EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101861/2023

Final Hearing Held in Dundee on 5 - 7, 11, 13 - 15 and 22 March and 15 April 2024

Employment Judge A Kemp
Tribunal Member S Currie
Tribunal Member J Lindsay

Mrs Nicola McIntyre	**Claimant** **Represented by** **Mr P Brady** **Friend**
Cygnet Health Care Ltd	**Respondent** **Represented by** **Mr M Brien** **Barrister** **Instructed by** **Mr M Creamore** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The unanimous Judgment of the Tribunal is that

(i) the claimant was dismissed by the respondent under section 95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act"),

(ii) that dismissal was unfair under section 98(2) and (4) of the 1996 Act,

(iii) the claims under sections 47B and 103A of the Act are dismissed on withdrawal by the claimant,

(iv) the claim in relation to breach of the Working Time Regulations 1998 is not within the jurisdiction of the Tribunal and is dismissed,

(v) the claimant is awarded the sum of EIGHT THOUSAND THREE HUNDRED AND FORTY FIVE POUNDS TWENTY FIVE PENCE (£8,345.25) payable to her by the respondent in compensation for the unfair dismissal, and

(vi) the respondent is awarded expenses in the sum of FIVE HUNDRED POUNDS (£500) payable by the claimant under Rules 76 and 78, in respect of the day of hearing on 22 March 2024.

2. The Tribunal grants an Order under Rule 50(3)(b) that the identities of residents of the homes at which the claimant worked for the respondent should not be disclosed to the public and they are anonymised in this Judgment, as set out below.

REASONS

Introduction

1. This Final Hearing was held to address the claimant's claims which had been identified at a Preliminary Hearing before EJ Kemp on 15 June 2023. At that hearing the issues before the Tribunal were identified. Thereafter there was a hearing as to jurisdiction and a Judgment issued by EJ Mackay on 31 August 2023 which in effect reserved any question of jurisdiction for events prior to the effective date of termination to this hearing. Subject to that qualification, and noting that there was some disagreement over the proper designation of the respondent, the issues were confirmed as being those for this hearing.

Preliminary Matters

2. Mr Brady appeared for the claimant. He is a friend of hers and has appeared at earlier hearings. He explained that he had had experience conducting his own Employment Tribunal claim and did not wish me to comment on the process at the Final Hearing. He is not however someone legally qualified and works as a Support Worker. Mr Brien, Barrister appeared for the respondent on the instructions of Mr Creamore, Solicitor.

3. The parties had agreed a Chronology. There had been an application for a witness order, but after discussion it was confirmed by Mr Brady that that be deferred for final decision later. He confirmed that he did wish to call Ms Falconer thereafter, and arrangements were made for her to do so remotely. There was also an application for a document order. Mr Brien explained that his clients had carried out a search but had not found it. I suggested to Mr Brady that if that was their position it could be explored in the evidence, but that I could not order something that was said not to exist.

4. Mr Brien sought clarification from the claimant on what she alleged to be the last straw. Mr Brady said that it was the fourth grievance in April 2022. Mr Brien also sought clarification of which investigations were relied on by the claimant, and it was confirmed that there was one in July 2020 and a second in August 2020.

5. Mr Brien raised the issue of dividing liability and remedy, given that there had intended to be a ten day hearing, but that two of the days had been lost due to other commitments and one lost as on what was to have been the first day of the Final Hearing on 4 March 2024 the Judge had been unwell and the hearing that day cancelled. The Judge explained that in Scotland it is normal to hear both together and that that was his preference. It did not appear to him that the evidence on remedy was likely to be particularly lengthy in itself.

6. The fourth day of evidence was heard with the two Tribunal members appearing remotely as they had tested positive for Covid-19. That was done with the approval of the parties. One member was able to return to the hearing, but the arrangement continued for the other member, until later the other member was again able to attend in person.

7. At the end of the evidence on 15 March 2024 there was not time to hear evidence from the claimant as to losses. A proper Schedule of Loss, with detailed calculations as required by the case management order and with accompanying supporting documentation, was required, and a direction given to the claimant to produce that by 4pm on 18 March 2024. The claimant provided a handwritten document with details of the net earnings

she received and calculations as to losses claimed. 22 March 2024 was arranged as a further day to hear her evidence on loss, with that being carried out remotely. The claimant had difficulty in joining the hearing, however, and with agreement of both representatives latterly did so by telephone only. She had not obtained access to the Bundle of Documents for that hearing that Mr Creamore had emailed to her, to Mr Brady and to the Tribunal on the afternoon of 21 March 2024. In due course after attempts to remedy that matter failed it was agreed that the hearing should be discharged, and re-arranged to take place in person on 15 April 2024, but allowing Mr Brien to appear remotely at it. Mr Brien sought expenses for the abortive hearing, as addressed below.

8. That hearing on 15 April 2024 then took place, and included the evidence as to loss, and submissions. The Tribunal deliberated thereafter.

The evidence

9. The parties had prepared documentation in the form of a Bundle in two lever arch files marked A and B, which was added to at the start of the hearing, most but not all of which was spoken to in evidence. The total number of pages exceeded 1,600. The claimant gave evidence, and called as a witness Ms Isabel Jackson and Ms Stevie-Jo Falconer, who appeared remotely and whose evidence was interposed with that of the respondent by agreement. The respondent's witnesses were Ms Kerry-Anne Johnson, Ms Robyn Burns, Mr Peter Morrice, Mr Anthony Stewart, Mr Michael Kenny, Ms Heather Smith and Ms Vicky Bradshaw. By agreement Mr Kenny and Ms Bradshaw appeared remotely.

10. At the conclusion of the claimant's examination in chief it was pointed out to Mr Brady that some matters had not been addressed. The Judge stated to Mr Brien that he would question the claimant to seek to elicit facts (under Rule 41 and having regard to Rule 2 and in particular putting parties on an equal footing) and that Mr Brien could object if he wished to do so, although Mr Brien did not in fact do so. During the questioning the claimant said that the protected disclosures relied upon by her as recorded in the Note of the Preliminary Hearing on 15 June 2023 had not been made. She said that the allegations against her of over-administering medication had

been said by the respondent to have come from a whistleblower. In law that is an entirely separate matter. She said that the respondent was contriving allegations against her as she was to be a witness for Ms Jackson in her case, a case referred to in that Note. That is a different matter in law to the claims the claimant made.

11. Mr Brady thereafter confirmed that the claimant withdrew the claims in relation to any protected disclosure. The issues in relation to them noted at the earlier Preliminary Hearing are therefore not now relevant. The claimant gave evidence as to loss on the final day, which had been adjourned for that and for evidence.

12. The Tribunal also questioned some of the witnesses for the respondent under Rule 41, and having regard to the terms of Rule 2.

13. The claimant's evidence as to loss was heard on 15 April 2024, without objection from the respondent. Documents had been exchanged in advance of that, and the earlier day of evidence referred to below, and a further Bundle prepared as to remedy, then spoken to by the claimant in her evidence.

14. The evidence in the case included details of some of the residents of the homes at which the claimant worked for the respondent. They are highly vulnerable adults. The Tribunal considered that, under Rule 50, it was necessary to protect the Convention rights of those persons not to name them in this Judgment, and to grant the order above. It considered that proportionate having regard to the principle of open justice and the overall circumstances.

15. Throughout the hearing the Tribunal was assisted considerably by the helpful conduct of it by the two representatives, who are to be commended for the manner of their doing so.

The Issues

16. For ease of reference the issues which had been identified at the Preliminary Hearing, modified to an extent for ease of presentation in this Judgment, were:

1. Are the claims or any of them prior to the effective date of termination outwith the jurisdiction of the Tribunal as having been commenced outwith the statutory period?

2. If so was it not reasonably practicable to have commenced the claim timeously?

3. If so, was the Claim presented within a reasonable period of time?

4. Was the claimant dismissed by the respondent under section 95(1)(c) of the Employment Rights Act 1996 ("the Act") ?

5. If so, was the reason for that potentially a fair reason under section 98(2) of the Act?

6. If so, was the dismissal fair or unfair under section 98(4) of the Act?

7. Did the respondent refuse to permit the claimant to exercise the right to a rest break in Regulation 12 of the Working Time Regulations 1998, or to compensatory rest for that under Regulation 24 in the event that Regulation 21 applies, in breach of the said Regulations?

8. In the event that the claims or any element of them succeed to what remedy is the claimant entitled, including but not limited to (i) any financial losses sustained or to be sustained as a result of the dismissal; (ii) non-financial loss, including as to injury to feelings; (iii) whether there might have been a fair dismissal by a different procedure (iv) any contribution to dismissal (v) whether the claimant has mitigated her loss (v) whether the disclosure was not made in good faith, (in which case whether the award should be reduced by up to 25%) and (vi) whether there should be any increase to or deduction from the award made should either party not have complied with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

The facts

17. The Tribunal considered all of the evidence led before it, not all of which it regarded as relevant to the issues before it. It found the following facts that were relevant to the issues to have been established:

Parties

18. The claimant is Mrs Nicola McIntyre. Her date of birth is 26 January 1974. She qualified in 2003 as an adult general nurse. She worked initially at Ninewells Hospital in Dundee. She was diagnosed with Addison's disease in 2012 and was absent from work for two years. She returned to work and started to work in the private sector.

19. The respondent is Cygnet Health Care Ltd. It is a company incorporated under the Companies Act.

20. The claimant was initially employed on 19 January 2019 by Danshell LLP. A written contract of employment was issued by that company. Shortly prior to her employment commencing the Nursing and Midwifery Council had imposed undertakings on the claimant as a result of an error she made at work, which required particular supervision by her employer.

21. Her employment transferred to the respondent in or around November 2019 on the same terms and conditions. For the first 18 months of her employment with the respondent the claimant had seven managers. The management of the undertakings was not complete because of the changes to her management.

22. For the respondent the claimant initially worked in a unit named Thistle House. It cared for around twelve residents who had a variety of serious physical and mental health needs. Her role was as nurse in charge. She generally worked around 42 hours per week. She worked on day shift, with hours of 7.45am to 8pm. The residents were all highly vulnerable adults, who required a high level of care.

Contract terms and policies

23. The contract referred to policies for discipline and grievance, and to a Staff Handbook. The contract stated that such policies were contractual.

24. The respondent operated a Disciplinary Policy, which stated that it was not contractual. Its terms material to this case were

"**Suspension/Alternative Work**

5.3 At any point before investigation or during investigation if(it is believed that the matter involves serious or gross misconduct, or is of a sensitive nature where the presence of the employee at work may hinder the investigation, the employee may immediately be suspended from work on full pay and contractual benefits….

Gross misconduct

5.28 Gross misconduct is misconduct of such a serious and fundamental nature that it breaches the contractual relationship between the employee and the Company. In the event that an employee commits an act of gross misconduct the Company will be entitled to terminate summarily the employee's contract of employment without notice or pay in lieu of notice.

5.29. Matters that the Company views as amounting to gross misconduct include but are not limited to:

…..

- Failing to complete observations or falsifying observation data …
- Serious or negligent medication errors
- Allowing an unauthorised person to access Company premises…..
- False or malicious allegations/disclosures against the Company, colleagues or the individuals in our care

Appeal

5.30 An employee may, if they wish, use the Appeal Procedure to appeal against any formal disciplinary sanction imposed against him/her under this procedure.

