EMPLOYMENT TRIBUNALS

Claimant: Ms Marta Kalista

Respondent: North West Anglia NHS Foundation Trust

Heard at: Cambridge Employment Tribunal

On: 5, 6, 7, 8 and 9 June 2023
Tribunal deliberations 12 June 2023

Before: Employment Judge Hutchings

Members: Dr Gamwell
Mr Smith

Representation
Claimant: in person
Respondent: Ms Jennings of Counsel

RESERVED JUDGMENT

1. The Claimant's complaint that her dismissal was automatically unfair pursuant to section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.

2. The Claimant's complaint that she was unfairly dismissed contrary to section 98 of the Employment Rights Act 1996 succeeds.

3. Had the procedure been fair the claimant would have been dismissed in any event. For the reasons set out in the Tribunal's conclusions below, the Tribunal makes a Polkey deduction of 100%. Accordingly, there is no award of compensation to the claimant.

REASONS

Introduction

1. The claimant, Ms Marta Kalista, was employed by Hinchingbrooke Healthcare NHS Trust, which was acquired by the respondent, North West Anglia NHS Foundation Trust (who became her employer) as a Health Care Assistant from 10 October 2016. She was dismissed on 9 July 2020.

2. By a claim form dated 13 November 2020 the claimant says she was dismissed because she made a protected disclosure in emails dated 29 and 30 July 2019. She also claimed age discrimination, disability discrimination and unlawful deduction from

wages; these claims were dismissed by the Judgment of Employment Judge Laidler dated 28 April 2022. The claim for unfair dismissal proceeds. Parties engaged in early conciliation.

3. By Grounds of Resistance dated 28 January 2021 and amended Grounds of Resistance dated 10 May 2022, following dismissal of some claims in April 2022, the respondent contests the claims. It says the claimant was dismissed for misconduct.

Preliminary matters

4. At the beginning of the hearing, before we heard any evidence, we had to deal with a couple of preliminary matters concerning the bundle raised by the claimant in an email to the Tribunal dated 4 April 2023:

    4.1. That the respondent had included duplicate documents, blank pages and documents which the claimant had not previously received. We explained to the claimant the process of exchanging documents and established that the claimant had received all documents prior to the hearing. A couple of documents were disclosed by the respondent later in the process, which we were satisfied complied with the on-going duty to disclosure any documents a party finds which are relevant to the issues.

    4.2. The claimant had requested that recordings of conversations she had taken without the knowledge of the respondent's witness should be disclosed to the Tribunal so we could consider her tone of voice. We established that her transcripts of these conversations had been disclosed; we did not admit the recordings as it is not for a Tribunal to determine tone of voice and we would rely on her transcripts to the extent they related to the issues.

Procedure, documents and evidence

5. The claimant represented herself and gave sworn evidence. A Polish interpreter supported with translations. At the start of the hearing the claimant told us she only required translation when she indicated to the interpreter that she required clarification or assistance. The claimant called sworn evidence from Mr Jonathan Norman, for whom the claimant worked as a full-time care giver.

6. The respondent was represented by Ms Jennings of Counsel, who called sworn evidence from:

    6.1. Shaun Fretter, interim Pre-Registration Clinical Educator Lead;
    6.2. Penny Snowden, Deputy Chief Nurse; and
    6.3. Joanne Bennis, Chief Nurse.

7. The hearing was listed for 5 days. At the start of the first day, we agreed the list of issues in relation to the outstanding claims. Mindful the claimant was not represented, we gave her the preference to ask questions first or after the respondent's barrister. She chose to ask her questions of the respondent's witnesses after giving her own evidence and this informs the timetable the hearing followed:

    7.1. Day 1: preliminary matters and Tribunal reading;
    7.2. Day 2: claimant's evidence;
    7.3. Day 3: claimant's evidence; respondent's evidence;
    7.4. Day 4: respondent's evidence; and
    7.5. Day 5: closing statements (by CVP).

8. The hearing was before a full Tribunal. We considered the documents from an agreed 789-page File of Documents which the parties introduced in evidence. The claimant and Ms Jennings made closing statements.

Findings of fact

9. The relevant facts are as follows. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the material point.

10. In January 2018 the claimant commenced a 'Diploma in Higher Education Nursing Associate' (the 'Apprenticeship'), which is a 2-year apprenticeship to become a nurse, for which she attended Anglia Ruskin University (the 'University') for 15 hours a week and was employed by the respondent as a Trainee Nursing Associate for 22.5 hours a week in placements at the respondent's various hospitals. The claimant accepted that in this role she was not a practicing nurse and was under the supervision of a mentor.

11. Periods when the claimant could take holiday were mapped in advance to align with her learning and placement schedules, and these were confirmed to her in a Nursing Associate Course Plan dated January 2018 (the 'Plan'), which mapped out the teaching, placement, and holiday dates from 14 May 2018 to 25 November 2019. The claimant told us she was not familiar with the system. We prefer Mr Fretter's evidence that, initially students had to book holiday direct with the respondent. Subsequently, the University emailed all students a Course Plan identifying block periods when holiday should be taken and uploaded it to the University's Blackboard learning system. Looking at the dates on the Plan, we find that the claimant would have been able to access the Plan, and the University's explanation, around 15 May 2018. We find as a fact she was aware of restricted holiday periods up to 25 November 2019.

12. An Occupational Health ("OT") assessment took place in October 2018 following concerns raised by the claimant that she could not complete 12 hour shifts due to a medical condition. The recommendation was that in placements with high demand to complete ambulatory tasks without being able to be seated for periods of time, the claimant should not work shift patterns of more than 8 hours. This informed the subsequent Development Plan.

<u>2018 Development Plan</u>

13. Around this time the respondent put the claimant on a Development Plan with 5 objectives to address concerns the respondent had about her attendance, supervision, and behaviour. It is dated 29 October 2019. The claimant says she did not receive this until 10 November, although his signature states 9 November, when she had a meeting with Victoria Darling to discuss it. We find that this is when the Development Plan began, running until the end of that placement on 5 December 2018, when Vanessa Darling signed off objectives 1, 2 and 4.

