# EMPLOYMENT TRIBUNALS

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| **Claimant:** | Ms Makawa |
| **First respondent:** | Transform Healthcare Limited |
| **Second respondent:** | Dr Sayani Sainudeen |
| **Third respondent:** | Lee Rycroft |
| **Fourth respondent:** | Jane Dawson |
| **Fifth respondent:** | Zoe Levick |

**Heard at:** West Midlands (Birmingham) Employment Tribunal **On: 27 June 2024**

**Before:** Employment Judge Childe

**REPRESENTATION:**

**Claimant:** In person

**First respondent:** Mr Wood (Counsel)

# REASONS

## Summary of the case and Introduction

1. This is a case in which the claimant, a nurse, alleges that she was dismissed by the first respondent after making a protected disclosure about the qualifications and competences of international nurses that she was required to work alongside, and after refusing to work alongside those non-UK qualified international nurses in complex surgery.
2. I had access to an agreed tribunal bundle which ran to 166 pages.

3. I did not hear any witness evidence.
4. I spent some time at the outset of the hearing confirming the issues in dispute, which required a summary assessment in the hearing, and these are set out in paragraphs 5 and 6 below.

## Issues

### 5. Protected disclosure

a. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996 ("**ERA 1996**")? The Tribunal will decide:

i. What did the claimant say or write? When? To whom? The claimant says they made disclosures on these occasions:

1. In an Email dated 11 April 2024 sent to Lee Rycroft (the third respondent), Jane Dawson (the fourth respondent) and Sayani Sainudeen (the second respondent) they said:

a. The first respondent was insisting international nurses are recognised as Assistant Theatre Practitioners ("**ATPs**") when they didn't have UK certification to practice as ATPs and weren't certified to practice in these roles.

b. Registered nurses cannot and should not be forced or coerced into supervising the overseas nurses working as ATPs without seeing their UK qualifications first.

2. In an Email dated 22 May 2024 to Lee Rycroft (the third respondent) and Zoe Levick (the fifth respondent) they said:

    a. The first respondent had confirmed the international nurses didn’t have their UK certification, nor had they done the training (ATP Course). However, the first respondent had confirmed that the international nurses could nonetheless act up as ATPs and scrub independently.

    b. The claimant had been advised by the Royal College of Nurses (“the **RCN**”) that if the international nurses aren't UK certified to perform their role as ATPs, they shouldn't be scrubbing independently, and her insurance would not cover her to work alongside them and do a scrub count.

    c. The Nursing and Midwifery Council (“**NMC**”) had advised the claimant she shouldn't be forced or coerced into doing scrub counts with the international nurses because they are effectively practising in a role they shouldn’t and are not UK certified to do.

    d. The international nurses are practising outside their scope of practice and shouldn't be 'acting up' as ATPs when they're not certified in the UK to practice

in this role. This is against the law and against the code of conduct.

e. Since the claimant came back from suspension questions remain about whether international nurses should be scrubbing independently in bariatrics as it is deemed high risk as the likelihood of it being converted to open surgery remains high. Two complex bariatric cases had happened over the weekend of 18 and 19 May 2024 where the claimant identified the following concerns:

    i. In one case an international nurse wanted to scrub for a bypass. A decision was taken by another member of staff that because it was complex surgery, the claimant should scrub for it.

    ii. That same international nurse went on to scrub in another complex case and was asked by the surgeon to get a suture ready for him repair the bowel. This nurse didn't even know which suture he was referring to although she had been given the sutures beforehand.

b. Did they disclose information?

c. Did they believe the disclosure of information was made in the public interest? The first respondent accepted for the purposes of today's hearing that the disclosure was made in the public interest.

d. Was that belief reasonable?

e. Did they believe it tended to show that:

   i. a person had failed, was failing or was likely to fail to comply with any legal obligation. The legal obligation the claimant relies on is:

      1. The requirements of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

      2. Her legal duty of care towards her patients.

   ii. the health or safety of any individual had been, was being or was likely to be endangered. The claimant relies on the health and safety of the patients she was caring for.

f. Was that belief reasonable?

g. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

### 6. Unfair dismissal

a. Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

   If so, the claimant will be regarded as unfairly dismissed.

## Relevant Law

7. An employee that presents a complaint that his or her dismissal was unfair and that the reason was that specified in s.103A ERA 1996 may apply for interim relief (s.128(1)(a) ERA 1996).

