



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Albert Emueze

**Respondent:** Guys & St Thomas' NHS Foundation Trust

**Heard at:** London South      **On:** 2- 4 August 2023

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

## **Appearances**

For the claimant: Mr Ogilvy, Legal Consultant

For the respondent: Mr Watson, Counsel

## **JUDGMENT WITH REASONS**

### **Decision**

The claim for Unfair Dismissal under S.94/98 of the Employment Rights Act 1996 is not well founded and fails.

The claim for Wrongful Dismissal is not well founded and fails.

### **Reasons**

#### **Claims, appearances and documents**

- (1) This was a claim for Unfair Dismissal under S.94/98 of the Employment Rights Act 1996 and for wrongful Dismissal ( in respect of notice pay).
- (2) The claimant was represented by Mr Ogilvy, Legal Consultant, the respondent by Mr Watson, Counsel.
- (3) The Tribunal had a Bundle running to 425 pages.
- (4) The issues in the case were agreed.
- (5) The Hearing had been postponed from November 2022.

- (6) The Tribunal heard from the claimant and for the respondent, from Ms Anita Macro, Deputy Head of Nursing and Clinical Lead for the Neighbourhood Nursing (suspended the claimant and commissioned the investigation), Ms Karen Milner, former Deputy Head of Nursing (investigating officer), Ms Jackie Downing, Deputy Head of Nursing within the Integrated Local Services Directorate (Dismissing Officer) and Ms Jo Carter, Head of Nursing, Heart Lung and Critical Care Clinical Group (Appeals Officer).
- (7) It emerged during the afternoon on day 1, the claimant's representative did not have the same version of the Bundle as the respondent and the Tribunal.
- (8) The Tribunal informed the claimant's representative that subject to an explanation as to how he came to working off a different bundle, he could address the Tribunal on any attendant prejudice or any application he wished to make at the outset of day 2, noting in passing however, that this was the second listing of this trial. The respondents counsel asserted the Bundle had been sent to the claimant's representative.
- (9) No further submissions were made by either party on day 2.

**Relevant Findings of Fact**

- (10) The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.
- (11) Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant to any issue in the case.
- (12) The respondent is an NHS Trust.
- (13) The claimant worked as a Band 5 community nurse from 11 May 2015 until his dismissal for gross misconduct on 15 June 2021.
- (14) The claimant's role involved delivering nursing care to patients in their homes, sometimes alone.
- (15) The claimant was line managed by Mr Kargbo, He was bound by the professional obligations in the Nursing and Midwifery Council Code (pages 98-120).
- (16) This Code included under section 20 (page 115), a requirement for nurses to uphold the reputation of the profession at all times including:

- Acting with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment (20.2)
  - Treat people in away that does not take advantage of their vulnerability or cause them upset or distress (20.5)
  - Stay objective and have clear professional boundaries at all times with people in your care (20.6)
- (17) Under the respondent's Gross Misconduct section of its disciplinary procedure, failure to follow the professional code of conduct was cited as an example of Gross Misconduct, amongst others (page 65).
- (18) On 29 October 2020, an adult safeguarding form was completed in relation to patient X, by Merton council (pages 144-150). This related to allegations against the claimant that he had (on 15 October 2020):
- Grabbed hold of the patient and said he wished he could take her with him
  - Said to the patient he had developed feelings towards her and he could help her shower
  - Engaged in a WhatsApp conversation with the patient and sent her a photo of him (then was blocked) (pages 218 – 220)
  - Kissed the patient on the lips
  - Followed the patient into the bedroom and tried to undo her pyjama top
  - Not been wearing PPE
  - Further, on 22 October he had attempted to visit the patient when she told him she wanted him to leave after he had told her to let him in.
- (19) This report was not provided to the respondent until 18 January 2021. It was not clear why there had been a delay, the Tribunal found this was not owing to any act or omission on the respondent's part (pages 155-156).
- (20) An allegations panel was formed comprising of a Deputy Chief Nurse, the Trust's Safeguarding Lead, an HR adviser and Ms Macro, as the Service Lead. This was because the allegations were considered to be serious and because the allegations had been reported by an external body (the Local Authority).
- (21) The allegations panel decided to suspend the claimant. The panel took into account a previous 'improvement notice' in April 2020 which had concluded/partially upheld an allegation that the claimant had not kept professional conversational boundaries with a patient and the dangers of becoming over familiar with female patients who are well known to the team (page 138). An allegation that the claimant had offered a patient a cuddle had not been upheld, though it was noted that this allegation was made via that patient's GP and she did not wish to discuss it any further with anyone else.
- (22) The claimant was suspended on 21 January 2021. The suspension meeting was handled by Ms Macro. The claimant was offered the right to be accompanied at the suspension meeting but he declined this. The suspension