14. Objective 5 required her to write a Written Reflection on trust values". On 23 October 2018 the claimant sent a reflective statement to the respondent; she considered this statement satisfied the obligation in the plan to reflect. The respondent says not. Mr Fretter told us the statement was to reflect in the trust values. We find the statement does not do so and this is the reason objective 5 was not signed off. The signed copy of the Plan was not included in the subsequent report for the first investigation.

15. In December 2018 a further OT assessment recorded that the claimant was able to work long shifts provided she had a mix of sedentary and ambulatory tasks. The report recommended that bank working was guided by HR and union advice.

<u>First Investigation</u>

16. The respondent decided to investigate the concerns raised about the claimant's behaviour. On 24 January 2019 Nikki Butler, Assistant Director of Nursing, wrote to the claimant inviting her to a meeting on 6 February 2019. The letter informs the claimant she may be accompanied, encloses a copy of the respondent's Disciplinary Policy and sets out 6 allegations. In summary, these are that the claimant:

    16.1. changed pre-agreed working hours between 23 July and 27 October 2018 without discussion with the University or respondent ('Allegation 1');
    16.2. failed to adhere to reasonable adjustments set by Occupational Health ('OT') following assessment on 18 October 2018 ('Allegation 2');
    16.3. took unauthorised annual leave 9-11 September 2018 (an extra 52.5 hours) ('Allegation 3');
    16.4. demonstrated unprofessional behaviour in meetings, demonstrating aggressive behaviour ('Allegation 4');
    16.5. failed to complete objectives in an informal action plan implemented on 29 October 2018 ('Allegation 5'); and
    16.6. kissed a patient on 27 October 2018 ('Allegation 6').

17. At this meeting these allegations were put to the claimant. She did not identify anyone at this meeting she wanted Ms Butler to interview. The claimant received, and we have seen, a note of this meeting, on which she added comments. Following this meeting Ms Butler spoke with Mr Fretter (7 February), Victoria Darling (6 March), Jeanette Kao (18 March) and Andy Howes (25 April). Ms Butler's recorded her findings in a document created as "Investigation Report April 2019, to which the meeting notes were appended along with OH reports, the 2018 Development Plan, respondent policies, correspondence, and other statements she had gathered. Then the process stalled, communication between the respondent and claimant ceased and she was not updated about the investigation until 27 August 2019, when she was handed a letter from Annette Parker informing her that the respondent had decided to delay the outcome of this investigation pending the completion of a second investigation.

18. In oral evidence the Ms Bennis told us that the investigating officer had a family bereavement, subsequently leaving the respondent's employment and this was the reason the investigation stalled. By its own admission, the respondent did not provide any explanation to the claimant for the 6 months of silence. In the meantime, on 17 June 2019, the claimant started a placement as part of her Apprenticeship on Apple-Tree ward.

19. On 24 July 2019 the claimant assisted a patient on the ward with a respiratory issue. Concerns about the claimant's handing of this situation were raised by Karin MacLeod, the sister on ward, directly with the claimant on 25 July 2019.

20. In an email at 10.19 on 29 July 2019 the Sister told the claimant that she was raising "an urgent Cause for Concern with the University as your practice is not safe and there is a high risk to patient safety." We have seen a copy of the form, which was sent to the University. It records "25/7 spoke to Marta she showed no insight that the sats of 786 were a medical emergency" and that the claimant had also "disconnected IV medication….that is not in the scope of practice of any student".

<u>Protected disclosure</u>

21. At 13.59 on 29 July 2019 the claimant emailed Vanessa Waller, her contact at the University, setting out concerns she had about patient care on Apple-Tree Ward. The following morning, at the claimant's request she met with Mr Fretter and the Clinical Facilitator. Mr Fretter told us they discussed the cause for concern document; the claimant told us they did not, but offered no details of what was discussed. We have seen the contact sheet the clinical facilitator completed recording the oxygen incident

on 24 July. The claimant said this document was not disclosed to her until she received the hard copy bundle for the hearing, suggesting to the Tribunal it had been created later by the respondent. Following a demonstration of the electronic bundle, we are satisfied it was not.

22. We have also seen the email Mr Fretter sent to Annette Parker on 30 July in which he seeks advice about a suspension risk assessment and recorded the concerns the claimant made about Apple-Tree Ward. This email a contemporaneous account of their conversation; it aligns with Mr Fretter's evidence to the Tribunal. We prefer Mr Fretter's evidence and find as a fact the incident and cause for concern document were discussed with the claimant at this meeting.

23. At the hearing the claimant told us she had raised these concerns to the respondent prior to the sending the email to the University. She does not mention this in her witness statement, nor is there any evidence before the Tribunal that the claimant had expressed these concerns to anyone within her employer prior to alerting the University. It was only after this meeting that the claimant forwarded her 29 July email to the University to Shaun Fretter. Taking account of the timeline, that within hours of finding out the University were being informed of the respondent's concerns she raised her own concerns about the ward with the University, we prefer the respondent's evidence that she had not previously raised these concerns. We find that, while the content of the claimant's email was in the public interest, raising her concerns about patient welfare, she was motivated to send it only when she found out the respondent had raised its own concerns about her own conduct with the University. We find the two events inextricably linked; her knowledge that the University had been sent a Cause for Concern about the incident on 24 July triggered her whistleblowing email. We also find it was for this reason she raised her concerns first with the University.

2019 Development Plan

24. We find that as a result of this incident and in discussion with the University on 31 July 2019 the respondent placed the claimant on a Development Plan for the period 31 July 2019 to 30 September 2019, setting 9 objectives. The claimant told us that she was happy about the plan as she felt the staff "were finally engaging with her".

25. The respondent says it was made clear at this meeting that the claimant would only be working Monday to Friday when full supervision was available, so she could not work at the weekend as direct supervision was not made at this time. The claimant denies this was explained to her at the meeting.

26. We have seen this Plan. It is signed by the claimant, who says she signed it without being taken through it in detail, telling us she was not aware that she would be subject to supervision and would not have signed it if she had known she would be under direct supervision. She also suggested the wording at the top of the Plan "…..there will be a requirement to work under direct supervision at all times" was added at a later date. We have considered the Plan. There is no evidence that wording was added. It is clear at the top of this document that the respondent required the claimant to be supervised at all times. We find that the claimant signed Plan without reading it. This was foolish. The claimant told us that she can refuse to be supervised because she was not in the wrong in what she did with the oxygen. Her employment with the respondent was part of the Apprenticeship; as a student, she was not in a role that gave her the option of choosing when to be supervised. The role determined how she was supervised, not any experience she may have had prior to starting the Apprenticeship.