## Relief

8. The relevant parts of s.129 ERA 1996 provide:

   a. (1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—

   (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

      i. (i) section … 103A

   (2) The tribunal shall announce its findings and explain to both parties (if present)—

   (a) what powers the tribunal may exercise on the application, and (b) in what circumstances it will exercise them.

   (3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

   (a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or (b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

   (4) For the purposes of subsection (3)(b) “terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed” means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a) states that he is willing to re-engage the employee in another job, and

(b) specifies the terms and conditions on which he is willing to do so,

the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—

(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and (b) otherwise, the tribunal shall make no order.

(9) If on the hearing of an application for interim relief the employer—

(a) …

(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3), the tribunal shall make an order for the continuation of the employee's contract of employment.

b. The relevant part of s.130 Employment Rights Act 1996 provides:

    i. An order under section 129 for the continuation of a contract of employment is an order that the contract of employment continue in force—

(a) for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and

(b) for the purposes of determining for any purpose the period for which the employee has been continuously employed, from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.

(2) Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.

(3) Subject to the following provisions, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid—

(a) in the case of a payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and

(b) in the case of a payment for any past period, within such time as may be specified in the order.

(4) If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.

(5) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that

contract, in respect of a normal pay period, or part of any such period, goes towards discharging the employer's liability in respect of that period under subsection (2); and, conversely, any payment under that subsection in respect of a period goes towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.

(6) If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall



take the payment into account in determining the amount of pay to be payable in pursuance of any such order.

(7) For the purposes of this section, the amount which an employee could reasonably have been expected to earn, his normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed.

## Relevant Authorities

9. I am grateful to Mr Wood for accurately identifying in his skeleton argument the following authorities, which are relevant in this case.

## Whether it is likely that reason for dismissal was an automatically unfair one

10. The industrial tribunal should ask themselves whether the applicant has established that he has a “pretty good” chance of succeeding in the final application to the tribunal. “Likely” means more than “probable” and “probable” means “51 per cent or more” (**Taplin v. C Shippam Ltd**. [1978] ICR 1068).
11. Further guidance was provided in **Ministry of Justice v. Sarfraz** [2011] IRLR 562 at [16]: “likely” does not mean simply “more likely than not” — that is at least 51 per cent — but connotes a significantly higher degree of likelihood.
12. Where interim relief is sought in relation to a dismissal under s.103A, the claimant must show that it is likely that the tribunal will find that:

    (1) They made one or more disclosures to the employer;

    (2) The disclosure(s) (and in the case or more than one, each) met the requirements of specificity and precision identified in *Kilraine*;

    (3) They believed that:

    (a) The disclosure tended to show one or more of the wrongs in s.43B(1); and

    (b) The disclosure was in the public interest;

    (4) Those beliefs were reasonable;

    (5) The disclosure was the sole or principal cause of the dismissal

    (**Al Qasimi v. Robinson EAT/0283/17** at [11]-[15]).

13. “what [determination of the application] requires is an expeditious summary

assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim" (**London City Airport Ltd. v. Chacko** [2013] IRLR 610 at [23]).

## Findings of fact, Analysis and conclusion

14. I've identified the legal test that I must follow in determining the claimant's application for interim relief.
15. The bar the claimant must satisfy is high. I've got to decide whether the claimant has a pretty good chance of succeeding in the various components of her argument in which she must first establish that she made a protected disclosure and then establish that the principal reason for her dismissal was because she raised a protected disclosure. Necessarily i'm looking at this in summary format and I'm assessing it on the material before me.
16. The approach I take to my summary assessment of the case is to go through each of the contested issues identified, and then to explain how I've reached the view I have about whether the claimant has a pretty good chance of succeeding in each component of her case.