5.31 The appeal must be in writing and received within seven (7) days of the date of the letter informing of the disciplinary decision, stating the grounds of the appeal……"

25. The respondent also operated a Grievance Policy, which policy also stated that it was not contractual. Its terms material to this case were:

> "3.1 The purpose of this procedure is to enable individual employees to raise issues of grievance with managers relating to any aspect of their employment and to provide a fair and effective method for resolving those grievances within a reasonable time of any particular issue being raised…..
>
> 4.1 If you have a grievance about any aspect of your employment, in the first instance we encourage you to attempt to resolve it informally with the person concerned or with your Line Manager. He/she will discuss your concerns in confidence, make discreet investigations where necessary, and attempt to resolve the matter speedily and fairly.
>
> 4.2 If this does not resolve the problem you should raise your grievance formally as set out below.
>
> 4.3 If the matter cannot be satisfactorily resolved informally, or it is inappropriate to do so, you should raise the matter formally, without unreasonable delay, by setting out your grievance in writing and sending it to your Line Manager……
>
> 4.6 A formal grievance meeting will be arranged, usually within ten working days of receiving your grievance and you will receive a written invitation to this. You should make every effort to attend the meeting.
>
> 4.7 You will be given the right to be accompanied by a fellow employee or trade union official at a formal grievance hearing……
>
> 4.11 Following the grievance meeting the manager hearing it will consider the facts surrounding your concerns and will undertake any necessary investigations. Once this is concluded, they will inform you of their decisions and confirm the outcome in writing.

> 4.12 The grievance outcome letter will also advise you of your right of appeal and where appropriate it will explain any further action the Company intends to take to resolve your grievance.
>
> 4.13 If your grievance has not been resolved to your satisfaction you should appeal against the grievance outcome decision. Your appeal should be made in writing fully setting out the full grounds of your appeal within five working days of the date of the letter confirming the initial grievance decision, and sent to the person specified in the grievance outcome letter……"

26. The respondent had an "Administration of Medication in Care Homes and Supported Living Procedure." It referred to maintaining Medication Administration Records ("MAR"). It also included reference to pro re nata (PRN) medication, which had the heading "PRN medication – medication a person may take as and when required". All residents were to have their own PRN plan. Paragraph 2.61 stated "PRN medication is to be given as directed on the MAR and the PRN plan."

27. PRN medication was given in addition to medication prescribed and administered on a set basis, normally daily.

28. Each resident had about twenty written plans in respect of different elements of their care. One was a Positive Behaviour Support (PBS") Plan, tailored for each resident. It referred to proactive strategies, fast triggers or early warning signs, a crisis phase and a recovery phase. Another was a PRN plan which was prepared individually for each resident.

29. In addition to the MAR sheets recording the medication administered, including by whom, when, in what amount and in what circumstances, there were "Pink Notes" for each resident which recorded interactions with the resident or events that occurred, which included the administration of any medicines including which medicine, in what amount, and when.

30. The claimant and others developed a menstrual cycle chart for one of the residents, who experienced pain during her menstrual cycle. The resident exhibited pain by banging her head against a wall, pulling her own hair,

scratching her fingers around her eyes, and biting her own arms. The chart was not before the Tribunal.

31. No written Policy on breaks issued by the respondent was before the Tribunal.

First suspension

32. On 4 April 2020 the claimant was suspended from work. She was in a household which included her two sons. One of them attended at the Thistle unit to give the claimant a lift home after work, but said to her that he had shooting chest pain. Although the unit was one to which access was regulated, she took him into the unit to undertake a check of his condition. She did not wish to call an ambulance given the pressures during the Covid pandemic which had led to lockdown arrangements on 23 March 2020.

33. A disciplinary hearing was convened into matters. By letter of 6 May 2020 the claimant was issued with a final written warning to be effective for a year. She had allowed entry to the unit of a person (her son) not authorised to be present, which breached the respondent's Disciplinary Policy,, Covid Policy, and government guidelines.

34. Thereafter the claimant had a new line manager, Ms Kerry- Anne Johnson, who commenced as Service Manager on 22 June 2020.

35. In or around early July 2020 the claimant gave an instruction for a resident that there was to be "nil by mouth" as a result of concerns the claimant had over the ability of the resident to swallow. Ms Johnson questioned that. The claimant said to her something to the effect that she {Ms Johnson} had put the resident at risk when no assessment of the ability to swallow had been carried out.

Second suspension

36. On 10 July 2020 two members of staff raised a complaint by email that the claimant and another staff member had taken excessive breaks that day, and that the unit had been unsafe. On 22 July 2020 the claimant was suspended from work "pending an investigation into the allegation in

relation to conduct and the safety of the service" by letter from Ms Johnson.

37. The claimant and Ms Johnson had a fact-finding meeting on 24 July 2020. The claimant was not shown CCTV which was available. She was not provided in advance of the hearing with details of when she was said to have taken breaks in the sense of when each break started and stopped, nor of the basis on which it was alleged that the safety of the service was affected by her doing so. Ms Johnson said that staff took what she described as "working breaks", meaning that breaks were taken at the same time as the member of staff was with a resident providing support.

First grievance

38. On 28 July 2020 the claimant initiated a grievance in relation to Ms Johnson into how Ms Johnson had conducted the investigatory meeting with her. It was considered by Ms Heather Smith on 6 August 2020, who rejected it by letter dated 10 August 2020. The claimant appealed that decision.

Dismissal

39. A disciplinary hearing was held on 1 September 2020 before Ms Kirsty Dale into the allegation that the claimant had had excessive breaks and put the unit at risk. The claimant denied having had excessive breaks, or that there had been any risk. CCTV footage that was available for 10 July 2020 and which would have established the length of breaks taken was not made available to or shown to the claimant.

40. On 2 September 2020 the claimant was dismissed by letter from Ms Dale who referred to an alleged acknowledgement by the claimant of having taken a 17 minute break and a further 3 shorter breaks between 5.30 and 8pm on 10 July 2020. No such acknowledgement had been given in the disciplinary hearing by the claimant.

41. The claimant appealed that decision on 10 September 2020.

Appeals

42. Both the grievance and disciplinary appeals were heard together by Mr Seamus Quigley of the respondent at a hearing on 7 October 2020. By letter dated 26 October 2020 he granted the appeal against dismissal, and reinstated her. His letter included the comment that "It is possible that you left the unit unsafe during this time, but the lack of written communication and clarity on the management of breaks and cover at Thistle means that I find it difficult to uphold the decision made at disciplinary." With the exception of two points, one of which related to information the respondent had sent to the NMC in relation to the incident on 10 July 2020, he did not uphold her grievance appeal. He was concerned at how the claimant and Ms Johnson would work together in future, and proposed that the claimant work at a different but similar unit named Ellen Mhor.

Move to Ellen Mhor

43. The claimant did move to that unit, shortly after the appeal decision, and came under the line management of Mr Anthony Stewart. She told him that she had been through a hard time in relation to the earlier dismissal and appeal. He supported the claimant and in due course assisted her in achieving the undertakings required of her by the NMC. He also carried out regular assessments of the claimant's work at the unit which all provided a positive assessment. The unit principally cared for 12 adult residents who had learning disabilities including autism.

Second grievance

44. The claimant raised a grievance in relation to information that the respondent had passed to the NMC. It was considered by Ms Liz Brooks of the respondent at a hearing on 1 December 2020. It was partially upheld by letter of 16 December 2020. Corrective steps were taken by the respondent to provide accurate detail of the incident on 10 July 2020 to the NMC.

45. On 17 December 2020 the claimant appealed that decision, but latterly did not proceed with it.

Third suspension

46. The claimant ought to have completed documentation for revalidation as a nurse with the NMC by 27 April 2021. She did not do so, believing wrongly that she had longer time to do so. Her registration lapsed on 28 April 2020 as a result. She was suspended from work by the respondent by letter from Mr Stewart on 30 April 2021 when that came to the respondent's attention. On the same date he sent an email to the NMC to support the claimant's application for re-registration.

47. On 1 May 2021 the claimant completed the documentation for re-registration and submitted the required fee. She was re-registered as a nurse. She informed the respondent of that on 4 May 2021. On 7 May 2021 the suspension was lifted.

Third grievance

48. On 22 August 2021 the claimant intimated a formal complaint with regard to a fun day. It was addressed by Ms Vicky Bradshaw of the respondent on 16 September 2021, who after an investigation issued a detailed letter of decision on 4 October 2021. It was not appealed by the claimant.

Fourth grievance

49. On or about 28 April 2022 the claimant was telephoned at about 10.50pm, when asleep in bed, by two colleagues, who berated her, swore at her and shouted at her. They were on the opposite shift to the claimant and did not agree with what the claimant had done when on the day shift that day.

50. The claimant spoke to her manager Mr Stewart on 29 April 2022 when she came to work. He suggested that she raise matters at the handover meeting that morning, but when she sought to do so with those who had spoken to her during the call the previous night she was again berated. She raised that with Mr Stewart. He said that he would speak to the staff and issue an email about such contact, which he did on 29 April 2022. The claimant was prepared to deal with matters informally if the two members of staff apologised to her. One did so. The other, Ms Kehinde Oke, did not.

51. Thereafter in or around mid May 2022 the claimant was informed that an anonymous complaint had been made about her to the NMC which alleged that at a meeting at work the claimant had been under the influence of illicit substances and that resident safety was jeopardised. The claimant was informed by the NMC on 27 May 2022 that it would not be investigating that complaint.

52. Mr Stewart met Ms Kehinde Oke, who was another nurse employed by the respondent, and took a statement from her in writing on 1 June 2022.

53. The claimant made a data subject access request to the NMC (on a date not given in evidence) and obtained details of the anonymous complaint made to it. It disclosed that the complaint was from a colleague, and referred to details of the handover meeting that had been held at work between the claimant and three other members of staff.

54. The claimant as a result of discovering that what she thought had been a malicious complaint to the NMC had been made by a colleague made a formal written complaint to Mr Stewart with the heading “Formal complaint, bully and harassment” about firstly the behaviours of calling her at home late at night in the manner that had taken place, as well as the events that followed from that and secondly the NMC referral which she believed to have been made by the member of staff who had not apologised. It was undated but sent in early June 2022. It consisted of a little over five pages of detail.

55. Mr Stewart did not acknowledge the formal complaint in writing, and when asked by the claimant about it later said that he could not address it at that stage as the member of staff about whom the complaint was made had been suspended on an unrelated issue.

Fourth suspension

56. On 2 August 2022 Mr Peter Morrice, a nurse employed by the respondent, presented a grievance against the claimant. In it he made allegations that included her over-administering PRN medication to residents.

57. On 9 August 2022 at 7.45am the claimant attended for the start of her shift. Mr Stewart met her and handed her a letter inviting her to a meeting

said to be a fact finding one, not part of a disciplinary process. The meeting took place immediately. At it Mr Stewart said that it was informal, and handed the claimant a table of figures comparing her administration of as required medication to three residents over a three month period compared with that given to those residents by other nurses. He asked her to explain the amount she had administered compared to that of her colleagues. She responded by referring to under-administration by Mr Morrice, although she had not been provided with his grievance against her. She also referred to her being on more day-shifts than others, and was being penalised for being a good nurse. He asked her about the procedure before administering and she said that it depended on the symptoms. He asked her about the Personal Behaviour Support Plan, which is a document prepared for each resident, and she said that she had started to document that and knew them well enough. He asked her if she had followed the PBS before administering and said that she did not physically look at it before administering but knew it.

58. The claimant was shocked by the questions, and asked if she could consider matters and respond by email later. He agreed.