27. We find that the claimant was unable to accept that, by her enrolment on the Apprenticeship, she was subject to levels of supervision determined by the respondent's managers. This is evident in her response to questions about this

Development Plan. At the hearing she said she "had done nothing wrong" on 24 July 2019, telling us that she brought into the role a level of expertise having previously worked as a healthcare assistant, and, as a result, she knew her limitations. We have no doubt her actions for the patient were well meaning. However, by her enrolment on the Apprenticeship and employment with the respondent she had to defer to the expertise and guidance of those she was working with. It was their view she required supervision. The facts before us are that she did not comply with requirements which were clearly stated in a document she signed.

28. While completing the placements for her Apprenticeship, a professional course, it was incumbent on her to ensure she was familiar with any guidance the respondent put in place, including adhering to this Plan. It was not for her to override this with her own views on how her placement should be managed. In this regard we find that the claimant was difficult to manage. For these reasons we prefer Mr Fretter's evidence that the claimant knew she had to be supervised on the ward.

29. In early August 2019 an issue arose with the claimant's shifts. She did not attend her placement on 5 August, the respondent says telephoning that morning to request a change to 6 August 2019. At the hearing the claimant challenged this, telling us her request was to work 6 August instead of 7 August, when she was due to attend a conference and this change was authorised. The respondent says it did not agree to the claimant's request on 6 August to work 10 August instead of 7 August as 10 August was a weekend; We have found that the claimant's Development Plan determined she could not work weekends; therefore, any change of days could not include a weekend.

30. This resulted in the respondent submitting a second Cause for Concern form to the University 7 August 2019 regarding the attendance issues and an alleged breach to Development Plan that day that that she completed patient observations without supervision. We have seen 2 versions of this document; a handwritten one and a typed version which is more detailed and signed by Clare Fisher on 21 August 2019.

31. The same day the claimant met with Shaun Fretter and Vanessa Waller to review the Development Plan was reviewed at a meeting on 7 August 2019, at which the respondent concluded she was not achieving several objectives. We have seen a copy of the note of this meeting. It records that "Marta did not have the action plan with her at that meeting, so the review and discussion was carried out based on the issues that triggered the action plan and new concerns raised over the past 2 work shifts". As part of a professional course, it was incumbent on the claimant to attend a meeting to discuss her Plan to have a copy with her.

32. On 8 August 2019 the claimant sent a personal email to Mr Fretter with a photograph of a patient drug chart, from which the patient could be identified. The claimant accepts this contained the name and district number of the patient, telling us Mr Fretter requested the information. We prefer Mr Fretter's evidence to the Tribunal that he had discussed the patient with her, he did not ask her to take photographs and in doing so she had breached the respondent's Data Protection Policies.

<u>Suspension</u>

33. When the claimant returned to Apple-Tree Ward from annual leave on 27 August 2019, she was asked to attend a meeting with Annette Parker. She was told that the investigation against her had concluded, and Ms Parker had received the investigation report dated 26 June 2019 to consider whether there was a case against the claimant to answer regarding the 6 Allegations. This was the first update the claimant received from the respondent since she attended the investigation meeting in February. She was not given an explanation for the delay. At the hearing, Ms Snowden told us the delay was due to a family bereavement in Ms Butler's family meaning the investigation report was not finalised until July.

34. The claimant was told that the respondent's decision on these 6 allegations was being rolled over until completion of a second investigation relating to 5 new allegations, which were discussed with the claimant at this meeting. She was also told she was being suspended on full pay pending the outcomes. At this meeting the claimant was handed 2 letters, confirming the roll-over of the decisions, suspension, listing the new allegations and informing her that Vicky Birchall (a Matron) had been appointed as her support. The suspension resulted in the claimant's Apprenticeship being paused from 27 August 2019 to 31 January 2021. In summary, the 5 allegations were that the claimant:

    34.1. demonstrated unsafe practice regarding a patient's clinical observations and working outside her role on 24 July 2019 ('Allegation 7');
    34.2. shouted at colleagues and making them feel threatened on 6 August 2019 ('Allegation 8');
    34.3. told Apple-Tree Ward staff Shaun Fretter had agreed to swap a shift on 7 August 2019 to 10 August and contravening the 31 July action plan ('Allegation 9');
    34.4. performed a set of observations of a patient without supervision on 7 August 2019 ('Allegation 9'); and
    34.5. emailed Shaun Fretter from her personal account with photographs of a patient drug chart ('Allegation 11').

35. Nothing further happened until 12 September 2019 when the claimant's trade union representative wrote to the respondent, raising concerns: (i) there was no formal outcome to the first investigation; and (ii) about the fairness of the 27 August. The letter asks that the suspension meeting and asking that the suspension is lifted. The respondent's Disciplinary Policy at paragraph 11 states" in cases where a period of suspension with pay is considered necessary this period will be kept as brief as possible and the decision will be kept under review". By letter dated 9 October 2019 the claimant is told her suspension will continue. We find that the respondent was reactive in reviewing the suspension, doing so only when concerns were raised.

Second Investigation

36. By letter dated 23 October 2019 the claimant was invited to an investigation meeting with Sophie Cuschieri (Matron for Cancer Services). The respondent agreed to the claimant's request dated 24 October 2019 to delay the meeting due to her mother's illness; the investigation meeting subsequently took place on 28 November 2019. The claimant accepts that she did not identify anyone to be interviewed as part of the second investigation process. Ms Cuschieri subsequently interviewed Karin MacLeod, Clare Fisher, Naomi Southern-Auustine, Shari Dimaflies and Shaun Fretter. On 10 February 2020 she sent an Investigation Report to Penny Snowden to determine next steps.

37. On 7 February 2020 the claimant complains to Ms Cuschieri, who replies on 13 February 2020 explaining the delay as resulting from initial difficulty identifying an investigation officer and issues with resources and annual leave. On 16 March 2020 the claimant emailed a formal grievance to Annette Parker regarding the amalgamation of the investigations and length of time being taken, receipt of which is acknowledged by Annette Parker in her letter dated 13 April 2020. This letter informs the claimant of Ms Parker's conclusion that there is a disciplinary case to answer.