## Protected Disclosure

### Did the claimant disclose information in her protected disclosures identified in paragraph 5 above (issue 5.b)

17. The question for me is whether the claimant has a pretty good chance of demonstrating that she was providing information in her disclosure, as opposed to a bare allegation.
18. The first respondent's position is that the claimant was simply raising an allegation in her disclosures.
19. I conclude the claimant has a pretty good chance of showing that she was providing information in her disclosures. The concern she raised was specific. She was saying that the international nurses should not be working on complex cases because they did not have the requisite UK certification or training to carry out this role and this was against the law. The claimant then went on to describe a very specific scenario where an international nurse, who didn't have the requisite qualifications, was asked to get equipment ready to enable a surgeon to carry out a medical procedure and who did not understand what it was she was being asked to do.
20. Adopting the approach in *Kilraine v London Borough of Wandsworth*, I find the claimant has a pretty good chance of demonstrating that the two protected disclosures identified in paragraphs 5.a.i.1 and 5.a.i.2 ("the **Disclosures**") provide enough information and factual content for the first respondent to understand that the claimant thought it was unlawful and against the code of conduct and therefore potentially in breach of patient safety, that international nurses were required to work in roles that they were not UK qualified for or

trained in. The claimant then went on to give a specific example of an international nurse working beyond her competencies and unsafely in a surgical procedure.

### Did they believe the disclosure of information was made in the public interest (issue 5.c)?

21. The first respondent has fairly accepted these protected disclosures were in the public interest, so I don't need to consider that matter further for the purposes of today.

### Was that belief reasonable (issue 5.d)?

22. The claimant's case is that her belief that the international nurses needed to hold a UK qualification and be trained was reasonably held because she had taken advice from the RCM in the beginning of April 2024 and the NMC on 18th April 2024 on this issue. The claimant said she'd also carried out extensive research herself.
23. I accept the claimant's argument on this point. It is consistent with the Email of 22nd May 2024 where the claimant told the first respondent that she had contacted the NMC and she had also discussed her concerns with her RCN representative.
24. The first respondent's case is that this belief was not reasonably held because the claimant had misunderstood what certification or training an ATP needed to have to work independently on complex surgery.
25. The first respondent has produced nothing, other than its own interpretation of the regulatory and legal position, to counter what the claimant has said.

26. The first respondent is not saying that the claimant deliberately misunderstood the advice she was given from the NMC and RCN.
27. There is also some considerable force to the claimant's submission that she genuinely believed international nurses working in the UK on complex surgery should have the necessary UK qualification and training before doing so.
28. On the basis of the information I have available to me today, I conclude that the claimant has a pretty good chance of demonstrating that she held a reasonable belief that the disclosures she had made disclosed information to the respondent of wrongdoing, which was in the public interest.

Did the claimant believe it tended to show that:

(i) a person had failed, was failing or was likely to fail to comply with any legal obligation. The legal obligation the claimant relies on is:

1. The requirements of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.
2. Her legal duty of care towards her patients.

the health or safety of any individual had been, was being or was likely to be endangered.

The claimant relies on the health and safety of the patients she was caring for (issue 5.e).

29. The claimant referred specifically in the Disclosures to international nurses acting up as ATPs and practising outside their scope of practise which is against the law and against the code of practise.
30. The law the claimant was referring to, as identified by Mr Wood in his skeleton argument, is *the Health and Social Care Act 2008 (Regulated Activities)*

*Regulations 2014 ("**the Act**")*. Mr Wood identified section 18 as being a relevant part of the Act. I find the relevant sections of this Act to the Disclosures are as follows:

***a. Safe care and treatment***

*12.—(1) Care and treatment must be provided in a safe way for service users*

*(2) Without limiting paragraph (1), the things which a registered person must do to comply with that paragraph include—*

*(a)assessing the risks to the health and safety of service users of receiving the care or treatment;*

*(b)doing all that is reasonably practicable to mitigate any such risks;*

*(c)ensuring that persons providing care or treatment to service users have the qualifications, competence, skills and experience to do so safely;*

***Staffing***

*18.—(1) Sufficient numbers of suitably qualified, competent, skilled and experienced persons must be deployed in order to meet the requirements of this Part.*

*(2) Persons employed by the service provider in the provision of a regulated activity must—*

*(a)receive such appropriate support, training, professional development, supervision and appraisal as is necessary to enable them to carry out the duties they are employed to perform,*

*(c)where such persons are health care professionals, social workers or other professionals registered with a health care or social care regulator, be enabled to provide evidence to the regulator in question demonstrating, where it is possible to do so, that they continue to meet the professional standards which are a condition of their ability to practise or a requirement of their role.*

31. The first respondent's case is as follows:

    a. The claimant did not explain how the requirements of the Act were not being met in the Disclosures. The first respondent says the claimant needs to do more than simply say that international nurses are not

competent or qualified or haven't received support, training or supervision.

b. The first respondent says that it does not follow that an international nurse poses a danger to health and safety by virtue of their lack of UK registration.

c. The first respondent's case is that the claimant was concerned that she would be liable for any error on the part of the international nurse, and this was her primary concern, not the safety of the patients that she was caring for.