59. He stated that he had to investigate fully and suspended the claimant on full pay that day. The claimant asked about her grievance and he said that it had not been forgotten about. He confirmed the suspension in writing the same day, that she was suspended on an allegation that she had administered medication excessively, and was at a level higher than any other nurses at the unit.

60. On 10 August 2022 the claimant sent Mr Stewart her detailed response to the allegations in an email. No meeting to address the claimant's grievance was held with her.

Grievance outcome

61. Mr Stewart wrote to the claimant with regard to her grievance by letter dated 15 August 2022. In it he referred to the claimant meeting him on 20 June 2022 but no such meeting between them had taken place. He partially upheld the first aspect of the grievance in relation to the call made to the claimant, but not the second as he stated that the NMC referral had

been made anonymously, and he had spoken to the member of staff the claimant suspected who denied doing so. The claimant did not appeal that outcome at that stage in accordance with the timelimit to do so.

Disciplinary process

62. Mr Stewart prepared an investigation report. It was dated 23 August 2022. It had 10 appendices. They included charts he had prepared from his examination of documents for three residents referred to by Mr Morrice, pink notes for three service users in the period 14 April to 24 July 2022, MAR sheets for that period, PBS documents, a note of the meeting with the claimant, a note of a discussion with Ms Lori Sutherland, and others. It did not include (a) the PRN protocols for the three residents concerned, (b) the grievance by Mr Morrice (b) statements from other nurses (d) examples and explanations of what was said to be over-administration of PRN medication or a failure to document the same properly or (e) the claimant's email of 10 August 2022.

63. The report alleged that the claimant had not completed fully or at all records of administration of medicine to residents identified anonymously as service users 1, 2 and 3, particularly on the Pink Notes for them. For service user 1 the dates on which she had not done so were 6 and 7 April, and 21 and 22 June; for service user 2 on 5 April on two occasions, 7, 14, 15 ,16 and 27 April, 20 May and 11 June and for service user 3 on 6 and 21 April and 28 May, all during the period 14 April to 24 July 2024. He noted that there were other occasions where the Pink Notes were complete.

64. The report had errors in the tables produced in relation to nurses' administration of PRN to three Service Users. It stated that Nurse 1 (Peter Morrice) had had 39 day shifts in the period. He had had 43. It stated that Nurse 2 (Stevie-Jo Falconer) had had 25 day shifts in the period. She had had 17.5. It stated that Nurse 3 (the claimant) had had 43 days shifts in the period. She had had 40. It stated that Nurse 5 (Peter Cain) had had 5 day shifts in the period. He had had 6.

65. It stated that nurses had given the following total numbers of PRN medication to three Service Users, or residents, in the period –

Nurse 1 – 16

Nurse 2 – 26

Nurse 3 – 216

Nurse 4 – 12

Nurse 5 – 33

Nurse 6 – 9

Nurse 7 – 6.

66. It did not note that the PBS documents were not on the face of it timeous, in some respects signed, and that one was purportedly signed by the claimant on a date prior to her working at Ellen Mhor. It referred to prescribing by the claimant, which she did not do, as her role was administration. It recommended that matters proceed to a disciplinary hearing.

67. The claimant was invited to a disciplinary hearing by letter dated 26 August 2022. It had two pages, and was not signed. It had been prepared by Mr Stewart. It alleged that the claimant:

(i) Wilfully or negligently breached company policies and procedures in failing (a) to document the reasons for administering as required medication (b) to document accurately administration of medication within service user documentation (c) to document efficacy of medication administered and (d) to document clearly the rationale for administration and that it was an appropriate use.

(ii) Wilfully or negligently breaching her training

(iii) Wilfully or negligently putting the health and safety and wellbeing of service users at risk in not following the PBS plan and consider medicine administration support reductions

(iv) Wilfully or negligently putting the contract with the local authority at risk

(v) Fundamental breach of trust and confidence.

68. All bar one appendix was attached to the letter. Appendix 2 was not attached, said to be due to data sensitivity, and it was said would be provided at the meeting. The hearing was fixed for 6 September 2022.

69. The claimant and respondent then engaged in protracted email correspondence in which the claimant firstly sought access to the documentation so that she could prepare for the meeting, and secondly an adjournment. On 22 September 2022 a revised letter was sent to the claimant by Mr Mike Thomson of the respondent. It added sections to the earlier letter as to the right to be accompanied, a copy of the disciplinary procedure, a warning that there might be a summary dismissal, and that if she did not attend it may proceed in her absence. The initial hearing date was changed to 28 September 2022. Allegation (iv) that had originally been made was removed.

70. The claimant was provided with nearly 500 pages of the documents she had asked for, being the pink notes for the residents concerned, on or around 26 September 2022.

71. On 27 September 2022 the claimant sent a detailed statement for use at that hearing by email.

72. The disciplinary hearing took place remotely on 28 September 2022 before Mr Mike Kenny, Deputy Regional Nurse Director (North) of the respondent, with an HR representative and note taker present, with the claimant accompanied by her trade union representative. A note of that meeting is a reasonably accurate record of it. At the start of the meeting Mr Kenny made comments which included that:

> "MK [Mr Kenny] advised that despite [the claimant] in her statement referencing other nurse practice's [sic] in Ellen Mhor re: the use of PRN, individual nursing practices, actions and skill-sets, these will not be raised in this meeting as this is not what today's meeting is about. MK will accept what is reasonable to reference re; others and stop the meeting if otherwise."

73. A Final Hearing took place in a claim by Ms Isabel Jackson against the respondent at the Employment Tribunal Dundee on 17 – 21 October 2022. The claimant was a witness for Ms Jackson at that hearing.

74. On 19 October 2022 Mr Kenny wrote to the claimant with his decision, which was that the allegations against her were at least partially upheld

and to issue her with a final written warning. Her suspension was lifted as a result. The letter was on the headed notepaper of Cygnet Health Care Limited

Further appeals

75. The claimant did not immediately return to work. She appealed the outcome of the disciplinary process on 26 October 2022, and by the same email sought to appeal the grievance outcome from Mr Stewart dated 15 August 2022. She exchanged emails with Mr Stewart about a return to work meeting, but that did not take place prior to her going on holiday.

76. The claimant had made a subject access request of the respondent in relation to the decision by Mr Stewart on 15 August 2022 on a date not given in evidence. She had sought to recover notes of the meeting said to have taken place, witness statements taken, and other relevant documents. The issue was handled by Michelle Crump of the respondent, who exchanged emails with her in relation to her request. Ms Crump sought time to find documents. She stated to the claimant in an email of 20 October 2022 that "I am being told that they may be in a safe at Ellen Mhor and I am awaiting the outcome of this."

77. By letter dated 28 October 2022 her late grievance appeal was accepted by the respondent, and by email of the same date 1 December 2022 was identified as the date for the grievance appeal. The appeal was to be heard before Ms Bradshaw.

78. The claimant exchanged emails with Mr Stewart on 1 November 2022 with regard to her return to work after her holiday. The claimant was on holiday in Australia from 2 to 29 November 2022.

Resignation

79. On 18 November 2022 Ms Crump emailed the claimant to inform her that she had chased the hospital, being a reference to Ellen Mhor, and "they have confirmed they do not have copies of the statements and I have not been able to find anything on the manager's personal drive."

80. In about mid November 2022 Ms Jackson received notice that her Employment Tribunal claim against the respondent had succeeded. At some point thereafter on a date not given in evidence she contacted the claimant, who was then on holiday in Australia and informed her of that outcome.

81. The claimant considered that her grievance had not been investigated to any extent. She decided to resign her employment with the respondent with immediate effect when on the flight back to the UK. She had been so concerned at the prospect of returning to work with the respondent that she had been sick.

82. She emailed her resignation to the respondent on 29 November 2022 stating "Please take this email as my formal resignation as a senior staff nurse Ellen Mhor Dundee with immediate effect." She referred to what she said was four suspensions, three disciplinaries and four grievances, and two malicious referrals to the NMC, as well as the dismissal and re-instatement. She continued

> "The last straw was an email I received last week while on annual leave when it came to light that after asking for the paperwork of the investigation that had taken place for the Grievance that I had raised in June 2022 was only concluded while I was suspended in September 2022. The email from Michelle Crump head of information management and privacy confirmed to me that Ellen Mhor have confirmed there are no copies of any minutes statements taken during the formal Grievance. In fact there is nothing on the HR files nor anything found on the Ellen Mhor managements pcs ….it looks like due process has not been carried out."

She alleged that she had lost all faith and trust in having any fair treatment of any kind from the respondent's management.

83. Mr Stewart accepted her resignation by letter to her that day. It was on the headed notepaper of Cygnet Health Care Limited. It offered the claimant the opportunity to proceed with her grievance and disciplinary appeals. The claimant did not do so.

Grievance Appeal Decision

84. Ms Bradshaw considered the grievance appeal. She interviewed Mr Stewart. She issued a report on the matter partially upholding the appeal on 30 December 2022. She accepted that the correct procedure for the grievance had not been followed, with no formal process adhered to. In her opinion the outcome of a formal process would have been the same in relation to the outcome letter of 15 June 2022. Her recommendations included that Mr Stewart undergo training on the grievance procedure.

Losses

85. Prior to her suspension the claimant earned the following net sums with the respondent:

November 2021	£2,745.77
December 2021	£2,930.42
January 2022	£2,618.35
February 2022	£2,696.94
March 2022	£3,094.58
April 2022	£2,798.60
May 2022	£2,342.20
June 2022	£2,782.52
July 2022	£2,437.06

86. From August 2022 her net monthly earnings with the respondent were

August 2022	£2,223.50
September 2022	£2,062.50
October 2022	£2,125.72
November 2022	£2,144.55
December 2022	£994.09

87. Her net income from the respondent was reduced during suspension as it did not include any overtime. Her payslips were all provided in name of Cygnet HD Limited.

88. The claimant had employer pension contributions made to her by the respondent during her employment, at the average rate of £128.89 per month.

89. During her employment with the respondent the claimant also carried out work for an agency H1 Healthcare Solutions Ltd during her spare time. In the period 1 April 2022 to 5 August 2022 (payslips for the period prior to April 2022 not being provided by the claimant) her earnings from the agency totalled a net sum of £4,571.54. Her earnings from the agency continued up to the point of the termination of her employment with the respondent in the period from 12 August 2022 to 25 November 2022 in the total net sum of £6,809.98.

90. After the termination of her employment the claimant continued to work for that agency, and another agency. The amounts of her net earnings paid on each week are accurately set out in an excel spreadsheet prepared by the respondent (the calculations provided on that spreadsheet are however disputed). The total of her net earnings from those employments for the period from 2 December 2022 to 1 March 2024 is £51,736.73. When employed by the agencies she did not receive payment for period of sick leave, and holiday pay was included within the rates received. She required to pay for travel to and from locations she worked at, very often materially further away from home for her than when working at the respondent. She pays the cost of that travel herself.

91. The claimant applied for a role as Deputy Manager, on a full-time basis, in around November 2022 but withdrew it as she did not feel able to discuss the issues around the termination of her employment with the respondent and the referral to the NMC. She has not made any other application for employment on a full time or permanent basis to date for the same reason. She has been waiting for the outcome of the NMC referral referred to in the following paragraph, and of these proceedings.

Other issues

92. On 29 November 2022 Ms Smith of the respondent referred the disciplinary findings made by Mr Kenny to the NMC. The NMC acknowledged receipt of that referral and intimated that it was considering

a matter in relation to her by letter of 30 November 2022, and informed the claimant about it on 9 December 2022. It is investigating the allegations against the claimant that she excessively administered PRN medication. It has yet to reach a decision on the allegations.