38. The respondent did not communicate any reason for the delay; indeed, the respondent did not communicate at all between the February investigation meeting and 27 August. On the basis of the timeline alone, we find that the investigation was protracted. Indeed, it was in breach of the respondent's own policies. We have seen the respondent's Disciplinary Policy. It states its purpose "to deal quickly, fairly,

consistently and constructively with breaches in conduct." Paragraph 4.3 requires an investigating officer to "prepare an investigation report of the findings in the shortest possible time and submit to the sponsoring manager. To regularly keep the employee and sponsoring manager updated and informed of the likely timescale for completion of the investigation and report".

39. We find that the respondent failed to adhere to its own Policy guidelines. There is no reason before the Tribunal as to why the respondent did not update the claimant about the reasons for the delays.

Disciplinary meeting

40. The respondent appointed Ms Snowden as disciplinary officer. Addressing the claimant's concerns she was not independent, as she worked in the same department as Ms Parker, Ms Snowden explained to us the team structure. We find that while she worked in the same team as Annette Parker, this team was large, and they did not work together. At the time of her appointment, she had been working for the respondent for a couple of months (joining in February 2020), she did not know the claimant or anyone in team. We are satisfied that Ms Snowden was impartial and did not communicate the evidence she received from the investigation with anyone. Indeed, she emphasised in her evidence that the material was confidential, and any communication would have been improper.

41. At the hearing, Ms Snowden also addressed the delays the claimant raised with the process overall, and the decision to carry over the outcome of the first investigation until the second investigation was concluded. Explaining these delays predated her employment with the respondent, it was her understanding the delays were due to a family bereavement of the first investigation officer and difficulty the respondent had in finding someone to undertake the second investigation and that some of the people giving evidence to the investigation were clinicians. Acknowledging the delays, she told us that while she spoke to HR about the length of the period of time since the first investigation, but the reality was she could not change this. We find that Ms Snowden was cognisant of the delays, but they related to a time before her involvement and that had the first investigation proceeded in a timelier way, it would not have changed the findings of the investigation or her decision to dismiss the claimant.

42. By letter dated 28 April 2020 Ms Snowden invited the claimant to a disciplinary hearing on 7 May 2020. The letter set out the allegations from both investigations, asked the claimant whether she would be calling witnesses / submitting documents and informed her of her right to be accompanied. She was told if the allegations were upheld it could result in her dismissal. At the hearing the claimant acknowledged that she understood from this the matter was serious and one possible outcome was her dismissal. The letter was sent by email and post. We find that the claimant received hard copies of both investigation reports on 1 May 2020.

43. On 3 May 2020 the claimant asked to postpone the hearing, as she was signed off sick by her GP, to which the respondent agreed. On 5 May 2020 Penny Snowden wrote to the claimant noting that the sick note she had provided did not specifically say she could not attend disciplinary meeting the hearing would go ahead as the claimant had raised a grievance about the length of time the process was taking. The letter noted the hearing would include regular breaks and that the claimant could speak to OT to talk through anxieties.

44. In reply (5 May 2020) the claimant has for the hearing to be postponed a second time until she had "all the necessary information", saying she did not want the union representative to speak for or defend her. On 6 May Ms Snowden agreed to postpone the hearing, suggesting 21 May 2020. On 11 May 2020 replies that her mother is ill and asked for another postponement; she requested additional information, which was

provided by the respondent on 15 May 2020 and 28 May 2020. At the hearing the claimant challenged the accuracy of some documents, but accepted she did not raise this at the time. We have considered these documents; we find that she did receive the information she requested. On 28 May 2020 Ms Snowden reschedules the disciplinary meeting for the third time to 9 June 2020.

45. The claimant's sick note dated 1 June 2020 records that she is unfit for work as her "mother died". The sick note is for the period 1 June 2020 to 25 June 2020. Following an OT assessment on 2 June 2020, a report was sent to Ms Snowden which recorded that claimant was in Poland and she was not fit to attend a disciplinary meeting. The assessment could not determine when the claimant would be able to attend the hearing, advising that the respondent should follow policy guidance in this situation.

46. On 3 June 2020 Ms Snowden informed the claimant by email that the meeting would go ahead on 9 June 2020 as OT unable to say when she would be fit to attend. This email invited her to attend by telephone or Microsoft TEAMS and informed her she could be represented by a Trade Union representative. This email is sent during the time period that the sick note states the claimant is unfit to work. The claimant told us she did not attend as she was grieving her mother; she sent her statement for the hearing to Ms Snowden on 5 June. We have seen this statement; she responds to each allegation but does not identify any witness accounts or documents she wishes to be considered at the hearing, accepting that she acted beyond her remit and seeks to justify why she acted as she did.

47. The disciplinary hearing took place in person on 9 June 2020 without the claimant; she did not send a representative. Again, this is in the time period that the sick note states the claimant is unfit to work. In explaining the respondent's decision to proceed with the disciplinary hearing in the claimant's absence Ms Snowden told us"

    "….it was an extremely difficult decision… We made the referral to OH and they said to follow our processes. We consulted with HR about what we should do. It was felt that given the delays and given the fact that [the claimant] had raised concerns around the delays that the impact it would have on [the claimant], the fact we had already tried to hold the disciplinary hearing. We discussed all of that and felt that the best way to proceed was to hold the hearing. It was guidance that I received from HR. I appreciate it was a difficult decision and I am cognisant of that. We did follow OH and trust policy."

48. There is no record before the Tribunal of the advice Ms Snowden received from HR. We have considered the Disciplinary Policy. Paragraph 15 states: "Only if a reasonable explanation is provided will the hearing be rearranged". We find that death of the claimant's mother, communicated in the sick note and through the OT report, was a reasonable explanation for the claimant's non-attendance of a meeting scheduled during a period when the sick note stated that she was unfit for work. In this regard, we find the respondent did not follow its policy guidelines, nor is there evidence before the Tribunal of from its HR resources to proceed in the claimant's absence in these circumstances.

49. At the hearing both investigating officers presented their findings to the Ms Snowden, who considered their investigation reports in advance. The hearing was adjourned, and notes of disciplinary hearing sent to the claimant 19 June 2020 to allow her to comment, again during the period when the sick notes states that the claimant was not fit for work. The claimant accepted that she did not respond to this email. The hearing was reconvened on 9 July 2020 and Ms Snowden's conclusions by reference to each allegation are set out in her letter to the claimant dated 22 July 2020.