32. I've got to decide based on the material before me whether the claimant has a pretty good chance of showing she believed the first respondent was in breach of a legal duty or that the safety of patients was endangered.

## Breach of a legal duty under the Act

33. Turning first to the breach of a legal duty under the Act. I summarise what the Act provides in sections 12 and 18 as follows:

a. Care and treatment must be provided in a safe way for patients (section 12 (1) of the Act).

b. Persons providing care to patients should have the qualifications, competence, skills and experience to do so safely (section 12 (c) of the Act).

c. Enough suitably qualified, competent, skilled and experienced persons must be deployed (section 18 (1) of the Act).

d. Health care professionals carrying out regulated activity should be enabled to demonstrate that they continue to meet the professional

standards which are a condition of their ability to practise (section 18 (2)(c) of the Act).

34. The claimant:

    a. In her disclosure of 22 May 2024 was saying care and treatment for patients was not being provided in a safe way for patients. Bariatrics is high risk surgery, with a high likelihood of it being converted to open surgery. Non-UK certified international nurses didn't necessarily have the competence, skills or experience to act up as ATPs and scrub independently, to carry out this surgery safely. A specifical example of this was when, over the weekend of 18 and 19 May 2024, a non-UK qualified international nurse was required to independently scrub for a bypass surgical procedure. When the nurse was asked by the surgeon to get a suture ready for him repair the bowel, she didn't even know which suture was being referred to although she had been given the sutures beforehand.

    b. In her disclosure of 11 April 2024 was saying non-UK certified international nurses didn't have the UK certification to practice as ATPs and weren't certified to practice in these roles.

    c. In her disclosure of 22 May 2024 was saying the first respondent had told her international nurses acting up as ATPs weren't UK certified and hadn't done the necessary training course to practice as ATPs. Nonetheless those international nurses were being allowed by the first respondent to scrub independently as ATPs.

d. In her disclosure of 22 May 2024 was saying the international nurses are practising outside their scope of practice and shouldn't be 'acting up' as ATPs when they're not certified in the UK to practice in this role.

35. I find the claimant has a pretty good chance of demonstrating that:

a. The disclosure identified in paragraph 34.a demonstrated a breach of section 12 (1) of the Act as the claimant was clearly identifying generally that international nurses acting up as ATPs were not able to provide treatment safely. The claimant then went on to identify a specific example of an international nurse acting up as ATP and being unaware of which equipment she was being asked to prepare for the surgeon to enable them to carry out a surgical procedure. If that procedure was carried out unsafely due to that nurse's lack of knowledge of the correct equipment they were being asked for and how that equipment should be prepared, that treatment (i.e the bypass surgery) would not be provided in a safe way to the patient.

b. The disclosure identified in 34.b demonstrated a breach of (section 12 (c) of the Act). I repeat my findings in paragraph 34.a above about how the claimant was saying in the Disclosures that the international nurses didn't have the competence, skills and experience to carry out the ATP role and independently scrub in complex surgical cases safely. I would add to this that the claimant was clearly saying (based in part on what the first respondent had confirmed to her) that the international nurses didn't have a UK qualification or sufficient ATP training, to enable them to carry out the role of ATP.

c. The disclosure identified in 34.c 33.cand 34.d demonstrated a breach of section 18 (1) of the Act. As I have said in paragraphs 34.a and 34.b above, the claimant was saying that the non-UK qualified international nurses were not suitably qualified, competent, skilled and experienced to carry out the role of ATP to enable them to scrub independently in complex surgical cases safely. As I record at paragraphs 5.a.i.2.e.i and 34.a above, the claimant gave two specific examples of where an international nurse acting up as an ATP was not qualified, competent, skilled and experienced to carry out their role.

d. The disclosures identified in 34.b, 34.c and 34.d demonstrated a breach of section 18 (2)(c) of the Act as the claimant was saying that non-Uk qualified international nurses, acting up as ATPs and scrubbing independently in complex surgical cases (i.e carrying out regulated activity) could not demonstrate that they met the professional standards which are a condition of their ability to practise or a requirement of their role as they were not UK certified to do so and did not have the requisite training to do so.