letter was at page 162-164. The allegations against the claimant were as follows:

- That he had made inappropriate and sexually orientated physical contact with patient x.
  - That he had made inappropriate comments to patient x by offering to assist her in the shower, saying he had feelings for her and would like to take her with him.
  - That he had kissed patient x on the lips.
  - That he had followed patient x into her bedroom and tried to open her pyjama top.
  - That he had communicated with patient x by WhatsApp and given her his personal mobile number and sent her a photograph.
  - That he did not wear PPE on his visit to patient x.
- (23) The claimant denied the allegations at the meeting though he accepted he used his personal mobile phone for work and he had communicated with the patient by WhatsApp. He said he gave out his personal mobile number to patients who needed it and expressed the claimant was emotional as the claimant was now outside of the usual visit area for the team.
- (24) By a letter dated 28 January 2021, the claimant was informed by Ms Milner that she would be conducting an investigation into the allegation (pages 168-169). A copy of the disciplinary procedure was attached. The claimant was invited to submit a statement in relation to the allegations and was also informed that if necessary, a meeting would be set up with him in due course. The claimant was informed that if a disciplinary hearing was required, this would be arranged within a 12-week period.
- (25) The claimant submitted a statement in response to the allegations (page 170). He denied the allegations but accepted the use of his personal mobile phone and messaging with the claimant. He said this was a consolatory gesture as the claimant had expressed regret at the change in care which would now come from the local district nursing team following the claimant's change in GP. He added that his work phone was not working and he would give out his personal number to patients who needed it.
- (26) On 5 February 2021, Mr Fullerton, Safeguarding Adults Lead, as part of initial safeguarding enquiries. This was recorded in a contemporaneous email of the same day (pages 175-177). Mr Fullerton recorded that the patient's account was consistent with that which the claimant had previously provided to Social services. She had added:
- That the claimant always seemed to out of his way to make physical contact – putting his arm around her shoulders, giving her a hug

- She believed all he was looking for was sex and all that had happened had been to manipulate her to this point
  - The police had visited her but she had declined to press charges but wanted it stopped from happening to others
  - She said she had set up a phone screening service so she can decide who she talks too. She said she was 'very stressed'.
  - She said she didn't want much involvement in the process but wanted to know the outcome so 'he cant do this to other vulnerable women'
- (27) Ms Milner did not arrange to interview the claimant as having reviewed Mr Fullerton's email, she determined it was broadly consistent with the account provided to the safeguarding team at Merton Council. Further, there was no information before her that the account might be fabricated. In addition, Ms Milner was informed by the safeguarding team she could not interview patient X to avoid adding stress to her.
- (28) Ms Milner interviewed the claimant on 18 February 2021. The notes were at pages 180-184. The claimant explained that his exchange of messages with the patient was on a Christian level. Also, in relation to the last Whats App message when the patient had said "I don't think I'm well enough for a relationship at present, so we best leave it there, I like you, but it felt a bit rushed", the claimant said maybe the claimant had got angry and he did not have time to check messages. He accepted that in retrospect, he should have taken the situation more seriously and escalated it. On one occasion he said the patient had touched and held his hand. He said he had not kissed her and would not do so as she was dirty. He said he did not know where this all came from. He said he visited her again on 22 October, having taken the file away with him on 15 October 2020, as he did not know if the new district nursing team was in place. He had not telephoned to check instead as he said the other team did not have the patient on their caseload.
- (29) Ms Milner also interviewed Mr Kargbo and Mr Manu. Mr Kargbo stated that the claimant often asked to see mostly women, some with mental health issues, who often lived alone and that he had a similar complaint of this nature. Mr Manu (who had responsibility for Allocations), confirmed that the claimant did move his allocation around a lot but believed this was to do with geographical issues as he didn't drive. When he had asked him however, he said he had just walked off. He said he was aware the claimant used his personal mobile but not that his work phone was broken (pages 188-189).
- (30) Ms Milner also interviewed 2 other District Nurses who expressed frustration about how the claimant swapped/change the allocations but they did not offer an explanation about why this happened.
- (31) Ms Milner compiled an investigation report dated 13 April 2021. This was at page 208-215. Ms Milner concluded that there was a disciplinary case to answer in relation to all of the allegations with the exception of allegation 6 relating to PPE.