93. Ms Stevie-Jo Falconer had administered mefenamic acid, an analgesia specifically for those suffering menstrual pain, to a resident when she considered that that resident had pain as a result of her menstrual cycle, on 22 September 2022.

94. Other medications administered to residents as and when required are Lazaropam and Olanzapine, each of which is a sedative.

95. Mr Peter Morrice had been disciplined by the respondent for errors made with regard to administration of medication to residents on a date not given in evidence. He had worked three consecutive 12 hour shifts on two occasions during the period 4 April to 24 July 2022. He had provided a resident's family with Tramadol, a powerful analgesic which is a controlled drug, in a manner that did not conform to the respondent's procedures.

96. The claimant commenced Early Conciliation on 16 December 2022. The Certificate was issued on 19 December 2022. The present Claim Form was submitted on 22 March 2023, an earlier version presented on 24 February 2023 having been rejected.

The claimant's submission

97. Mr Brady had helpfully provided a detailed written submission, and as it was in writing it is not summarised other than in outline. It analysed in detail the evidence heard, and set out the arguments as to why the respondent's evidence and arguments should not be accepted. It sought findings in the claimant's favour.

The respondent's submission

98. Mr Brien had also helpfully provided a written submission, which is referred to in outline only for the same reason as for the claimant's submission. It set out the basis on which it was argued that the Tribunal did not have jurisdiction for the claim in relation to the 1998 Regulations,

and that there had not been a dismissal. It addressed matters in the event that the Tribunal was against the respondent on dismissal, and on remedy he clarified orally that he also argued for a contribution to dismissal.

The law

(i) Unfair dismissal

99. Section 95 of the 1996 Act provides, so far as material for this case, as follows:

> "**95 Circumstances in which an employee is dismissed**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
> ……..
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

100. Section 98 of the Act provides, so far as material for this case, as follows:

> **"98 General**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (b) relates to the conduct of the employee,
> (c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

101. The first issue is whether or not there was a dismissal. The onus of proving a dismissal where that is denied by the respondent falls on the claimant. From the case of ***Western Excavating Ltd v Sharp [1978] IRLR 27*** followed in subsequent authorities, in order for an employee to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the employer, actual or anticipatory.

(2) That breach must be significant, going to the root of the contract, such that it is repudiatory.

(3) The employee must leave in response to the breach and not for some other, unconnected reason.

(4) She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may have acquiesced in the breach.

102. In every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20***, which was slightly amended subsequently. The term was held in ***Malik*** to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

103. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that the test should be "calculated or likely". That was reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8,*** which also held that the test was an objective one:

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

104. The law relating to constructive dismissals was reviewed in ***Wright v North Lanarkshire Council [2014] ICR 77***, which in turn referred to ***Meikle v Nottinghamshire Council [2004] IRLR 703*** on the issue of causation. The reasonableness or otherwise of the employer's actions may be evidence as to whether there has been a constructive dismissal, although the test is contractual: ***Courtaulds Northern Spinning Ltd v Sibson and Transport and General Workers' Union [1988] IRLR 305***, ***Prestwick Circuits Ltd v McAndrew [1990] IRLR 191***. Failure to deal properly with a formally raised grievance may constitute a contractual repudiation, based on a specific implied term to take such grievances seriously (not just on the more general term of trust and confidence): ***W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516,*** and there can be breach of trust and confidence in relation to the denial of proper procedures on an appeal in a grievance case, in ***Blackburn v Aldi Stores Ltd [2013] IRLR 846*.**

105. Where it is argued that there was a final straw, being a last act in a series of acts that cumulatively lead to repudiation, that last straw must not be entirely trivial – ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833.*** The questions that a Tribunal should ask were summarised as follows:

> "(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?.....
>
> (5) Did the employee resign in response (or partly in response) to that breach?"

106. If there is such delay before the resignation indicating that the individual has acquiesced (affirmed is the term used in English law) in any breach, there will not be a dismissal. The leading case on that principle is ***W E Cox Toner (International) Ltd v Crook [1981] IRLR 443.*** In ***Bunning v GT Bunning and Sons Ltd [2005] EWCA Civ 104*** there was a finding of detriment because of pregnancy, but not that there had been a constructive dismissal, as there had been acts which amounted to affirmation.

107. It is the law of Scotland that is applied to determine the matter – ***McNeill v Aberdeen City Council [2014] IRLR 114.***

108. If there is in law a dismissal, the second issue is what the reason or principal reason for that was, and if a potentially fair reason the third issue is fairness. In ***Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166***, the Court of Appeal held that there was an obligation on the employer to establish the reason for dismissal, but Waller LJ commented that 'this goes

beyond the simple circumstances of the employer's conduct which amounted to dismissal and involves looking into the conduct of the employee and all the surrounding circumstances'. It was followed in ***Berriman v Delabole Slate Ltd [1985] IRLR 305*****,** the Court of Appeal adopted a simpler approach to the question of determining the reason for dismissal in a constructive dismissal case and stated that the onus of proving the reason was "requiring the employer to show the reasons for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer."

109. There can be a fair constructive dismissal. ***Wells v Countrywide Estate Agents t/a Hetheringtons UKEAT/0201/15*** is an example of such a case where it was held that if the employee's demotion for an act of gross misconduct did constitute a constructive dismissal, that dismissal was for a potentially fair reason (conduct) and was reasonable in all the circumstances.

110. There are a number of authorities on the extent of an investigation that may be appropriate in a disciplinary context, and whilst there was no dismissal following the disciplinary procedure such authorities are relevant to the issues of whether or not what the respondent did fell within the band of reasonable responses.

111. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said the following after referring to the employer establishing potentially fair reasons for dismissal:

> "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

112. Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett 1988 IRLR 497,*** that "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to

increase." It was also held in ***A v B [2003] IRLR 403*** that the more serious the allegation the more it called for a careful, conscientious and evenly-balanced investigation.

113. The investigation required may include undertaking more detailed enquiries – as found by the Inner House in ***Sneddon v Carr-Gomm Scotland Ltd [2012] IRLR 820*** where a tribunal decision that there had been insufficient investigation of allegations against a care worker was overturned by the EAT but then reinstated on further appeal.

114. The Court of Appeal has also held that the severity of the *consequences* to the employee of a finding of guilt may be a factor in determining whether the thoroughness of the investigation justified dismissal: ***Roldan v Royal Salford NHS Foundation Trust [2010] IRLR 721*** (the dismissal was likely to lead to revocation of the work permit and deportation). In ***Monji v Boots Management Services Ltd UKEAT/0292/13*** the EAT suggested that some care may be needed in its application; the basic principle was not doubted, but three caveats were mentioned: the second of which was that the principle may be most applicable to facts such as those in that case itself, namely where there is an acute conflict of fact with little corroborating material either way, and/or where the case against the employee starts to 'unravel' as it proceeds, in which case it makes sense to expect a higher level of investigation and adjudication on the part of the employer in the light of the severe effects of dismissal on that employee;

115. The terms of sub-section 98(4) of the Act were examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable for conduct cases. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

116. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?
(ii) Was that belief reasonable?
(iii) Was it based on a reasonable investigation?

117. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
> in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
> the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

118. The focus is on the knowledge at the time, not what is later argued by an employee, as discussed in ***London Ambulance Service v Small [2009] IRLR 563.***

119. The band of reasonable responses was held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

120. Account is to be taken of the ACAS Code of Practice on Disciplinary and Grievance Procedures (section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992). It includes the following provisions with regard to disciplinary matters:

"4. That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this

……..Employers and employees should act consistently….

Employers should carry out any necessary investigations to establish the facts of the case…..

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification…

12. …….. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. ……"

121. The Code defines grievances in the introduction section as "concerns, problems or complaints that employees raise with their employer." It is also stated that what action is reasonable depends on all the circumstances, but includes that

- "Employers and employees should raise and deal with issues promptly….
- Employers and employees should act consistently……"

122. Paragraphs 32, 33, 35 and 40 provide

"32 If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay

with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.

33. Employers should arrange a formal meeting to be held without unreasonable delay after a grievance is received…..

35. Workers have a statutory right to be accompanied by a companion at a grievance meeting…..

40. Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay……The employee should be informed that they can appeal if they are not content with the action taken….".

(ii) Working Time

123. The Working Time Regulations 1998 provide for a right to a rest break in Regulation 12 of 20 minutes after six hours of work. Regulation 12 (3) provides that, subject to the provisions of any collective or workforce agreement, the rest break must be an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his or her workstation where there is one. It was held in ***Grange v Abellio (London) Ltd [2017] IRLR 108*** that the employer's duty it to proactively manage working arrangements so as to allow breaks to be taken. Even if the shift is of 12 hours, the entitlement is only to one break - ***Corps of Commissionaires Management Ltd v Hughes (No 1) [2009] IRLR 122*.**

124. There are exceptions to that right under Regulations 21 and 22, and if they are engaged the provisions as to compensatory rest in Regulation 24 are engaged. There are two Court of Appeal cases addressing the issues - ***Hughes v Corps of Commissionaires Management [2011] IRLR 915*** (subject to the clarification of Elias LJ's judgment offered by the court in the subsequent case of ***Network Rail Infrastructure Ltd v Crawford [2019] IRLR 538*** and ***Network Rail Infrastructure Ltd v Crawford [2019] IRLR 538***). In brief summary, **e**xact replication of the Regulation 12 provisions is not required, and a balance is struck between the interests of employer and employee. Cumulative breaks totalling 20 minutes could be sufficient. Regulation 30 has provision for remedy, including that as to jurisdiction on the basis of timebar. There is an

equivalent provision as to jurisdiction where the claim is taken as one of unauthorised deduction from wages under Part II of the Employment Rights Act 1996 set out in section 23. The two sets of terms are in essentials identical.

Remedy

(i) Unfair dismissal

125. The claimant did not seek an order for re-instatement or for re-engagement under the Employment Rights Act 1996. The Tribunal requires to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". The Tribunal may increase the award in the event of any failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Awards are calculated initially on the basis of net earnings, but if the award exceeds £30,000 may require to be grossed up to account for the incidence of tax. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant.

126. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** The losses require to be grossed up for the incidence of tax where the award exceeds £30,000.

127. There is a duty to mitigate, being to take reasonable steps to keep losses to a reasonable minimum. The onus of proof in that regard falls on the employer - ***Fyfe v Scientific Furnishings Ltd [1989] IRLR 331*** reaffirmed in ***Ministry of Defence v Hunt [1996] IRLR 139*****,** (which was upheld on other grounds at the Court of Appeal, reported as ***Ministry of Defence v Wheeler [1998] IRLR 23***). How to address mitigation issues was addressed in ***Cooper Contracting Ltd v Lindsey UKEAT/0184/15.*** As

was there stated, not too exacting a standard must be applied to the claimant.

128. In respect of the assessment of the compensatory award it may be appropriate to make a deduction under the principle derived from the case of ***Polkey v AE Dayton Services Ltd [1988] AC 344.*** If it is held that the dismissal was procedurally unfair but that a fair dismissal would have taken place had the procedure followed been fair. That principle was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed.