<u>Dismissal</u>

50. This letter informs the claimant the respondent has upheld 10 of the allegations (the kissing allegation was not taken into consideration), concluding the allegations constituted misconduct by reference to provisions in its Dignity at Work Policy, Disciplinary Policy, Sickness and Absence Policy, NMC Code and Trust Value. The claimant accepted that an employment relationship should be based on trust and relationship, telling us this was particularly so in the environment in which she was working.

51. When challenged by the claimant that she did not take account of the investigation evidence in her favour Ms Snowden explained, by reference to investigation statements, interviews and documents, the basis on which she had upheld the allegations. Her explanations were comprehensive and consistent with the investigation documents and dismissal letter. For example, when challenged about her conclusion that the claimant was [allegation 4] Ms Snowden gave the Tribunal a detailed review of the evidence she had relied on in concluding the claimant was aggressive, telling us that she had 6 statements and felt that it was completely reasonable to triangulate different statements against one narrative to the contrary. Ms Snowden gave a comprehensive explanation as to why she concluded the Development Plan was not completed, which aligned to the conclusions she gave at the time. She explained in detail the evidence on which she had based her decision to uphold [oxygen allegation] by reference to the nurse's statement that she made the enquiry and was not told what had happened by the claimant, the DATEX report (explaining the reference to minor in the context that the ultimate outcome for the patient was not serious due to the nurse stepping in).

52. We find that the claimant had a genuine belief that the allegations she upheld amounted to misconduct by the claimant. We have considered the grounds on which Ms Snowden reached this conclusion.

Allegation 1 – changed working hours

53. We find the respondent's conclusion in the decision letter that the claimant "did speak to Jeanette Kao" (her mentor), does not align with the respondent upholding allegation 1 that she changed her hours without discussing this with "……mentor". This reason does not accord with some of the contemporaneous interviews. Nevertheless, this is the reason stated. We find the conclusion is flawed. For this reason, we find the respondent did not have reasonable grounds for upholding the allegation.

Allegation 2 – failure to adhere with OT report

54. The respondent concluded that the claimant regularly arrived late for shifts and attended work on an ad hoc basis. The evidence to support this conclusion is in the investigation report. Indeed, by her on admission at her investigation meeting on 6 February the claimant told Ms Butler that she attended a night shift and was not fatigued by it. For this reason, we find the respondent did have reasonable grounds for upholding the allegation.

Allegation 3 – unauthorised annual leave

55. The respondent concluded that the claimant continued to book leave using the HCA system despite having the TNA system explained. The investigation report evidences from interview notes this was explained to the claimant; indeed, in response to Tribunal questions the claimant confirmed that the system had been explained to her. For this reason, we find she did have reasonable grounds for upholding the allegation.

Allegation 4 – unprofessional behaviour

56. Interview notes in investigation report 1 reference incidences when colleagues found the claimant's behaviour unprofessional. At the hearing the claimant explored paragraphs in statements from colleagues interviewed as part of the first investigation which said the claimant was not aggressive or rude. Ms Snowden acknowledged that not all statements spoke of the claimant as being aggressive, explaining in the investigation reports were 6 statements (some from colleagues who had said on one occasion the claimant was aggressive, however on other not) to support her findings and that she "felt that it was completely reasonable to triangulate different statements against one narrative" and that she had a further 2 statements in the report that "corroborated the way [the claimant] spoke and CF said she felt trapped in the office when she was taking about the shift". We find that on the balance of evidence in the first investigation report that the respondent had reasonable grounds for upholding the allegation 4.

Allegation 5 – did not complete objectives in October 2018 Development Plan

57. While we have found that the 3 of 5 objectives completed, we note that the version of the October 2018 Development Plan included in investigation report 1 was not signed; it is not the partially completed version in the hearing bundle. When asked by the claimant at the hearing information caused that her to uphold this allegation, Ms Snowden referred to the evidence in the report that Victoria Darling was not aware whether the plan was completed and left it with Debbie Fisher who was also unaware. As she did not have the partially completed version in either investigation report, Ms Snowden had to balance Mr Fretter's evidence that the reflective statement was not completed with the claimant's that it was. She preferred Mr Fretter's, without exploring the misunderstanding over the substance of the statement or obtaining a copy of the signed plan. Similarly, she drew the Tribunal's attention to emails setting out concerns with the claimant's attendance and shifts. We do not consider these reasonable grounds for concluding" there is no evidence that the action plan was completed". Similarly, there was no evidence it was not completed. For this reason, we find she did not have reasonable grounds for upholding the allegation.

Allegation 6 – kissing

58. Ms Snowden did not determine this allegation as the respondent considered that it had been settled by the time of the disciplinary hearing.

Allegation 7 – 24 July 2019 unsafe practice

59. We are satisfied that Ms Snowden took all the all evidence into account, including the evidence from 2 nurses and the Cause for Concern document that the claimant's actions were outside her scope, that the claimant did not escalate the issue to her, rather she intervened, explaining the DATEX recorded the incident as "minor" in respect of outcome (no harm came to the patient due to the intervention) and triangulated this to conclude that this was an example of serious misconduct telling us "this example alone would be an example of serious misconduct alone" it was ill treatment and mishandling of patients, failure to adhere to codes of practice and failure to follow procedure and it was inaccurate treatment ". For these reasons, we find the respondent did have reasonable grounds for upholding the allegation.

Allegation 8 – threatening behaviour

60. We have considered the interview notes in the second investigation to which Ms Snowden referred in the outcome letter and in her evidence to the Tribunal. This evidence the conclusions Ms Snowden reaches that the claimant was shouting and aggressive with colleagues; indeed, some of the interviews with colleagues use this language. For this reason, we find the respondent did have reasonable grounds for upholding the allegation.

Allegation 9 – shift swap

61. The evidence of Mr Fretter (his interview notes in the investigation report) supports the conclusion that the claimant swapped her shift outside the times on which she was required to work. For this reason, we find she did have reasonable grounds for upholding the allegation.

Allegation 10 observations without supervision on 7 August 2019

62. The evidence Ms Snowden referenced in the second investigation bundle confirms that the claimant's actions were outside her scope in her role at that time and that she was aware that all her actions had to be supervised. For this reason, we find she did have reasonable grounds for upholding the allegation.