- (32) Amongst the matters considered, Ms Milner relied on the previous improvement notice and the partly upheld allegation relating to the claimant not maintaining professional boundaries with a patient. She also referred in her report to the claimant needing to write a reflective account (section 2.4, page 209). Further, two of the allegations at the time were not upheld due to a lack of evidence, which included attempted physical contact. The investigation report referred to the patient on that occasion reporting the issues via her GP and refusing to engage any further. The Tribunal was not satisfied on the evidence before it that the report at pages 134-139 had been shared with the claimant, but the Tribunal found that Mr Kargbo had shared the output with the claimant on 3 June 2020, at a meeting (see letter at page 141). The suggestion by the claimant in evidence that the self-reflection task was about PPE was rejected. It made no sense in the light of the other allegations made and the partially upheld allegation about professional boundaries with female patients.
- (33) The claimant was invited to a disciplinary hearing by a letter dated 27 April 2021 (pages 239-240) together with the management case and appendices. There was no complaint in these proceedings that any evidence relied upon by the respondent was omitted. The claimant was forewarned that action up to and including dismissal could be taken.
- (34) The hearing took place on 19 May 2021 before Ms Downing. The minutes were at pages 249-269. The claimant was accompanied by a union representative from RCN. The investigation manager was called to present her case and Mr Kargbo and Mr Manu were also called. The Hearing was comprehensive with the investigating manager presenting her case first followed by the claimant's response to the allegations. There followed questions from the investigating officer, HR, and Ms Downing. In response to questions from Ms Downing about grooming and the need to maintain professional boundaries, the claimant accepted it was wrong to have an affair or suggest an affair with a patient and as some patients were vulnerable, there was a need to maintain a balance.
- (35) The claimant's union representative also asked about the previous improvement notice and Mr Kargbo referred to the reflective statement about behaviours and confirmed this had been done. This was not challenged at the time as a conversation which had not happened or that the statement was not done (page 252).
- (36) In her outcome letter, Ms Downing upheld all the allegations. With regard to allegations 1 to 4, she had regard to the patient having repeated the account given to Merton Council, consistently to Mr Fullerton a few months later. She concluded that many visits would be carried out alone and whilst she accepted several rearranged or swapping of allocations had logical explanations, she concluded that this had also provided the claimant with an opportunity to visit vulnerable women alone. She also had regard to the previous partially upheld allegation about professional boundaries. She had regard to the patient never having had cause to complain before yet had provided a congruent account for the safeguarding referral and the investigation. She also had regard to the claimant's denial of having kissed the patient for reasons relating to hygiene

rather than this being because of professional misconduct. She concluded the claimant had clearly crossed the boundary in the guise of friendship.