36. For the reasons set out in paragraph 35 I have found the claimant has a pretty good chance of demonstrating that she set out clearly in the Disclosures how the first respondent was not complying with the Act.

37. I would add that there is no requirement for the claimant to identify a particular legal obligation in the Disclosures (i.e to go through the sections of the Act specifically as I have done in my judgment). Such a requirement would, in my view, go beyond the statutory wording and be inconsistent with the purpose of the legislation.

## Breach of claimant's duty of care towards her patients

38. I turn next to the claimant's legal duty of care towards her patients.
39. The law imposes a duty of care on the claimant, as a health care practitioner, in situations where it is 'reasonably foreseeable' that the practitioner might cause harm to patients through their actions or omissions. It exists when the practitioner has assumed some sort of responsibility for the patient's care. This can be basic personal care or a complex procedure.
40. To discharge the legal duty of care, health care practitioners must act in accordance with the relevant standard of care. This is generally assessed as the standard to be expected of an 'ordinarily competent practitioner' performing that task or role. Failure to discharge the duty to this standard may be regarded as negligence.
41. When harm has come to a patient, the law examines who has a duty of care to that patient - and whether there was negligence - in order to attribute responsibility/liability for that harm.
42. I find the claimant has a pretty good chance of demonstrating, in the parts of her disclosures I identify at paragraphs 34.a to 34.d above, that it was reasonably foreseeable that a patient would come to harm if international nurses were practicing as ATPs and scrubbing independently in complex surgical cases, outside of their qualifications, competence, skills and experience for the reasons I have already set out in paragraph 35.a above.
43. In the claimant's disclosure of 22 May 2024, she said that she had been advised by the RCN and NMC that she shouldn't be that forced or coerced into doing scrub counts with the international nurses because they are effectively practising in a role they shouldn't and are not UK certified to do. The claimant

also said in this disclosure *"If they (International nurses) were UK certified, I would be happy to do their count and would support their role as Assistant Theatre Practitioners."*

44. I find that the claimant has a pretty good chance of demonstrating that she believed the first respondent's requirement that she work alongside non-UK qualified, insufficiently trained and potentially incompetent international nurses acting up as ATPs carrying out a scrub count in a complex surgical procedure would breach her own professional duty of care towards the patient.
45. In carrying out the procedure in her capacity of nurse she would be assuming a level of responsibility for the patient's care.
46. The claimant was not only concerned that she would be liable for any error on the part of the international nurse. She was also concerned for the safety of the patients that she was caring for.
47. The claimant has a pretty good chance of showing that:
    a. She was concerned that if she carried out complex surgery alongside international nurses it was reasonably foreseeable that the patients would come to harm due to the international nurses' lack of UK qualification, training skills and competence to act up as ATP.
    b. She thought that if she agreed to carry out this procedure, with this knowledge, she too might be negligent as she was aware of the risk to the patient in carrying out a complex surgical procedure with non-UK qualified, untrained and potentially incompetent international nurses acting up as ATPs and nonetheless did so anyway. The claimant was worried that in these circumstances she might be uninsured, or she

might lose her ability to practice as a nurse (and her PIN number) as she would be acting negligently.

## Claimant's concern for patient safety

48. Finally, I turn briefly to the concern the claimant had for patient safety.
49. As I have already recorded, the claimant's concern was not just lack of UK registration, but also lack of training, competency and skills. The claimant was also concerned that it was not possible, without a UK registration, to verify that the international nurses have the UK required skills and competences to carry out complex surgery in the role of ATP.
50. Therefore, for the same reasons I have given at paragraph 35.a and 47 above, I find the claimant has a pretty good chance of establishing that she believed that the health and safety of the patients she was caring for would be endangered.

## Was that belief reasonable (issue 5.f)

51. I find the claimant has a pretty good chance of showing her belief was reasonable.
52. As I have recorded at paragraphs 22 to 28, the claimant had taken advice from the NMC, RCN and had conducted her own research and had her own knowledge about the legal duty she and the first respondent were under and how the first respondent's practice of employing non-UK qualified international nurses to act up in the role of ATPs could engager patient safety.
53. It also appears to be a matter of common sense that having a non-UK certified or trained nurse, without the necessary skills or competencies to assume the role of ATP, then carrying out complex surgery, could potentially be in breach of a legal obligation held by the claimant or the first respondent or a health and safety duty.