Allegation 11 – photographs

63. The second investigation report includes the email sent and shows that the claimant took a photo on her mobile phone containing personal information about a patient consent and this was emailed to Mr Fretter in a format that was not encrypted, contrary to the respondents polices. For this reason, we find the respondent did have reasonable grounds for upholding the allegation.

64. The claimant raised concerns with Ms Snowden that she was not offered an interpreter as part of the investigation process. Ms Snowden explained that to be accepted on the Apprenticeship a student required minimum level 2 English and that the claimant had demonstrated throughout her employment and in her written communications that she had a good understanding of English. We agree. Indeed, there is no evidence this concern was raised by the claimant at any time during the investigation, disciplinary or appeal processes. She had not raised it as part of her claim or in her witness evidence. The first time this issue was raised by the claimant was in her questioning of Ms Snowden. We find there was no flaw in the process in the claimant not being offered an interpreter.

65. There is no evidence that Ms Snowden had a preconceived conclusion and was using the evidence to fit this. There is no evidence the claimant was dismissed as a result of the emails she sent on 29 and 30 July 2019. These emails were not sent to Ms Snowden, did not form any part of the second investigation and were dealt with by a separate investigation which did not involve Ms Snowden. We find that the emails played no part in the decision of Ms Snowden to dismiss the claimant. Indeed, the issues which formed part of this decision were raised in February 2019, that investigation concluding by June 2019, and on the 25 July 2019, before the claimant sent the emails of 29 and 30 July 2019. We find that Ms Snowden's review of the investigation evidence was systematic and comprehensive.

<u>Appeal</u>

66. The decision letter informed the claimant of her right of appeal, which she exercised by email on 16 August 2020. While the appeal was sent outside the respondent's policy of 10 days from date of decision, the respondent allowed it to proceed. The email sets out the claimant's rebuttals by reference to the conclusions in each allegation. We have read this email. It does not raise new grounds of appeal.

67. By letter dated 1 September 2020 the appeal officer, Joanne Bennis, invited the claimant to an appeal hearing on 17 September 2020. She was told who would attend and that she could call witnesses and had the right to be accompanied. At the claimant's request, she attended by Teams. At the start of this hearing, it was established in her email the claimant had not on basis that there should have been a

lesser penalty to dismissal, nor did she bring new evidence (the respondent's policy on disciplinary appeals) something she accepted in evidence to the Tribunal, telling us this was because she had given up on the process. In light of this the claimant was allowed 15 minutes to discuss with her union representative how she wanted to proceed.

68. The claimant did not challenge any part of the appeal process in questioning Ms Bennis, other than raising concerns about her independence. We are satisfied Ms Bennis was independent, having never worked with the claimant. We find that the appeal process was fair.

Issues for the Tribunal to decide

69. The claimant was dismissed with effect from 9 July 2020. The Tribunal must decide what was the reason or principal reason for her dismissal. The claimant says she was dismissed because she made a protected disclosure. The respondent says she was dismissed for misconduct.

Automatic unfair dismissal (protected disclosure)

70. The Tribunal must decide whether the reason or principal reason for dismissal was that the claimant made a protected disclosure? The claimant's case is she was dismissed for sending emails to Vanessa Waller and Shaun Fretter on 29 and 30 July 2019 regarding concerns she had about alleged patient care on Apple-Tree Ward, and these emails were protected disclosures.

71. The respondent accepts that these emails could amount to a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996, but contests she made these disclosures in the public interest.

72. The Tribunal must determine did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? We will decide:

    72.1. Did she believe the disclosure of information in the emails was made in the public interest?

    72.2. Was that belief reasonable?

    72.3. Did she believe it tended to show that:

        72.3.1. a person had failed, was failing or was likely to fail to comply with any legal obligation; and / or
        72.3.2. the health or safety of any individual had been, was being or was likely to be endangered.

        72.3.3. Was that belief reasonable?

73. The Tribunal must ask whether the protected disclosure was the sole or principal reason for the claimant's dismissal.

Unfair dismissal

74. The respondent states the reason for her dismissal was misconduct relating to 10 allegations. If the Tribunal concludes the reason was misconduct, we must consider whether the respondent acted reasonably in all the circumstances in treating the misconduct (in any or all of the allegations) as a sufficient reason to dismiss the claimant? We must ask 4 questions:

74.1. Whether the respondent had reasonable grounds for that belief?
74.2. At the time the belief was formed had the respondent had carried out a reasonable investigation?
74.3. Whether the respondent otherwise acted in a procedurally fair manner? We must look at the process of investigation and the disciplinary and appeal hearings and the timeline involved.
74.4. Whether dismissal was within the range of reasonable responses? We must consider the size and resources of the respondent and ask whether a similar employer would have considered the misconduct a sufficient reason to dismiss.

75. Any considerations relating to contributory fault and any reduction in the compensatory award for unfair dismissal will be made under the principles set out in *Polkey v A E Dayton Services Limited 1998 ICR 142.* We shall refer to these principles as a 'Polkey deduction'. A Polkey deduction is a deduction made from a compensatory award in a successful unfair dismissal case to reflect the chance that, if a Tribunal finds that a dismissal was unfair, the Tribunal considers that the dismissal would have happened in any event. This can lead to any award for compensation being reduced by a percentage calculation based on the Tribunal's view of the likelihood of dismissal occurring.

76. Mindful that Ms Kalista was not represented, we set out these questions at the start of the hearing.

Law

Automatic unfair dismissal

77. Section 103A of the Employment Rights Act 1996 says: "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure." A dismissal which is contrary to section 103A is 'automatically' unfair. The tribunal does not need to consider whether the dismissal was reasonable in the circumstances.

78. Section 43B of the Employment Rights Act 1996 defines disclosures which qualify for protection; relevant to this claim are:

> **43B Disclosures qualifying for protection.**
>
> (1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
> ……
> (b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> ……
> (d)that the health or safety of any individual has been, is being or is likely to be endangered,
> …….
> (f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

79. The employee has the burden to show they had a reasonable belief the disclosure is made in the public interest. That, at the time the employee made the disclosure they believed it was in the public interest; if so, was that belief reasonable.