- (37) In relation to allegation 5, Ms Downing was satisfied that the claimant had been using his personal phone to communicate with the claimant which had included him sending the patient a picture of himself. The claimant had not escalated any concern in the light of the messages received. This was notwithstanding the previous issue raised about maintaining professional boundaries. In oral testimony, Ms Downing said that the claimant had previously been given the benefit of the doubt at the time of the April 2020 allegations which included indicated physical contact as there was no other evidence.
- (38) In reaching her sanction, Ms Downing had regard to remorse, but did not feel the claimant had learnt from the previous occasion of keeping professional boundaries. She referred to the NMC Code which included references to not taking advantage of a patient's vulnerability, to have clear professional boundaries at all times, respecting the privacy and dignity of patients and to act with integrity in dealing with confidential information (page 116, page 18 of the NMC Code). Ms Downing decided that she would dismiss summarily for gross misconduct and cited allegation 5 particularly. In evidence, she explained more than once, her decision making was multifactorial and all allegations were upheld but for her allegation 5 was the one that 'hung' the claimant.
- (39) The claimant was given a right of appeal which he duly exercised. He also submitted a grievance which was inter-related. The respondent dealt with these concurrently. The appeal grounds were:
- The decision was unfair, unsustainable and unreasonable
  - There was a failure to clarify, the allegations could not be substantiated, there were no witnesses and therefore the balance of probabilities was ineffective
  - There had been no action by the police and this had been a witch hunt
  - There was a lack of cogent reasoning/investigation
  - An unjust opinion had been formed regarding the claimant's credibility, there had been character assassination, a failure to decipher the mens rea and actus reus regarding Ms Milner's comment about whether she would be content for the claimant to visit a family member and that geographic scheduling offers a convenient cover up.
  - The improvement notice should have helped not hindered the claimant's position
  - He challenged the balance of probabilities approach to the allegation regarding WhatsApp communications
  - Inappropriate use of the word 'Dear'
  - The claimant's use of his phone.
- (40) The claimant also submitted a grievance document dated 12 September (pages 333-340) which Ms Carter confirmed receipt of at the start of the appeal hearing on 15 September 2021 (page 318). There was no complaint in these proceedings about conflating the grievance and dismissal appeal. There was a complaint however about whether all of the grievance points had been dealt

with in the appeal outcome. In response to Tribunal questions, the claimant said the only matter which had not been addressed was the 6-month delay.

- (41) Ms Carter presided over the appeal. The claimant was accompanied by his union representative. The appeal was essentially a review of the decision to dismiss having regard to the claimant's grounds of appeal and the appeal criteria – new evidence, process issues, decision fair and reasonable. This was made clear at the outset.
- (42) At the appeal hearing the claimant said he placed reliance on the respondent's 'Serious Incidents' procedure which was at pages 406-409. The claimant said he did not have much to say about that but simply that was what he had been advised (page 321). The reliance on this policy was not taken any further in this hearing, it was not asserted why it might apply or what difference it would have made. It was a policy which appeared to apply in circumstances of clinical acts or omissions resulting in injury or death.
- (43) The appeal was rejected. The outcome was at page 328-331. The appeal was rejected as the claimant had not presented any new evidence, he had failed to show any insight into his conduct and the inappropriateness of his contact with the patient and had said the patient might have been untruthful because of mental health issues and Ms Carter found no reason not to believe the claimant's relationship with the patient had overstepped the professional boundaries.

### **Applicable Law**

#### **Unfair Dismissal – S.98 (2) & (4) Employment Rights Act 1996 ('ERA')**

- (44) The respondent relied on S.98 (2) (b) (conduct) in relation to its potentially fair reason for the claimant's dismissal. The burden to show the reason rested with the respondent.
- (45) Subject to showing a reason, the Tribunal needed to consider whether the dismissal was fair or unfair, having regard to the reason shown by the respondent, whether the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissal which question shall be determined in accordance with equity and the substantial merits of the case – S.98 (4) ERA. This is a neutral burden.
- (46) The test in a conduct case is as set out in the well-known case of ***BHS v Burchell 1978 IRLR 379***:
- That the respondent genuinely believed in the claimant's misconduct
  - That belief was based on reasonable grounds
  - That there was as much investigation as was reasonable.
- (47) Further, the Tribunal needed to be satisfied that the dismissal was within the range of reasonable responses. This does not entitle a Tribunal to substitute its



view for that of the employer. The range of reasonable responses applies both to the substantive decision to dismiss and to the procedure **Sainsburys Supermarkets Ltd v Hitt EWCA Civ 1588**.