54. I therefore conclude that the claimant is likely to show at a final hearing that a qualified disclosure has been made and that such a disclosure was protected under the relevant sections of the ERA 1996.

## Unfair Dismissal

### Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

### If so, the claimant will be regarded as unfairly dismissed (Issue 6).

55. The reason for dismissal advanced by the first respondent for the purpose of today's hearing is set out in paragraph 62 of Mr Wood's skeleton argument as follows:
    a. The claimant's refusal to carry out certain activities (swab count) alongside international nurses.
56. I have already found at paragraphs 44 and 47 that the claimant has a pretty good chance of showing that she reasonably believed she would be in breach her own professional duty of care if she carried out complex surgery alongside non UK qualified international nurses acting up as ATPs, as it was reasonably foreseeable that harm might come to a patient and she in turn might be found to be negligent and may lose her ability to practice as a nurse.
57. I find that a swab count is a process used in theatre during a surgical procedure on a patient, which may be complex. The swab count is completed before the surgical procedure starts, mid procedure and at the very end of the procedure to ensure nothing is retained inside of the patient during their surgery.

58. I have recorded at paragraph 43 that the claimant said in her 22 May 2024 disclosure that she would be happy to do a swab count alongside international nurses "*If they (International nurses) were UK certified"* and [she] *"would support their role as Assistant Theatre Practitioners"*."

59. I therefore find that the claimant has a pretty good chance of showing that she did not refuse to do the swab count with international nurses in **all** circumstances. In fact, the claimant made it clear to the first respondent on 22nd May 2024 that she was happy to carry out the swab count in circumstances where the international nurses carrying out the ATP role were UK certified to carry out this role.

60. However, what the claimant was not prepared to do was to carry out a swab count alongside international nurses carrying out the ATP role who were not UK certified to carry out this role. The reason for this was as set out in the Disclosures. The claimant has a pretty good chance of showing that she reasonably believed if she did she would be in breach her own professional duty of care for the reasons I set out in paragraph 56 above; that the first respondent would be in breach of their legal duty under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 for the reasons I set out in paragraph 35 above and that patient safety would be endangered for the reasons set out in paragraph 50 above.

61. The first respondent was aware of the claimant's views on this from the Disclosures the claimant had made to the first respondent.

62. It is not the first respondent's case that they would accommodate the claimant's concerns expressed in the Disclosures and require her to carry out swab

counts alongside international nurses carrying out the role of ATP **only** when those nurses had full UK certification to carry out this role.

63. Rather, the first respondent required the claimant to work alongside international nurses carrying out swab counts in circumstances where the international nurses had **no** full UK certification to carry out this role.

64. I conclude that the claimant has a pretty good chance of showing that the principal reason for her dismissal was the Disclosures. As I have recorded at paragraph 55, the reason the claimant was dismissed was because she refused to carry out the swab count with non-UK qualified international nurses, and as I have recorded at paragraph 61, the first respondent knew the claimant had refused to do so because of the concerns raised in the Disclosures but nonetheless instructed the claimant to carrying out swab count alongside non-UK qualified international nurses. When the claimant refused to carry out the swab count with non-UK qualified nurses because of the concerns she had raised in the Disclosures she was dismissed. It is likely the tribunal will find that the Disclosures and the decision to dismiss were intimately connected and therefore the principal reason for dismissal was the Disclosures.

65. This isn't, in my view, a case where the tribunal is likely to find that the Disclosure themselves and the way the claimant conducted herself (by refusing to work in what she considered to be an unsafe and illegal way), should be separated.

66. In my view it would be different if the claimant had refused to carry out any surgical procedures alongside international nurses, including in circumstances where they **were** UK certified and trained. In those circumstances the claimant's refusal to work alongside international nurses might be separable

from the Disclosures and considered to be a failure to follow a reasonable management instruction. However, this is not the case here.

67. In reaching this conclusion I've therefore decided on the information I have that there is a pretty good chance the tribunal will find at the final hearing:
    a. the protected disclosure was not separate from the decision to dismiss or that they bore no other relationship.
    b. the claimant "could not have done one without the other" as suggested by the first respondent because the claimant couldn't carry out the first respondent's instruction that she work alongside non-UK qualified international nurses, acting up as ATPs, carrying out surgery (potentially complex surgery) for the reasons set out in paragraph 60 above.

Employment Judge Childe

9 July 2024