129. In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution to the dismissal in respect of conduct justifying a deduction, the conduct required to be culpable or blameworthy and included “perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct.” Guidance on the assessment of level of contribution was given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant’s conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP Packaging Ltd UKEAT/023/13.*** The contributory conduct did not need to amount to gross misconduct to be taken into account – ***Jagex Ltd v McCambridge UKEAT/0041/19***

130. In ***Holroyd v Gravure Cylinders Ltd [1984] IRLR 259*** the EAT in Scotland held that it would only be in exceptional cases that a finding of contributory conduct would lie in a constructive dismissal case, but in ***Morrison v AT & GWU [1989] IRLR 361*** 40% contributory fault was found against the employee who had provoked and precipitated a breach of contract entitling her to resign. It is therefore competent to make a contributory conduct reduction dependent on the facts of the case.

131. There are limits to the compensatory award under section 124, which are applied after any appropriate adjustments and grossing up of an award in relation to tax – ***Hardie Grant London Ltd v Aspden UKEAT/0242/11.***

132. In the event of an unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, the Tribunal may adjust the level of compensation upwards or downwards by up to 25%. It has a discretion on whether or not to do so.

133. There is a limit to the award of compensation for unfair dismissal under section 124(IZA) of the Employment Rights Act 1996, which is of "52 multiplied by a week's pay". There is also a separate statutory limit.

134. Where the awards exceed £30,000 they require to be grossed up to account for the incidence of taxation under the Income Tax (Earnings and Pensions) Act 2003 sections 401 and 403 and ***Shove v Downs Surgical plc [1984] IRLR 17***.

(ii) Working time

135. The issue of remedy is addressed in Regulation 30. Any claim must be made to the Tribunal within the end of the period of three months from the date when the exercise of rights should have been permitted, unless it was not reasonably practicable to do so and the claim is made within a reasonable period of time (echoing the provisions as to unfair dismissal referred to in the said Judgment). Regulation 30B makes provision for early conciliation.

136. If a complaint is well founded the Tribunal shall make a declaration and may award compensation which is just and equitable having regard to the employer's default and any loss sustained by the worker attributable to the matters complained of.

Observations on the evidence

137. The **claimant** was we considered an honest witness, and one who was generally reliable. She was argumentative at times, and did not always answer the question directly. She had her own views on how matters should have been conducted by her employer which were not always

shared by the Tribunal. She had a somewhat strident and inflexible approach, as exemplified by the manner she spoke to Ms Johnson about the care required for a resident, which had the air of someone who thought that they knew better. Not all of the points she founded on we accepted. The suggestion for example that Ms Johnson deliberately raised a matter at the fun day to upset her we did not accept. But overall her evidence was we considered reliable on what we considered to be the key aspects that led her to resign.

138. Ms **Isabel Jackson** was we considered both credible and reliable as a witness. She supported the claimant's evidence with regard to the events on 10 July 2020, in particular that the claimant had spoken to all other staff to state that she was going for a break outside before doing so.

139. Ms **Stevie-Jo Falconer** was we considered both a credible and reliable witness. She supported some of the claimant's evidence on documentation for the resident with menstrual pain, and she had herself administered mefenamic acid to that resident.

140. Ms **Kerry-Anne Johnson** was the first witness for the respondent. To her credit she conceded that it was not fair not to have shown the claimant CCTV footage of the incident on 10 July 2020, and that she should have asked the claimant more questions about the breaks taken. The investigation she undertook was the first such investigation she had undertaken and she had not had training on how to do so. That was apparent from the terms of that investigation.

141. Ms **Robyn Burns** gave brief evidence with regard to the fun day, and we considered her a credible and generally reliable witness, although she could not recall some of the detail.

142. Mr **Peter Morrice** we considered to be someone seeking to give honest evidence, but we had some concerns about his reliability. Initially he said that he had not discussed his grievance with anyone before submitting it, but latterly said that he had done with Ms Falconer to an extent, and he was referred to his email to Mr Stewart on 2 August 2022 when he had sent it "As requested." He could not explain why it had been requested. He denied initially being under a disciplinary process, but in his

investigation meeting statement had referred to that. He said that although he believed that the claimant had over-administered medication when a similar issue was raised in relation to his own practice all depended on the circumstances at the time. His grievance raised a number of matters beyond that of over-administration of medication, and overall we considered that there were material doubts over the reliability of his evidence.

143. Mr **Anthony Stewart** was we considered seeking to give honest evidence. He had initially a good relationship with the claimant, and appeared to be supportive of her. His performance assessments of her were positive, and he assisted her in resolving the work for the undertakings to the NMC. He was refreshingly candid in several aspects of his evidence. He accepted that he had not followed the grievance procedure, and that there was several issues with his Investigation Report. There were some areas where we had concerns over his reliability. Firstly he said that there was no alternative but to suspend the claimant when her registration lapsed, but could not point to any written document authorising his doing so. It was not in the disciplinary policy. We accepted that he genuinely believed that there was no choice but to do so. Secondly he did not treat the formal complaint made to him as a grievance, but dealt with it informally. He failed to follow the grievance policy as Ms Bradshaw found, and as latterly he accepted. His decision letter referred to a meeting on 20 June 2022 but he accepted that there was no such meeting, rather that there had he said been a verbal discussion. He held a meeting with Ms Oke on 1 June 2022 which was recorded and before us but had not been passed to Ms Crump at the time. In any event simply asking such a question is not in our view the kind of investigation a reasonable employer could do – the allegation of a malicious complaint was serious, potentially of gross misconduct, and deserved a proper investigation which included firstly a formal meeting with the claimant, and then speaking fully to those who were at the handover, as that is referred to in the anonymous referral at least by clear implication. His investigation of that grievance contrasted very sharply with what he did with Mr Morrice's grievance.

144. Thirdly in relation to that investigation we considered that he did not undertake it in a full and fair manner. There were serious and obvious gaps

in it. He did not drill down into any detail, He did not include in it the claimant's email of 10 August 2022, the PRN protocols, or other documents he said in evidence that he considered relevant such as DisDAT and NMC Codes of Practice. The PBS documents had issues of reliability as to dates, lack of signatures, and in one case that it had allegedly been prepared by the claimant despite the fact that on the date given she was not yet at Ellen Mhor. He did not interview other nurses. He did not consider fully what the claimant said in her initial email to him, and that was the day after he had provided her with a table he had prepared which she had no fair opportunity of addressing. He appeared to accept what Mr Morrice said, did not investigate other than three residents as he suggested, and appeared to believe at the time that differences in levels of medication administered was of itself sufficient cause for concern. He accepted however firstly that some of the figures used were wrong, as put to him in detail during cross-examination, secondly that some of the mathematics used for analysis in his report was wrong, and thirdly that PBS did not always precede PRN administration, in that there could be occasions when a resident was in pain, such that PRN medication was appropriate to administer. He accepted that the circumstances of administration or not by each nurse could be different, and that different nurses might have different opinions on use of PRN medication, but each acting properly. He accepted that Mr Cain, another nurse, appeared to have a level of PRN administration broadly equivalent to that of the claimant, but that Mr Morrice appeared to administer it far less than other nurses. Given his many concessions on such matters, which was to his credit when giving evidence as it was a clear indicator of credibility, we concluded that his report was materially flawed, such that the kind of investigation that a reasonable employer might have conducted had not taken place. In short, the claimant's many criticisms of it were most often justified.

145. Ms **Heather Smith** gave brief evidence with regard to an investigation she had undertaken and the referral she made to the NMC after the final written warning was issued. We accepted her evidence as credible and reliable. The one issue with it was that she might have delayed the referral until an appeal against the warning had been determined, but as that

appeal was not proceeded with by the claimant that was not a material issue.

146. Mr **Michael Kenny** was clearly giving honest evidence, and he gave the claimant a final written warning rather than a dismissal as a consequence of the disciplinary hearing he held, which he genuinely believed to be the appropriate decision. We accepted that he considered that he had held a full and fair process, and that his belief that the claimant had acted as alleged was genuine also. We considered that his evidence was unreliable in some respects, however, such that the belief he held was not in our view one that a reasonable employer might have held, and the investigation that led to it was not one that a reasonable employer might have conducted, such that his decision fell outwith the band of reasonable responses available to a reasonable employer.

147. Firstly, he stated that the test that he applied was to listen to the account of the claimant and try to establish without reasonable doubt the facts. That is not the correct test for a disciplinary matter, which as referred to above is one of reasonable belief after a reasonable investigation, in summary. But if that was the test that he applied, we did not understand how he could regard the table of figures showing the number of dayshifts worked by seven nurses, and the total number of PRN medications administered by them, to be evidence of the claimant having acted as alleged in, again in brief summary, over-administering PRN medication. He accepted that the numbers in that table could be explained by (i) over administration of PRN medication (ii) under administration (iii) nurses facing different circumstances (iv) nurses applying the policies differently but each within the proper extent of discretion or (v) a combination of those. He also accepted that not always would PBS be applied before consideration of administration of PRN medication. Having accepted those matters, it appeared to us that inevitably whether or not there had been wilful or negligent acts by the claimant that affected or risked the wellbeing of residents was a matter of clinical judgment in the circumstances. The table referred to could not, on that analysis, be evidence of over—administration by the claimant. That was quite apart from the detail that one of the nurses, Mr Peter Cain, had a level of PRN per dayshift that was broadly similar to that of the claimant, although the

number of dayshifts was significantly less. Applying the correct test however we considered that no employer acting within the band of reasonable responses could have come to the view that Mr Kenny did on the information before him.

148. Secondly, at the start of the disciplinary meeting he indicated to the claimant that he would not permit the claimant to comment fully on the actions of other nurses. We did not consider that any reasonable employer would have done so. Where the claimant was being compared with other nurses, as the respondent did, she could argue what she wished in responding to the allegation. It may or may not be relevant to issues for example of consistency, but without understanding the claimant's position from what she wished to say a fair hearing did not take place.

149. Thirdly, Mr Kenny considered matters only at a generalised level. He did not ask the claimant about any of the hundreds of pages of supporting material, such as Pink Notes or MAR sheets. Where the allegation was one of wilfully or negligently acting, as here, and where it was such a serious allegation, the lay Members of the Tribunal, each of whom have wide and lengthy experience, were clear that all reasonable employers would have provided the claimant with specific examples from the documentation for her to comment on rather, than seek to decide matters on the basis of generality. On Mr Kenny's view of the table, there were something around 100 - 200 examples of over-administration in the period in question. By considering the Pink Notes and MAR sheets, some examples of specific instances could have been chosen, as all reasonable employers would have done, from the documents, where it appeared to him that the claimant had not engaged PBS when she should have done, and instead administered PRN medication in a manner that was not only not required, but wilful or negligent. Those specific examples would then have given the claimant fair notice of what she is said to have done, sight of the relevant documentation in relation to them, and an opportunity to comment. The absence of such detail was not consistent with any notion of a fair procedure. No reasonable employer would have acted in that manner in our view.

150. Fourthly Mr Kenny said in his evidence that PRN medication was that it was “not as required, but as necessary”. But that is not what the respondent’s administration of medication policy states. It refers to the medication being as and when required. It appeared to us from that evidence that Mr Kenny did not apply the terms of that policy but his own different view of what PRN meant, and one that had a higher standard than the policy itself. No reasonable employer would have done so. All reasonable employers would have considered the documentation as to policy and procedure in the terms written. In so far as reference was made to the STOMP policy it would firstly have noted that it was for prescription of medication, not its administration (an error in the Investigation Report initial draft was amended when the claimant pointed out the distinction between those terms, she not being someone who prescribes medication) and the claimant’s evidence that it was a policy for England and Wales was not disputed in cross examination.