### **Conclusions and analysis**

- (48) Applying **Burchell**, the Tribunal first considered if the respondent had a genuine belief in the claimant's misconduct. The Tribunal concluded that the respondent did have a genuine belief in the claimant's misconduct. There was nothing presented to the respondent to suggest that there was some ulterior or dishonest motive behind the patient's escalation of her serious concerns. It was done quite contemporaneously to the events of 15 and 22 October 2020. It was not the claimant's case that there was some bad blood or adverse motive. Neither was there any competing reason before the Tribunal that the respondent was looking for an excuse to dismiss the claimant for capability, restructure or redundancy reasons which had influenced them to use these events as an opportunistic occasion to dismiss the claimant. The respondent's belief was thus exclusively caused and formed by the events leading up to the claimant's dismissal, nothing more or less.
- (49) In assessing whether the respondent had reasonable grounds to hold its belief, the Tribunal concluded that the respondent did have reasonable grounds for its belief. The respondent was entitled to take into account the two written accounts of the patient which, were broadly consistent. They were thorough and specific. They were provided almost 3 months apart but maintained significant common ground albeit there was additional information provided. The respondent also had regard to the WhatsApp messages. These showed the claimant engaging in conversation with the patient using his personal phone which included commenting on the patient's appearance and sending a picture of himself. The last message on 15 October 2020 was extremely incriminating. On any objective view, the respondent was entitled to be alarmed by what that message suggested had happened on that day. It was unactioned, not addressed or escalated. The patient had blocked then unblocked the claimant to send that message. The respondent had regard to the patient being a vulnerable female patient with mental health issues and being an organisation providing nursing care. That context was crucial. The respondent also had regard to the claimant's previous occasion to write a reflective statement about patient boundaries. The claimant's case on this seemed to completely miss the point about the key relevance of the April/May 2020 incidents. The respondent was entitled to have regard to the crossing the boundary similarities in its assessment of whether on this occasion the claimant had crossed the line and/or in respect of sanction. The respondent also reasonably took into account that in relation to complaints not upheld in April/May 2020, the claimant was given the benefit of the doubt on that occasion because of a lack of supporting evidence having regard to the circumstances of how those allegations were reported. The respondent noted that on that occasion, the complaints from another patient, which included offering physical contact, had been made via a GP and the patient did not want any further contact. That was a factor the

respondent could have regard to in determining the credibility of the claimant's defence on the (subsequent) occasion (leading to his dismissal) and in its overall assessment, on a balance of probabilities, whether it believed the case against the claimant.

- (50) In assessing the reasonableness of the investigation, the Tribunal concluded that the respondent carried out as much investigation as was reasonable. At each stage of the disciplinary process, the enquires of the case against the claimant were thorough. The two key criticisms made by the claimant were first that the patient was not directly interviewed face to face by the investigating officer. In this regard, the Tribunal concluded it was open to the respondent not to do so in circumstances where two full accounts existed of the patient's complaints which were broadly consistent together with some supporting corroborative written messaging/communications evidence. In addition, the patient had been interviewed by a designated safeguarding lead who had regard to the patient's vulnerability as a female patient with mental health issues who did not wish to have any further stress. The second key complaint was about the applicability of the Serious Incidents procedure. This was not advanced with any real force at the time or during this Hearing; it was plain and obvious that the procedure was not applicable in these circumstances. This was not a case where the patient had been caused injury as a result of clinical misconduct. This was quite obviously a situation characterised as professional misconduct. To the extent that there was complaint of a delay in the investigation process taking 13 weeks not 12 weeks (as provided for in 9.15 of the disciplinary procedure), the delay was minimal and not unreasonable. There was criticism of the respondent not disclosing meeting notes with other patients (which patients had not revealed any adverse information relating to the claimant – pages 222-223). Under cross examination, Ms Downing said she did not consider the notes to be relevant. She did not have regard to them. She said she had been sent a long list of names which she also did not have regard to. Instead, she focused on the complaints received, noting there had not been others previously. The Tribunal found this to be a reasonable explanation within the range of reasonable responses.
- (51) In relation to sanction, the Tribunal concluded that it was open to the respondent to dismiss the claimant for Gross Misconduct. The Tribunal noted that Ms Downing's outcome placed greater weight on allegation 5; she also said however that her decision-making was multifactorial. She had upheld allegations 1 to 4. Allegation 5, even on its own, amounted to Gross Misconduct under the Gross Misconduct examples on page 65 – (I) (breach of professional conduct code), when read with 20.5 & 20.6 of the Code on 115 regarding not taking advantage of vulnerability and having clear and professional boundaries. The claimant relied on Ms Downing's reference to allegation 5 being the key allegation as that was the one for which the respondent had documentary evidence. Nothing turned on this statement, it was merely a statement saying that was the allegation she could be most sure about but her reference to her decision-making being multifactorial was understood to mean that the allegations were intertwined. The last WhatsApp message provided a relevant related reason to whether allegations 1 to 4 were made out. Ms Downing also stated in evidence that if she had only upheld allegations 1 to 4, she would still