80. The burden shifts to the employer to that it was not materially the reason for the dismissal or that it was not materially influenced by any protected disclosure of the employee (Fecitt and others v NHS Manchester [2011] EWCA Civ 1190). A Tribunal

must consider whether the sole or principal reason for dismissal is that the employee made a protected disclosure (Kuzel v Roche Products Ltd [2008] ICR 799.

81. In a complaint of a conduct dismissal on the ground of protected disclosures, the question is whether the protected disclosure was the sole or principal reason for the claimant's dismissal. The starting point is generally the motivation of the decisionmaker. This will require consideration of whether they knew about the protected disclosure, to understand whether the protected disclosure was the reason or the principal reason for dismissal.

Unfair dismissal

82. Section 94 of the Employment Rights Act 1996 (the '1996 Act') confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95. This is also satisfied by the respondent admitting that it dismissed the claimant (within section 95(1)(a) of the 1996 Act).

83. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98:

    83.1. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Where this is in dispute, an employer bears the burden of establishing that it had a potentially fair reason for dismissing its employee. The potentially fair reason must be capable of justifying the dismissal (Abernethy v Mott Hay Anderson [1974] ICR 323)

    83.2. Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

84. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

85. Where the reason for dismissal is misconduct, Tribunals should have regard to the well-established guidance in British Home Stores v Burchell [1978] ICR 303. We have not felt it necessary to include the often-cited passage from Arnold J's Judgment in Burchell. The Tribunal must decide whether the employer held a genuine belief on reasonable grounds, and after carrying out a reasonable investigation, that the employee was guilty of misconduct. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed. It is immaterial how the Tribunal would have handled the events or what decision it would have made. The employer, and not the Tribunal, is the proper person to conduct the investigation into the alleged misconduct. Burchell and countless decisions since have served as a reminder that a Tribunal must not substitute its view for that of the reasonable employer (Iceland Frozen Foods Limited v Jones 1982 IRLR 439 and Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23*).* The employer is the primary fact finder; the Tribunal's role is to review the facts evident during the disciplinary process, not what may be raised at a later date (Fuller v The London Borough of Brent [2011] EWCA Civ 267, at [32] of Cossington).

86. The case of Iceland Frozen Foods is similarly long-standing authority that reminds Tribunals that their function is to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. The question for the Tribunal is whether the employer acted fairly and reasonably in all the circumstances at the time he was dismissed (London Ambulance Service NHS Trust v Small 2009 IRLR. In Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23 CA, the Court of Appeal confirmed that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal. Ultimately a Tribunal must consider, on the facts of the case, no reasonable employer in the respondent's position would have dismissed the claimant (British Leyland (UK) Ltd v Swift [1981] IRLR 91). The Tribunal cannot and must not ask whether a lesser sanction would have been appropriate.

87. The Tribunal must consider the whole process when determining fairness, notwithstanding any potential deficiencies (Taylor v OCS Group Ltd [2006] ICR. A Tribunal must consider whether any defect is so significant as to render the whole process unfair, considering equity and the substantial merits of the case to balance the seriousness of the misconduct and any procedural imperfections.

88. The compensatory award if a claim of unfair dismissal is successful must be 'just and equitable'. As a result of the decision in Polkey v AE Dayton Services Ltd [1987] IRLR 503 a Tribunal may reduce the compensatory award to reflect the chance that the claimant would have been dismissed in any event had the dismissal followed a fair process. If, in reaching its conclusions, the Tribunal identifies a deficiency with the process such that it concludes the dismissal was unfair, the Tribunal must assess whether this deficiency made a difference to the overall outcome. The assessment as to the percentage likelihood of dismissal without the defect is by reference to the actual employer in the claim. To substitute the Tribunal's own mindset is an error of law.

Conclusions

89. We set out our conclusions by reference to the list of issues. Parties are agreed the claimant was dismissed with effect from 9 July 2020. The claimant says she was dismissed because of her emails of 29 and 30 July 2019, which she says are protected disclosure. The respondent upheld 10 allegations of misconduct and for this reason it says she was dismissed for misconduct and the dismissal was fair.

Automatic unfair dismissal (protected disclosure)

90. The Tribunal must decide whether the reason or principal reason for dismissal was that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed. The claimant's case is she was dismissed for sending an emails to Vanessa Waller and Shaun Fretter on 29 and 30 July 2019 regarding concerns she had about alleged patient care on Apple-Tree Ward, and these emails were protected disclosures.

91. The respondent accepts that these emails could amount to a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996. We agree. We have found that, while her concerns about patient safety were genuine it was not this that motivated her disclosure. Combining the fact that she did not raise her concerns with the respondent, but with the University within hours of learning that the University had been sent a Cause for Concern documents, we have found that it was this and not any concerns she had about patient safety which motivated the disclosure.

92. Mindful of the sensitive contents of the emails, we have gone on to consider the objective element of this part of the test, that is whether, if we had found that the claimant believed her emails to have been sent in the public interest, we would have

found this belief to have been reasonable. We conclude, in the context of the information contained in the emails and the issues highlighted by the claimant, that was a reasonable belief. Indeed, the respondent took these seriously; we have found that Mr Fretter escalated the concerns raised by the claimant, and these were investigated by the respondent separately to the disciplinary process. For these reasons we conclude that the disclosure was protected as the 30 July email was sent by the claimant to her employer.

93. As we have found that the email was a protected disclosure, we must consider whether the email was the reason or principal reason for the claimant's dismissal. It is for the employer to show that it was not materially the reason for the dismissal or that it was not materially influenced. We must ask The Tribunal must ask whether the email was the sole or principal reason. The starting point is generally the motivation of the decisionmaker, Ms Snowden. There is no mention by the respondent during the second investigation process, the disciplinary and appeal processes of these emails. In our judgement Ms Snowden's decision was not influenced by these emails.

94. The claimant's claim of automatic unfair dismissal does not succeed.

Unfair dismissal

95. Next, we must consider whether the respondent dismissed the claimant for misconduct. In our judgement the respondent has discharged the burden upon it of establishing that its reason for dismissing the claimant was potentially fair, the reason being misconduct.