151. More generally in this regard, we considered that there was a lack of consideration of the claimant’s position stated both to Mr Stewart prior to and during the investigation hearing and to Mr Kenny to the effect that she believed that she was administering medication appropriately to respond to pain suffered by the resident. If there was to be an allegation of negligence as to her doing so, all reasonable employers would have investigated the basis on which it was said that she had acted negligently, either by reference to written policy, procedure or practice, or otherwise. That was not done in the manner any reasonable employer would have done. Mr Kenny appeared to us to consider matters against his own practices and views. He is an advocate for PBS, as he is fully entitled to be. But his background and experience is different to that of the claimant. He did not appear to us to understand her position that she was acting as she was entitled to, if not required to, from her training and experience.

152. Where negligence is alleged of a person in such a position, the basic test that any reasonable employer would apply is whether the person acted as no reasonably competent nurse, acting with ordinary skill and care, would have done. In a sense it is a concept not the same as, but not entirely dissimilar to, the band of reasonable responses for an employer in the context of fairness. Unless there is a relevant direction given that is clear

and was breached, which would not be an issue of negligence but of failure to follow a reasonable instruction, account requires to be taken of the range of discretion to act that someone administering medication in such circumstances has. We consider that all reasonable employers would have done so, but Mr Kenny did not.

153. In further consideration of that aspect, the PRN policy referred to individuals having their own PRN plan, and that it was to be given as directed on the MAR and PRN plan (paragraph 2.61 of the policy). In order to determine firstly whether the PRN medication was not properly given, and secondly whether the circumstances were those of wilful or reckless conduct as alleged, it was we considered at the very least as a matter of fairness a step that all reasonable employers would have taken to have considered those PRN plans for each resident within the disciplinary hearing. That was also not done.

154. Fifthly Mr Kenny gave evidence that he had been provided with summaries of each resident concerned in the investigation, but that was not provided to the claimant and was not before us. Not providing the claimant with copies of a document being considered by the person taking the meeting and making the decision was itself not the act of any reasonable employer.

155. Finally the letter of decision was we considered unclear on important aspects. It did not explain the extent to which there were findings made, some of which were partial. For the first allegation there was reference to the claimant's admission, but that was about three occasions of not recording matters properly, and it was not clear from the letter whether that was the finding, of about three instances, or those of the Investigation Report which indicated what we have counted as 16 occasions, addressed below. None of the detail of the failure to record the reasons for PRN medication for example had been put to the claimant in the disciplinary meeting.

156. The lack of clarity extended to not stating in what respect there were partial findings on the third allegation, and why overall the decision was taken to issue a final written warning as the penalty. That is naturally not as serious as dismissal, but it is a serious penalty, not only for the person's record,

but also as a further issue of conduct may lead to dismissal, and the issue itself was referred by the respondent to the NMC.

157. Overall the Tribunal considered that the meeting was not conducted nor was the decision reached by Mr Kenny in the manner that any reasonable employer would have done so, it was outwith the band of reasonable responses, and that the decision-making was based on what was a superficial assessment of the issues. It was for these reasons that his evidence was not regarded as reliable in these respects.

158. Ms **Vicky Bradshaw** was we considered a credible and generally reliable witness. She had conducted a full investigation into the grievance raised by the claimant in 2022 (one that contrasts very sharply with that by Mr Stewart). She sought to consider the latter grievance as best she could. The one area where we did have a concern was the view she expressed that conducting the grievance in accordance with the respondent's policy would not have made any difference. She accepted however that that depended on what information was given to the investigating officer by the claimant at a formal meeting, and what investigation was then undertaken. She was not aware that Ms Oke initially had not apologised, for example, and accepted that asking questions in a supervision meeting was not the same as conducting an investigatory interview.

Discussion

Dismissal

159. It was held in the earlier Judgment that the Tribunal had jurisdiction over the claim of unfair dismissal.

160. The Tribunal members had not come across a case such as the present in their collectively lengthy and wide experience. That there had been so many suspensions, grievances, hearings and issues was they considered close to if not actually unique. A number of issues arise for decision. At the heart of the case was a series of matters where what the respondent did was contrary to their own policies, or so far outside the band of steps that a reasonable employer might take that the Tribunal had no doubt but

that their actions destroyed trust and confidence such that the claimant had been dismissed as she alleged. We address that issue first.

161. The issue is - was the claimant dismissed by the respondent under section 95(1)(c) of the Employment Rights Act 1996 ("the Act")? Matters are not entirely straightforward. Firstly, the claimant was admittedly at fault for taking her son into the unit, the first of the disciplinary issues. The first suspension was appropriate in light of that. Secondly the respondent did allow her appeal against the dismissal in 2020, and although the claimant said that the move to Ellen Mhor was imposed that is not what the letter of decision says, as it refers to a proposal. In fact the move there very largely worked well in the initial months.

162. Thirdly the claimant's own perception of what should be done, particularly in relation to her grievances, was we considered unrealistic at least for some of them. The third grievance she raised was in our view well investigated and considered by Ms Bradshaw, and she did so as a reasonable employer might. The full forensic examination the claimant argued for is not what is required of a reasonable employer, not least when the claimant said in evidence that that matter was of lesser importance for her, and she did not appeal it. We did not consider that the issue raised in that grievance was particularly material. The claimant did not appeal the decision. We did not accept her arguments that Ms Johnson was lying about what happened, or why Ms Johnson had raised matters in the manner that she did.

163. Fourthly the claimant was in error in allowing her registration as a nurse to lapse. She brought it to Mr Stewart's attention however, he was aware that she was seeking to resolve it and assisted with that, and it was quickly remedied. Lapse of registration did not fall within the grounds for suspension set out in the Disciplinary Policy. She could have undertaken non-nursing work for the short period until matters were rectified, or other steps taken such as directing her to take annual leave. Mr Stewart genuinely believed that he had no other option. In all the circumstances we did not consider that his decision to suspend the claimant for the short period it took for her to remedy matters was outwith the band of reasonable

responses described in ***Hitt***, although many employers would in our view not have taken such a step.

164. Finally matters require to be assessed in the context of the care sector in which the respondent operates, involving caring for very vulnerable adults who lack legal capacity, and may not be able to articulate that they are in pain. It is a highly regulated sector, in which adhering to procedure and record keeping is of importance for obvious reasons. For reasons we shall come to we consider that the last suspension of the claimant was within the band of reasonable responses.

165. The background to the resignation was set out in the claimant's evidence at length, and not all of it is we considered relevant, nor were all of her arguments accepted. What is relevant to the issue, in our assessment, and the areas in which we considered that the claimant's evidence should be accepted, are the following matters:

166. The claimant was dismissed in 2020 for allegedly taking excessive breaks in a procedure that was substantially and obviously lacking in fairness. She disputed doing so and CCTV evidence could have been shown to her to establish the timings of them. It was not, and Mr Brien rightly did not seek to defend that. It was alleged that she had acknowledged taking excessive breaks in the letter of decision, but even the minute prepared by the respondent, which the claimant disputed, did not state that she had. The respondent did not appear to have a policy as to how breaks should be taken. There is an entitlement to rest breaks or compensatory rest under the Working Time Regulations 1998. One might think that that is particularly important in a role as stressful as that of a nurse running such a unit as that on which the claimant worked. No reasonable employer would have concluded that there was a basis to hold that she had taken excessive breaks on the evidence we heard (which did not include any CCTV evidence). The decision to dismiss fell well outside the band of reasonable responses in all the circumstances.

167. Whilst the claimant appealed the decision successfully, that did not entirely remedy matters. Firstly she did have the fact of a dismissal, and the period when not at work. That was for a material period from

10 September 2020 to 26 October 2020. That is liable to leave an emotional "scar" as we considered did happen, supported by what Mr Stewart said that the claimant had told him. Secondly the circumstances of that dismissal affected her sense of trust and confidence in her employer, because of the unfair way the process had been undertaken. Not being able to view CCTV evidence where length of breaks was in issue was particularly obviously unfair. Thirdly she did not simply return to work, as a move to Ellen Mhor was proposed. Her preference had been to remain where she was. She agreed to the proposal, and at least initially it went well, but she was the one who was moved. Fourthly whilst Mr Quigley recommended that management take what were in effect remedial steps, there was no evidence that that had been done. These matters collectively amounted to a significant aspect of the background.

168. The claimant was later woken from her sleep, whilst at home and verbally abused by two colleagues on the opposite shift who had telephoned her. She tried to raise it at the next handover meeting the following morning, without success. She initially was prepared to deal with that informally if they were spoken to, staff were emailed as was done, and the two staff concerned apologised. That reaction by the claimant was moderate and responsible. One of the staff involved in the call apologised, but the other refused to. When it then transpired that someone from the handover meeting had raised what was a malicious complaint to the NMC the claimant made a formal complaint in writing to Mr Stewart. That was clearly a formal grievance under the respondent's policy, and one that fell within the ACAS Code of Practice in relation to grievances.

169. She was fully entitled to do so. She believed that the same staff member who had refused to apologise had made that malicious complaint. That formal written complaint engaged the respondent's grievance policy. It required a meeting with the claimant at which she could be represented, as did the ACAS Code, and a reasonable investigation. That formal meeting with the claimant did not take place. If there had been, the claimant could have provided full details of what had happened, and why she believed that the person had done so was based in part on the refusal of the person she suspected to apologise. A reasonable investigation

would include interviewing all those at the handover meeting, of which there were only four. The finger of suspicion clearly pointed in the direction suggested by the claimant. Having been armed with what the claimant would have said at a formal meeting a full investigation could and should have taken place. It did not. The respondent argued in submission in brief summary that the claimant knew about the investigation but that is not the case. She did not know what Mr Stewart had done, or not done, and as we address later she was initially told by Ms Crump that she had been told in effect there had been an investigation with statements available.

170. In the intervening period the claimant was suspended. We do not consider that it can be fairly said that the decision to suspend was not within the band of reasonable responses. The allegations included the potential for harm to residents.

171. The handling of the investigation into the allegations that led to the suspension was however at best inept. Mr Morrice made an allegation. The first question was to decide what to do with it. That involved undertaking an investigation and the purpose of that is to assess whether or not a formal disciplinary hearing was required. The allegation was a serious one, which if true not only had the potential to be gross misconduct but career-ending. The respondent knew or ought to have known that and conducted the investigation and later disciplinary process in that light. All reasonable employers would we consider have undertaken a full and fair investigation.

172. Mr Stewart held an investigatory meeting with the claimant at which she was to all intents and purposes ambushed. She was given five minutes notice of that meeting which was said to be outside the disciplinary policy, and informal. It was neither. It led to her being shown a table, and asked to comment on it immediately, on the basis of generalised allegations deriving from the table. That was so obviously unfair that it almost beggars belief. The allegations as to over administration of PRN medication were entirely lacking in specification. That the table was thought by Mr Stewart to be the basis for such a meeting is a concern. At the very highest it indicated a matter for further investigation, but was clearly not sufficient of itself (as we address further below). The manner in which such an

allegation was addressed was also a significant factor in the deterioration in trust and confidence.

173. The claimant sent a detailed response by email the next day, as best she could from the woefully limited information available. It appeared to us that it was ignored entirely at that stage. It should not have been. It warranted consideration if the investigation was going to be a full and fair one.

174. Mr Stewart then sent a letter purporting to be a decision on the grievance which was misleading at best. For example it referred to the claimant and him having had a meeting on 20 June 2022. No such meeting had taken place. The decision letter was not one that any reasonable employer could have sent. That exacerbated the claimant's concerns, and further damaged trust and confidence. She did not appeal at that stage, however. She explained in evidence that her attention was on the investigation.