have decided to dismiss. In closing submissions, Mr Ogilvy said the right and proper course of action would have been an extended final warning – he said that should have been the outcome. Thus, even on the claimant’s case, the appropriate sanction was as high as an extended final written warning.

- (52) The decision to dismiss was both substantively and procedurally within the range of reasonable responses.
- (53) In pursuance of the foregoing analysis, the respondent has satisfied the Tribunal that it had a potentially fair reason for the claimant’s dismissal (conduct) and the Tribunal is satisfied it acted reasonably in treating this as a sufficient reason for the claimant’s dismissal.
- (54) The claim for Unfair Dismissal fails.

### **Wrongful Dismissal**

- (55) The Tribunal was satisfied itself that the claimant was in fundamental breach of contract. In assessing the case against the claimant, it was noted that there was in fact a third ‘re-enforcement’ of the patient’s complaint on 18 January (page 156). The accounts were fulsome and there was no real case before the Tribunal about why such detailed accounts would be fabricated. In addition, the Tribunal was most concerned by the content of the last WhatsApp message which suggested in fairly clear terms that boundaries had been completely crossed and it was evidence on its own of a relationship of a romantic, physical or sexual nature. The patient had blocked the claimant from messaging her before unblocking him to send this message and then blocking him again which the Tribunal concluded was evidence of a concerned patient. This view was compounded by the complete absence of any reaction or escalation thereafter. This was astounding. If the claimant only had a professional relationship, as he claimed, and the visit on 15 October 2020 was only professional, such a message would not, on any objective view, be unanswered or not escalated. The message itself referred to and spoke of a relationship. Pursuant to Rule 41 & *Hovis Ltd v Louton UK EATPA/1023/20/LA*, it is open to the Tribunal to make this finding on the evidence before it, even in the absence of patient X giving direct oral testimony. The claimant breached the professional code of conduct at least in relation to sections 20.5 and 20.6 (see above) which were serious breaches justifying summary dismissal. The Wrongful Dismissal claim fails.

### **Other**

- (56) As a postscript, the Tribunal records its interaction with Mr Ogilvy during submissions when it was suggested by Mr Ogilvy that he had been shut down from advancing the claimant’s case on occasions. This was rejected by the Tribunal. This discussion was had, in context, for 2 reasons. First, because notwithstanding the claimant’s acceptance in response to Tribunal questions, that *only* the ‘delay’ point was outstanding from his grievance, Mr Ogilvy attempted to argue in submissions for a number of failings relating to the grievance. It was said to Mr Ogilvy that those submissions were unlikely to have

much force. Second, Mr Ogilvy referred to the delay between October 2020 and January 2021 as being blameworthy on the respondent's part, who he said had been working in tandem with Merton Council. This was a new allegation about which no evidence had been put or tested. Thus, Mr Ogilvy was reminded that his submissions would not carry any weight.

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**Employment Judge Khalil**

**21 August 2023**

Sent to the parties on:

21<sup>st</sup> August 2023

For The Tribunal Office