assist nurse colleagues; then challenged Gill Cotton angrily and asked Sarah Baines who said she did not want to get involved and walked away

120. I have found that the claimant did challenge Mrs Rawnsley when she suggested to the claimant that she had refused to assist her nurse colleagues and was not a team player. The claimant was upset by that suggestion, and did not consider that what she had said could reasonably have been interpreted as it had been. The claimant was angry when she approached Ms Cotton, although the interaction with Ms Cotton was limited. So was the interaction with Ms Baines who told the claimant, in the presence of Mrs Rawnsley, that she did not want to get involved.

8 June did not inform R of her sick leave until 11.30 am

121. Again, this is a matter of record. It is also a matter of record that the claimant was suffering from work-related stress at the time and was very unwell.

Joined two consultant's meetings whilst on sick leave and was disruptive by raising concerns about her job plan

122. There is no direct evidence as to when the meetings occurred, or exactly what the claimant said at those meetings, save the claimant's own evidence, which I have accepted in full, it not having been challenged. The claimant was not told she could not attend the meetings. There was an ongoing dispute about the claimant's job plan and there was nothing wrong in principle with the claimant pointing out that the weekend working hours were still in dispute or her wanting to discuss the issues around her job plan with other colleagues. There is no reliable objective evidence before the tribunal that those actions were disruptive.

13 July – not expected in clinic; demanded to know why notes had not been prepared

123. I have found that both the claimant and Professor Glaser raised the 13 July clinic during the meeting on 8 July.

124. As for the claimant allegedly demanding to know why notes had not been prepared, I have found as a fact that did not occur. The claimant had already prepared her own notes and there was no need to make the alleged demand. The claimant had left those notes in her locked office, and was no doubt surprised, upset, and frustrated, when she arrived at the clinic on 13 July to find the notes were no longer there. The claimant was entitled to make

enquiries as to where those notes were, in order to be able to advise the patients she was due to speak to by telephone.

13 July, demanded that a room be booked

125. For the reasons set out above, I have found as a fact that the claimant did not demand that a room be booked. There was no need to do so because on the basis of both her and Professor Glaser's evidence, which I found ore reliable ion this point, the claimant carried out the telephone consultations in her own office.

Was that conduct repudiatory? Issue 1.2

126. Before considering this question, I remind myself of the following:

126.1. whether any conduct is repudiatory is to be judged objectively, and is a question of fact;

126.2. conduct can be repudiatory, without the employee intending it to be so;

126.3. a series of acts can be sufficient to amount to a repudiatory breach;

126.4. an employer can rely on breaches discovered after the dismissal has occurred, to justify the original dismissal.

126.5. In the words of Lord Jauncey in **Neary**, the conduct:

> *must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment.*

127. Bearing in mind those principles I conclude as follows. The words 'misconduct' and 'breach of contract' are used interchangeably.

127.1. As for the integration process, the claimant's behaviour was upsetting to colleagues. It is apparent that the claimant had a history of expressing her frustrations in front of staff in ways that some staff found upsetting, particularly more junior members. The respondent was entitled to challenge the claimant about this behaviour. It is however apparent from emails between Dr Sephton and the claimant by the beginning of April, that the claimant was starting to get to grips with the new systems, although she still felt very stretched by her workload. Her behaviour amounted to a minor breach of contract.

127.2. As for the 9 and 10 April, there had been no agreed change to the weekend working hours of the claimant at that stage. Rather, the respondent attempted to unilaterally impose those new hours and the claimant resisted that imposition. The claimant was still very concerned about the effect of her working hours on her family life, and was entitled to dispute the respondent's attempt to impose new working hours at weekends without consultation. The new working hours were agreed by her on 20 April, pending agreement on her job plan. Prior to that agreement, there was no breach of contract.

127.3. As to the telephone call with Mr Rutherford, voices were raised by all participants, including the claimant's husband and the claimant was entitled to end what was becoming a heated conversation, taking place on speakerphone, in a car, in front of her children. It is noted that there was no follow-up by Mr Rutherford which does not suggest that the incident was viewed seriously. Such matters were not specifically mentioned as an issue in the follow-up email of the 22 of April, following the meeting on 20 April. That suggests it was not viewed as a serious matter. In my judgment, it was not a breach of contract.

127.4. As for the 20 April meeting itself, that was a constructive meeting, and cannot reasonably be viewed as a breach of contract. It is noted in the email of 22 April, Dr Sephton described the meeting as a 'catch up'.