175. Mr Stewart prepared an investigation report which we considered was nowhere near to being a basis to hold a disciplinary hearing on the allegation of over administration of medication, which was the more serious of the allegations. So far as it addressed the lack of adequate recording of administration of medication however it was we consider within the band of reasonableness.

176. So far as over administration was concerned, the Report was predicated on the principle that if the claimant administered on average per day shift more medication than other nurses she was doing so excessively. It appears to us that that matter is not sufficient to make such a serious allegation, and he did not seriously dispute that in his evidence. There may be many reasons why one nurse administers more medication than another. One is the possibility of over-administration of PRN medication. Another might be that the second nurse is doing so less often than the resident might reasonably need. Another is that the nurses assessed situations differently whilst each was acting properly. Another is that they faced different situations. There may be combinations of those. Mr Stewart accepted that.

177. At best such a table as the respondent produced merits investigation into what it might show by considering individual examples of situations where

medication was administered or not, and the reasons for that in each case. That then requires more detailed investigation of the records for each patient, using specific circumstances of dates, times, medications administered and the presentation of the resident at that time, rather than generalised allegations, and the reasoning given by nurses including the nurse under suspicion. It requires consideration against policies and procedures, and whether or not the nurse's decision was one she or he was entitled to take. It required examination of the PRN protocols for each resident, and an examination of the documentation in relation to that in so far as the claimant's acts were concerned, but also if there was to be a comparison with those of other nurses. Such an investigation simply did not take place. Documentation that was relevant was not included in the Report, particularly the PRN protocols. Mistakes were made with the detail, mathematics, and the founding documentation such as the PBS documents. In our view the investigation report was materially deficient in this respect, and not one that a reasonable employer might have produced. It was outwith the band of reasonable responses.

178. The disciplinary hearing before Mr Kenny was also substantially flawed. The claimant had to pursue being given access to documentation. Some of it, very substantial in amount at almost 500 pages, was given to her about two days beforehand. She had to try and guess what the allegations related to in respect of alleged over administration of PRN medication within the documentation as the allegations had not been specified. No allegation against her in that regard was specific as to what she had done, when, in relation to which resident, and why what she had done was inappropriate in some way when assessed against policy or other documents. When she sought to raise issues of the other nurses she was generally shut down, and although not entirely so the extent to which she could argue her points were very limited. Given that the respondent argued a comparison with colleagues, as she was entitled to do, that also was obviously unfair.

179. The meeting did not include any detailed questioning around the issue of over-administration of PRN, and the relevant documentation, nor did it address the detail of the findings as to not recording matters properly. The process itself was we considered unfair, not one any reasonable employer

would have conducted and the conclusion based on it unreliable because of that. That was a material breach of procedure, and a significant matter in the background of the events. The authorities referred to above on the extent of investigation required are we considered relevant in this context of a final written warning, with modification for that not being dismissal. The potential consequences of such a finding for a nurse, with a referral to her regulatory body, were serious. The level of investigation required of all reasonable employers reflected that context as discussed above. The respondent was far from meeting it in our view.

180. We should also note that the cross examination of the claimant did not refer to examples of her administering medication other than as required, as examples of that allegation. She was not taken to any of the Pink Notes or MAR sheets for example, either to provide details of where she did not record matters fully, or where it was suggested that her administration of PRN medication was wilfully or negligently.

181. Had the disciplinary process been one within the acts of a reasonable employer, including the penalty of a final written warning, that could not have formed a basis for the finding of a constructive dismissal. But we consider for the reasons given above that there were a series of substantial matters that individually and collectively took it outwith the band of reasonable responses, or of acts that a reasonable employer might have done, such that that does form part of the background that is relevant to the issue of dismissal.

182. The outcome was a final written warning, rather than dismissal. The letter of decision did not explain the thought process for that, with findings as to “partially upheld” not setting out in what respect the finding had been made, and in what respect not. A final written warning is a significant matter, as it can lead to dismissal later. It can also affect reputation given the subject matter, and where a reference is made to the NMC, as was the case here, to one’s career. In our view it was outwith the band of reasonable responses to do so. This is also in our view a significant matter in the background of events.

183. The claimant appealed that decision, as was her right. She also sought to appeal the earlier grievance decision by Mr Stewart, although she was out of time to do so. The respondent permitted her to do so. She sought documents about the grievance, and had suggestions made that those documents were in a safe, or elsewhere, but eventually when she was on holiday she was told that there were none. The respondent had been in breach of its own policy in handling grievances, in that it had effectively not dealt with it at all. Not to investigate a formal grievance raised in the circumstances that the claimant did – being berated by telephone late at night, then having a malicious complaint made by one of those present at a handover the following morning to the NMC – was obviously of itself a significant matter.

184. Mr Stewart we accept spoke to three of the four staff involved, one not being present, and kept handwritten notes of those meetings, but did not produce them to us or to the claimant. There was some form of investigation, but not one within the grievance procedure, as he accepted and as Ms Bradshaw later found. At the time the respondent did not however state this to the claimant. Ms Crump told her by email that there were no documents, she (Ms Crump) having earlier been told that there were and passing that to the claimant. The claimant was entitled to believe that there had been no investigation from that, as well as from the reference in the letter of 15 August 2022 to a meeting on 20 June 2022 which had not taken place.

185. Had it been a matter considered in isolation the failure to conduct the grievance in accordance with the respondent's procedure, as well as the ACAS Code, would in our view have been sufficient to amount to a dismissal, supported by the authorities of ***McConnell*** and ***Blackburn*** referred to above. Putting it simply the serious failings in relation to the grievance alone rendered this a dismissal in our view.

186. But even if not, when considered with the background of the earlier events where the respondent has been found to be to some extent at fault, set out above, the Tribunal had not the slightest doubt that the claimant had proved that she had been dismissed by the respondent under the terms of section 95(1)(c) with the email from Ms Crump explaining that no

documents existed being the final straw, under the authority of ***Kaur***. That final straw was clearly related to the earlier sequence of events, in our view. These matters were all part of a continuum. Mr Stewart was the person who handled the grievance and conducted the disciplinary investigation.

187. The respondent argued in cross examination that the claimant had become aware of the decision in the case by Ms Jackson, and suggested that that was the reason for the decision to resign. We did not accept that. Whilst the claimant was aware of that decision, it did not we consider feature to any extent in her own decision to do so, save that she was concerned that steps were taken against her because she had been a witness for the claimant in that case. The reasons given in the email of resignation we considered to be the genuine ones.

188. The matters we have identified as relevant to the decision to resign are each of materiality individually, but when combined with the information Ms Crump gave as to the handling of the grievance as a final straw it is entirely clear in our view that the respondent had acted in material breach of the implied term as to trust and confidence explained in authority set out above, and the claimant was entitled to resile from the contract, as she did. She did so because of the matters set out above, in particular the final straw of the failure to address her grievance properly under the respondent's own policy. She did not delay unduly in so doing, as the respondent accepted in submission, to its credit. She has proved that she was dismissed by the respondent under section 95(1)(c) of the 1996 Act in our opinion.

Reason and fairness

189. The following issues are: if so, was the reason for that potentially a fair reason under section 98(2) of the Act, and if so, was the dismissal fair or unfair under section 98(4) of the Act? We did not consider that the respondent had proved any such reason, nor was that contended for. The dismissal is unfair as a result. Had it been necessary to do so we would have held that the dismissal was unfair under section 98(4) for the reasons

set out above. There were a number of what we considered to be obvious and serious matters of unfairness as set out above.

Working Time Regulations 1998

190. We next considered the issue of the alleged breach of the 1998 Regulations. The first issue in that regard is that of jurisdiction, which had been reserved for this Hearing by the earlier Judgment. The claimant was substantially late in commencing her claim. The latest possible date not to have had a break was 8 August 2022. Early Conciliation for such a claim ought to have commenced by 7 November 2022, but was not done until 16 December 2022. That means that the time for conciliation does not count for these purposes. The Claim Form was presented on 22 March 2023, although a version of it was presented in February, albeit not a competent one. The Claim in this regard is over four months late.

191. We consider, having regard to the earlier Judgment in this case which set out the relevant case law as to jurisdiction, and the evidence before us, that the claimant has not proved that it was not reasonably practicable for her to have done commenced this claim timeously and that she did so within a reasonable period of time when it became reasonably practicable. She was suspended from work on 9 August 2022, and her attention thereafter was partly on fighting the allegations, but this was before the referral to the NMC by the respondent on 30 November 2022, which is what is referred to in the earlier Judgment. That is a very different factual matrix to that applicable to the rest breaks claim. There was very little evidence as to why that claim was not made timeously. The test is one of reasonable practicability as set out in the earlier Judgment. The claimant was able to send detailed emails during the relevant period. The onus of proof is on her. We concluded that the claimant had not established that it was not reasonably practicable to have presented the claim under the Regulations timeously, and that it was not within the jurisdiction of the Tribunal because of that. It required to be dismissed as a result. That outcome is the same whether under Regulation 30 of the Regulations or section 23 of the 1996 Act, as the test in each case is the same.

Remedy

192. Remedy was addressed in light of the decision that there had been an unfair dismissal. The issue itself was amended following the withdrawal of the protected disclosure claim, as no injury to feelings head of loss arises, and the dismissal of that in relation to the Regulations, to be as follows: to what remedy is the claimant entitled, including but not limited to (i) any financial losses sustained or to be sustained as a result of the dismissal; (ii) whether there might have been a fair dismissal by a different procedure; (iii) any contribution to dismissal; (iv) whether the claimant has mitigated her loss; and (v) whether there should be any increase to or deduction from the award made should either party not have complied with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

193. The parties agreed that the **basic award** was the sum of £2,569.50.

194. The position on the **compensatory award** was disputed. The respondent argued that the claimant was receiving more net pay after dismissal than before, was suffering no loss, and that no award was appropriate because of that. For the reasons addressed below, the Tribunal did not agree with its position, which it regarded as an unduly simplistic approach.

195. The calculation of **losses** was not straightforward. The claimant had not initially produced a Schedule of Loss complying with the case management order. She later produced amended versions, which were not straightforward to follow. She produced handwritten workings on 18 March 2024, which again were not easy to follow. She produced through Mr Brady a document headed “Liability and Remedy” with new heads of loss, and an excel spreadsheet was produced by the respondent from the payslips, which we considered accurate for the amounts of net pay received, although we have carried out our own calculations as below. In short we did not consider that either party had accurately calculated the loss.

196. We commenced by calculating what the net income from the respondent would have been had there not been a dismissal. For that we considered that the starting point was the net income prior to the suspension, as it fell when there was no overtime. We started using the net income for the six

month period up to July 2022, which we considered reasonable as a basis for net earnings with the respondent. To make the calculations we did so in weeks. The average for that period is a net sum of £621.23 per week.

197. We then considered the agency earnings. The Tribunal considered that the claimant's evidence as to loss should generally be accepted. The Tribunal considered that the claimant had been working an additional job with an agency whilst employed by the respondent, doing so to raise extra money, for a substantial period and well before the suspension. She did so partly for a holiday in Australia, but partly as she had done before for extra funds, working extra hours to do so. The Tribunal accepted her evidence that but for the dismissal she would have continued to have done so. The Tribunal considered that the period prior to suspension was a more accurate assessment of her income at this stage, and noted that for a period of 18 weeks it was £4751.54, which is the weekly equivalent of £253.97. It accepted that she was working towards the cost of the holiday to Australia, and that in future may not have worked to the same extent. The evidence was that she had done so in earlier years to pay for items including holidays with her two sons, she being a single parent, which we accepted although the payslips were not produced for the earlier years. Taking a broad brush approach the Tribunal concluded that it was appropriate to take two-thirds of that figure as the estimate of future income from that source, which is the sum of £169.31 per week. It took that as the figure for what the claimant would, but for the dismissal, have been earning from the agency in addition to the income from the respondent.