96. First, we consider whether the respondent had reasonable grounds for that belief. It has satisfied us that it genuinely believed the claimant to be guilty of misconduct. We have found Ms Snowden, as the decision maker, genuinely believed that the claimant was guilty of 10 of the 11 allegations before her. We have explored the basis on which Ms Snowden upheld each allegation. We have found that she had reasonable grounds for upholding allegations 2, 3, 4, 7, 8, 9, 10 and 11.

97. We turn now to whether the respondent had undertaken a reasonable investigation in all the circumstances and followed a reasonably fair procedure, considering ACAS guidance and its own internal procedures. The hearing explored the timeline. We have found that the delay between February and August 2019 resulted in the most part from a family bereavement and staffing issues. However, this does not explain a delay of 6 months.

98. We have also found that a delay of this length breached the respondent's Disciplinary Policy to deal quickly, fairly, consistently, and constructively with breaches in conduct, and specifically paragraph 4.3 that the respondent an investigation report of the findings in the shortest possible time and submit to the sponsoring manager, to regularly keep the employee and sponsoring manager updated and informed of the likely timescale for completion of the investigation and report. By reference to its own internal procedures, the respondent did not follow a reasonably fair procedure. However, we have found that the first time the claimant raised concerns with the length of the process was 12 September 2019 when her trade union representative queried the lack of formal outcome to the first investigation and questioning the suspension.

99. Mindful that we must, as a matter of law, consider any procedural defect in the context of all the circumstances of the decision to dismiss, we conclude that this delay alone was not sufficiently serious to render the whole process unfair. We reach the same conclusion about our findings on the suspension, that the respondent did not keep the claimant updated until chased. We have considered

any detriment to the claimant. She did not raise any concerns with the length of the process between February and August at the time or in her claim. This refers to a loss of earnings during this time for bank work, something which was an extra payment. She was paid her usual salary February to August, and throughout the period of her suspension she received full pay. We have found the decision to delay the outcome of the first investigation until completion of second investigation was explained to the claimant by Ms Parker, stating the reasons for doing so. While she may not agree with these reasons, she had an explanation. It is not for a Tribunal to question this explanation or consider what it may have done in the circumstances; to do so would be an error of law.

100. Given the reasons before us, confirmed by Ms Snowden and Ms Bennis in oral evidence, that it would be more stressful to conclude one investigation and immediately start another, we cannot conclude that no reasonable employer would have taken the same approach, the test we must apply.

101. Next, we turn to the time from 27 August until completion of the second investigation report in June 2020. We have found that investigations took place in December 2020, the respondent explained the delay (February 2020) and the delays in May resulted from the claimant's requests to reschedule the date of the disciplinary hearing. Again, the claimant has not in her claim form or witness statement set out the unfairness she experienced from the period of the second process. Based on our findings for the second investigation, we cannot conclude that no reasonable employer would have taken the same approach, the test we must apply.

102. In determining whether the respondent otherwise acted in a procedurally fair manner, we must consider its handling of the disciplinary hearing. We have found that initial delays in May 2020 were responding to the claimant's requests to reschedule the hearing. The decision to go ahead in the absence of the claimant was made unilaterally by the respondent based on the OT report. We have found that the respondent was aware when it made this decision that the claimant's mother had recently died, that she was in Poland and due to lockdown restrictions was unable to return at that time. The respondent says it followed policy and HR advice. We have found that the sick note informed the respondent that the claimant would be unfit for work until 25 June 2020.

103. We conclude that the deficiency to the claimant in proceeding in her absence, during the period her 1 June sick note states that she would not be able to work until 25 June, was that she was not afforded the opportunity to engage fully in a hearing which determined the outcome of 2 investigations the first of which started 15 months earlier. The questions we asked ourselves were:

103.1. would any reasonable employer, with the size and resources of an NHS Trust, have proceeded with a disciplinary hearing during a time period when a sick note stated the employee was not for for work; and

103.2. would any reasonable employer, with the size and resources of an NHS Trust, have dismissed the claimant without affording her the opportunity to attend a disciplinary hearing once she was able to do so, emotionally and logistically, following the death of her mother.

104. In our judgement, on the balance of probabilities, no reasonable employer would have proceeded with the hearing so soon after the claimant's mother had died, when in receipt of a doctor's note informing the employer an employee would not be fit to work for another 2 weeks.

105. We have found the respondent had reasonable grounds for upholding [7] allegations; all are serious and amount to misconduct under the respondent's

Disciplinary Policy, meaning the ultimate outcome could be dismissal. In these circumstances, where the claimant was facing losing her job, having just lost her mother, we conclude that the respondent's decision to proceed with the hearing in the claimant's absence was procedurally unfair in all the circumstances, including the seriousness of the allegations she faced. It is our judgement that no reasonable employer with the respondent's resources would have proceeded as the respondent did. We consider that a reasonable employer would have afforded her the opportunity to attend a disciplinary hearing at a time when she was deemed to be fit for work. The justification for the decision to proceed, that she had raised concerns about previous delays, was not reasonable in all the circumstances where the claimant's mother had recently died, and she was signed off from work.

106. As we have concluded that the dismissal was procedurally unfair in the handling of the disciplinary hearing, we must consider whether to reduce any compensatory award to reflect the likelihood that the claimant's employment would or might still have terminated in any event. We are mindful that this is not necessarily an all or nothing exercise. Nevertheless, in our judgement, this is a case where a clear prediction can be made as to what would or might have happened. The claimant had not raised before the Tribunal or at any time since the hearing any detriment she says she suffered as a result of the June 2023 Disciplinary Hearing proceeding in her absence. Quite simply, the claimant has not raised anything she says would have been different had she attended the hearing, and there is no evidence before us that the hearing would have progressed differently. While the process of the investigations was protracted overtime, we have not found it significantly lacking. Indeed, while the investigation was on-going, the claimant did not challenge its extent, only its length and not until August 2019.

107. Based on our findings that the respondent had reasonable grounds to uphold 7 of the 10 misconduct allegations and our findings that these allegations constituted gross misconduct by reference to the respondent's Disciplinary Policy, we can sensibly conclude that she would still have been dismissed even if the respondent had waited to hold the Disciplinary Hearing when the claimant had returned from Poland. Therefore, we conclude that the compensation award must be reduced by 100%. For these reasons, there is no award for damages for unfair dismissal.

Employment Judge Hutchings

15 June 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27 June 2023

GDJ
FOR EMPLOYMENT TRIBUNALS