127.5. The 25 May email from the claimant to Mrs Rutherford was rude and inappropriate. Such a message should not have been copied to colleagues. It is noted however that this was no mentioned in Dr Sephton's email to the claimant of 7 June2022 as a further issue of concern. The claimant was content to apologise for the tine of her email during cross examination. It amounts to minor misconduct

127.6. As for 30 May incident, I consider that the claimant's actions did amount to a breach of contract, although not a serious one. There were mitigating circumstances, given that the claimant's retrieval rate of eggs was less than 50% of what she would normally expect. There is no evidence of any actual damage to the respondent's reputation or any complaints by any patients present on the day. Mrs Rutherford challenged her about her approach and the claimant immediately apologised.

127.7. As to 4/5 June, that arose from a misunderstanding, for which in my judgment, the claimant must bear primary responsibility. This was a matter that the respondent was entitled to raise, although in my judgment it was, at most, minor misconduct.

127.8. As for the challenge to Ms Cotton and Ms Baines on 5 June, the claimant was upset by the suggestion that she was not a team player and sought to explain what she had meant by her comments the previous day. She felt what she said had been misunderstood, and hence spoke briefly with Ms Baines and Ms Cotton about it. The claimant appears to have a lack of appreciation of the potential effect of her approach in such a manner to staff in a subordinate position. That is perhaps something she may wish to reflect on, outside of the adversarial process of these legal proceedings. This was a potential misconduct issue, but of a relatively minor nature. The interactions with Ms Baines and Ms Cotton were clearly very limited in duration.

127.9. It is also suggested that the claimant breached her contract by leaving early. I reject that assertion. Although there was some indication that the claimant did leave early on that day, there is no

indication what time she did leave, or that by doing so, patient safety was in any way compromised. In a situation where all of the work reasonably required has been carried out, it is in my judgment unreasonable for the respondent to insist on the claimant always staying for the remainder of her shift. Hers is a very different situation to that of a more junior employee, working fixed standard hours. The claimant was clearly exceeding, overall, the hours she was required to work for the respondent. It was not specifically mentioned as an issue in the email from Dr Sephton of 7 June or the letter from Ms Regan of 22 July. This did not amount to misconduct.

127.10. As for 8 June, it was a breach by the claimant to notify the respondent of her absence at 11.30am, instead of 9 am as the contract requires. But this was in circumstances where she was extremely unwell. This amounts at most to minor misconduct.

127.11. As for the two consultants' meetings that the claimant attended, that does not amount to misconduct. Nor was the raising of legitimate concerns about her working hours.

127.12. As for the 13 July clinic, I have found as a fact that the claimant neither demanded to know why her notes had not been prepared, nor that a room be booked for her. Further, her attendance at that clinic had been approved in principle by the respondent.

128. Taking these issues as a whole, which individually amount to minor misconduct (save perhaps for the 30 May incident which even then could not reasonably be classed as serious misconduct), I conclude that the respondent was entitled to have concerns about the claimant's behaviour during her employment, and was entitled to raise those concerns with her. In my judgment however, even when taken together, the claimant's actions were nowhere near sufficiently serious to have amounted to a repudiatory breach of contract by the time of her dismissal.

129. All of this could potentially have been avoided by the respondent raising the further concerns through formal processes. Such processes would have had the advantage of being properly noted and recorded. The claimant would have been formally informed about the improvements expected in her behaviour, warned of the potential consequences of failing to do so and given a reasonable opportunity to improve. That is of course the whole purpose of disciplinary procedures - they do not exist simply so employers can sack employees.

130. The above is stated as potential lessons to be learned for the future. For the avoidance of doubt, I agree with Ms Dobbie's submission that the failure to follow a fair process is not relevant to the question as to whether or not there was a repudiatory breach of contract. My conclusions in relation to that issue has not been affected in anyway by the respondent's failure to go through formal processes in the correct manner.

Has any breach been waived – Issue 1.3?

131. Had it been necessary to reach a conclusion in relation to this issue, I would have concluded that the respondent had not waived any breach. Following the incidents on 4 and 5 June, an email was sent to the claimant on 7 June,

informing the claimant that matters would be escalated to the CEO. The claimant then went on sick leave, and the meeting on 8 July was organised within a reasonable period thereafter. Although the respondent failed to properly notify the claimant of the purpose of that meeting, it would have been clear to the claimant at the conclusion of the meeting that the respondent had concerns and was considering its position.

Overall conclusion

132. in light of the conclusions above, the claimant's wrongful dismissal claim succeeds and she is entitled to three month notice. It is anticipated that the parties will be able to agree that figure between them. A separate case management order will be sent to the parties, with regard to the sending of written submissions as to whether the claimant's compensation should be increased because of any alleged failures to comply with the ACAS code of practice.

Employment Judge A James
North East Region

Dated 27 June 2023