198. To that we added the employer pension contributions from the respondent of £128.89 per month which is the weekly equivalent of £29.74. That produces a total net income prior to termination we assess at £820.28 per week.

199. We then assessed the claimant's net earnings in the period following dismissal, with the evidence before us for the period from 2 December 2022 to 1 March 2024, a total of 62 weeks. The total income in that period was, net, £51,736.73. That is an average sum during that period of £834.46 per week. From that we consider two deductions require to be

made. The first is for there being no separate paid annual leave, in contrast to the position with the respondent. That has a value, as the agency pay is inclusive of an element for holiday pay. We consider that that is assessed on a broad basis. We did not consider that doing so at the rate of 12.07% of the net weekly income, being the value derived from the 1998 Regulations, was appropriate, although it was not irrelevant as a guide. We concluded that a lesser amount of £50 per week was reasonable for that element. The second is for the extra cost of her travelling to locations, compared to her being able to work closer to her home at the respondent. The claimant in evidence stated that on occasion she paid for diesel for her car at £100 per week, but we considered that likely to be an unusual amount for her, and that some would be for other reasons in any event than the additional cost of travel to work. We consider that a broad brush approach is appropriate for that, and assess it at £25 per week. Those two amounts reduce the income after dismissal to £759.46 per week. The balance against the former total income, net, is the sum of £60.82 per week.

200. The respondent argued that there was not only no loss, but that the claimant had not mitigated her loss as she should have obtained a new permanent role with another employer within two months. We did not accept those arguments. We preferred the claimant's evidence, and accepted her reasons for not applying for a post which required her to go through the history of events set out above, as it caused her significant distress and upset. We accepted that her evidence on that was genuine. We did not consider that the respondent had discharged the onus on it as to mitigation.

201. The period of loss from the dismissal on 29 November 2022 to the date of the last day of hearing is almost 18 months or 78 weeks. The claimant's evidence was that she had not sought alternative full time employment partly because of the NMC referral, which remains outstanding, and partly because of these proceedings. With the passage of time it appears to us that although the claimant has not failed to mitigate her losses given all the circumstances, the period of loss should end eight weeks after the time this Judgment is received by the parties, which is to say a period of 86 weeks' loss in total. The resulting amount is £5,230.52.

202. The claimant lost her statutory rights. The respondent quantified that in its counter schedule of loss at £350 and in the circumstances we agreed that that was a reasonable figure. We added that figure, producing a total of £5,580.52

203. We considered that the respondent had breached the **ACAS Code** in several respects. Firstly and most obviously it did not conduct any form of investigation into the grievance in the terms set out in the Code. There should have been an investigation meeting with the claimant, at which she could be accompanied. Statements should have been taken. Those should have been taken from all present at the handover which is referred to in the NMC referral. That the referral was made to the NMC itself, and anonymously, did not prevent such an investigation. The claimant, understandably, alleged that it was malicious and put forward a rationale as to who she believed had done so. It could only have been one of the four staff attending the handover meeting which was referred to in the anonymous referral. A decision with regard to it could, and in our view should, have been made on the basis of the balance of probabilities from the outcome of that investigation unless (as we considered unlikely) it was not possible to come to a decision.

204. The investigation into the grievance initiated by Mr Morrice was handled entirely differently by the respondent. It became a disciplinary matter, and the claimant was not treated in accordance with the Code. The disciplinary investigation was materially flawed for the reasons we set out above. The claimant was not given the allegations in a manner that allowed her to respond to them. They were simply vague. Specifics were never provided to her, as they ought to have been. She did not have a fair opportunity to respond to them. The disciplinary hearing was not conducted fairly and in accordance with the Code, in our view.

205. We considered that these were collectively serious and sustained breaches of the Code. In our view, the breaches in respect of the disciplinary process whilst material are not sufficient to warrant any increase, but those in respect of the grievance that the claimant made were of such seriousness that an increase was appropriate. In our opinion an increase in compensation of 15% was warranted given all the

circumstances. We did so not taking account of the issues that arose from the dismissal that was later reversed on appeal. That increases the award by £837.08, and produces a total of £6,417.60.

206. The respondent argued that the claimant did not allow her appeals to be heard, and that that should lead to a **reduction** in the award. We did not consider it appropriate to do so. The claimant's trust and confidence in the respondent had been destroyed because of faults by the respondent in its handling of matters, which were both substantial and extensive as addressed above. That she resigned, as she was in law entitled to do, was not a surprise. We did not make any reduction from the award in such circumstances.

207. The Tribunal considered whether to make any reduction from the award made on the basis of contribution or ***Polkey,*** but that was not pressed by the respondent in submission, and we did not consider that there was any basis to make such a reduction.

208. The respondent did however argue for **contribution** as to her not properly documenting medication administered, as she had admitted. The claimant had admitted not providing details of the reasons for PRN on three occasions during the period investigated by Mr Stewart. Her explanation for that was that she had become busy with other matters and had in effect forgotten to do so. She stated that other nurses also did the same. The respondent did not investigate the extent to which other nurses did so. Whilst there was no detailed cross examination on this matter, it did appear to us from the examination of the evidence before us that the Report from Mr Stewart did identify 16 occasions, much more than the three conceded, on which details which were required were not sufficiently noted, and the claimant did not deal with these matters in detail in her evidence in chief, as she might have done. Her acceptance of three occasions was we concluded less than the true extent.

209. That failure of accurate recording of medication is a matter of importance. If medication is not accurately recorded and noted, those coming onto shift are unaware of it. That can, although there was no evidence that it did, cause potential harm to the residents.

210. Whilst the acts of the claimant in not fully documenting the PRN administered adequately were a factor in the final written warning, they were not we considered a significant factor. The issue for us is the extent to which that was a factor in what we have found was a dismissal, as otherwise there should be no contribution. We consider that it was. It was part of the background to the disciplinary process, including the investigation and the resulting Report, and of the final written warning. Not much attention appears to have been taken to the detail by Mr Kenny as the claimant accepted a degree of fault. Sixteen occasions within the timeframe considered is however a relatively high level. If the claimant was unable to record what required to be recorded so often in such circumstances we consider that that ought to have been raised with the respondent in some manner, and there was no evidence that that was done.

211. We consider that this was a level of fault or blame that does attract a contribution. We were mindful of the authorities referred to above on contribution in a constructive dismissal case, but concluded that this was a case where it was appropriate. It requires to be considered in the context of the work that the claimant did and the pressures of time that there were, as she spoke to and as we accepted. It is not an issue of gross misconduct, but does not require to be to attract contribution.

212. We should add some comments with regard to the allegations of over administration of medication. We did not consider that those allegations had been established in the evidence before us, as the respondent would require to do if seeking a contribution. Mr Brien did not however argue for that, which was we considered a responsible position for him to have taken. We considered that the evidence before us was far from supporting the allegation in this regard, for the reasons given above. We were concerned that Mr Kenny had an incomplete understanding of some of the factual matters, some of which were referred to in the claimant's written submission, but more significantly we were concerned that he assessed matters against what he would personally have done. We did not consider that appropriate in this regard. An employer may give directions to its employees on such matters, but if so they require to be entirely clear. If the view is that PBS must be followed first and only if not successful can

medication for pain relief be provided, that must be made explicit in our view. It was not, at least for the claimant. From the documentation before us she had a discretion on what medication to administer, and when. If she had such a discretion, she could be criticised if no nurse acting with reasonable skill and care would have done so, but the evidence before us was nowhere near that standard. We did not therefore include that aspect in our consideration of contribution.

213. For completion it is appropriate to note that in November 2022 the guardian of one of the residents made a complaint about the claimant, a matter included in Mr Stewart's report, but that was not addressed in detail in the evidence of the respondent or cross-examination and not raised as part of the argument as to contribution. It was also not included in our consideration of contribution accordingly.

214. Taking into account all of the evidence before us and having regard to the authorities set out above we considered that it was appropriate to reduce the level of award by 10% for contribution in relation to the failure to record medication administered on the occasions to which we have referred. We considered that it is appropriate to reduce the compensatory award by that amount. That reduces the compensatory award to £5,775.75. We did not consider that it was just and equitable to reduce the basic award given all the circumstances referred to above.

215. For completeness we should state that the Liability and Remedy document sought compensation in relation to annual leave, but that had not been pled as an issue, and we did not consider it to be before us accordingly.

216. The total sum we award for both the basic and compensatory awards subject to the increase and reduction set out above is £8,345.25.

Identity of employer

217. The parties did not agree on who was the identity of the employer. Letters intimating disciplinary matters, including the final written warning from Mr Kenny, came on the headed notepaper of Cygnet Health Care Limited. It appeared to the Tribunal that that was likely to be the best evidence of

the party which employed the claimant, rather than the payslips which referred to Cygnet HD Ltd.

Expenses

218. Mr Brien sought expenses for the abortive hearing on 22 March 2024. We considered that his submission was well founded. The claimant had not complied with the case management order when she should have done. Her documents were not in proper order. She was given considerable leeway by the Tribunal when the hearing on 22 March 2024 was arranged. Initially she had not produced all relevant payslips, and latterly when she did so Mr Creamore prepared the Bundle of them, and other documents. He sent that to the claimant and Mr Brady, but the claimant did not have them before her when giving evidence at the hearing. An attempt by Mr Brady to send them to her during the hearing, which was delayed by nearly an hour to allow that, did not succeed. Mr Brady had also tendered, very late indeed on the evening before the hearing, additional documents he sought to rely on despite that documentation being due by 4pm on 18 March 2024.

219. We considered that in the circumstances the claimant not being ready to give evidence on 22 March 2024 amounted to unreasonable conduct on the part of the claimant that fell under Rule 76. The Tribunal then made a summary assessment of the amount of the award under Rule 78, and considered that the sum of £500 was appropriate in that regard. It was made having regard to the fact that the claimant will have capital from the award being made, and is earning the sums set out above. That was we considered adequate information against which to make the assessment. That award of expenses was made against the claimant accordingly. It can be set off against the sums awarded to her and a net payment made by the respondent, in our view.

Conclusion

220. The claim that the claimant was constructively and unfairly dismissed succeeds, and the claimant is awarded the sum set out above.

221. The claim that the respondent breached the Regulations is not within the jurisdiction of the Tribunal and is dismissed.

222. The claims as to a protected disclosure are dismissed on withdrawal.

223. For the avoidance of doubt we wish to make it clear that our Judgment does not find that the claimant did or did not administer PRN medication always in accordance with the appropriate policies. We did not have the material before us to make a finding one way or the other. It remains possible that she did administer such medication contrary to policy, and we accept that there is a body of evidence that at least raises a suspicion about that, but the evidence before us was limited to the extent set out above.

224. In this Judgment we refer to a number of authorities not addressed by parties in their submissions. In the event that either party considers that it has been prejudiced by that it may make an application for reconsideration under Rules 70 and following, setting out which authorities it seeks to make submissions on and what those submissions are.

Employment Judge: **S Kemp**
Date of Judgment: **29 April 2024**
Entered in register: **30 April 2024**
and copied to parties