EMPLOYMENT TRIBUNALS

Claimant: Mrs Krishna Rai
Respondent: St. Luke's Hospital

Heard at: Watford Employment Tribunal
On: 19,20 and 21 March 2025
Before: Employment Judge S Matthews

Representation
Claimant: In person
Interpreter: Ms Dhankumari (Nepalese language)
Respondent: Mr I Aimufua (litigation consultant)

RESERVED JUDGMENT

The judgment of the tribunal is that:

The complaint of unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

1. The respondent dismissed the claimant for the stated reason of misconduct believing her to have neglected a patient, taken an unauthorised break, failed to test for Covid and failed to follow management instructions with regard to lifting patients. The case is about whether the respondent's decision to dismiss the claimant was unfair.

2. I heard evidence on behalf of the claimant from the claimant herself and from Shanti Rai (a work colleague). I heard evidence on behalf of the respondent from Richard Burden (CEO), and Vendula Waine (Matron).

3. At the outset of the hearing the respondent provided me with a bundle of 105 pages. Pages were added to the bundle during the course of the hearing, increasing the number of pages to 128. On the final day of the hearing the respondent was allowed to add further documents in evidence and a supplementary bundle was formed. Numbers in brackets below refer to pages in

the bundle and supplementary bundle, (X) and (X sup).

4. The initial bundle prepared by the respondent was not satisfactory. It did not contain the List of Issues or the disciplinary policy. It contained documents such as blank Agenda forms which were unnecessary. The respondent had not supplied the claimant with a paper bundle as required in the directions given by Employment Judge (EJ) Shastri-Hurst. The claimant had come to the tribunal with her own documents. As a result, it was necessary to spend some time before hearing evidence going through the documents. The claimant's husband confirmed that an email sent on 21 February 2025 included an electronic copy of the bundle and the respondent's witness statements. I ensured that the claimant had a paper copy for the hearing and that any additional documents were copied out and translated by the interpreter for her.

5. On day 3, part way through the claimant's evidence, the respondent applied to include further documents relating to the investigation and a letter inviting the claimant to a disciplinary hearing. The application was allowed in part where I was satisfied that the prejudice to the claimant in allowing their inclusion in the bundle did not outweigh the prejudice to the respondent in refusing to allow them. Where I could see those documents had been read out to the claimant during the disciplinary procedure I decided that there was no prejudice. The claimant confirmed that she had received the invitation to the disciplinary hearing and I was satisfied there was no prejudice to the claimant by the late inclusion in the bundle.

6. The failure to ensure that the bundle was complete before the hearing caused delay during the proceedings, which contributed to the need to reserve this Judgment. Moreover, Mr Burden and Mrs Waine produced a joint witness statement. Each witness should have had their own statement specific to their evidence. The respondent's representatives should have taken more care in preparing for the final hearing, including complying with the directions of EJ Shastri-Hurst and I urge them to carefully read such Case Management Orders in future.

The issues

7. The issues I needed to decide at this hearing are set out in paragraph 8 below. They reflect the discussion at the Case Management hearing before EJ Shastr-Hurst. At that hearing EJ Shastri-Hurst refused permission to amend the claim to include particulars relating to race discrimination and a claim for pay and holiday pay, restricting the claim to one unfair dismissal.

8. We agreed at the outset of the hearing that I would first hear evidence on liability and the 'Polkey' issue. The issues to be decided were therefore:

<u>Unfair dismissal</u>

1. The claimant was dismissed.

1.1 What was the principal reason for dismissal? The respondent says the reason was conduct. The tribunal will need to decide whether the respondent genuinely believed the claimant had

committed misconduct.

1.2 If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances including the respondent's size and administrative resources in treating that as a sufficient reason to dismiss the claimant?

1.3 The tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide in particular whether:

1.3.1 There were reasonable grounds for that belief

1.3.2 At the time the belief was formed the respondent had carried out a reasonable investigation.

1.3.3 The respondent otherwise acted in a procedurally fair manner.

1.3.4 Dismissal was within the range of reasonable responses.

Polkey

2. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?

Factual findings

9. This judgment does not seek to address every point about which the parties disagreed. It only deals with the points which are relevant to the issues that the tribunal must consider in order to decide if the claim succeeds or fails. If I have not mentioned a particular point it does not mean that I have overlooked it, it is simply because it is not relevant to the issues.

Background

10. The respondent is a charity that operates a nursing home offering long-term care, palliative care and support to patients recovering and moving from hospital to home. It employs around 100 staff. The claimant was employed as an auxiliary nurse from 30 December 2014 until the termination of her employment by the respondent on 23 January 2024.

11. The respondent employs around 45 to 50 auxiliary nurses. In addition, the nursing staff comprise senior nurses, charge nurses or sisters, and senior auxiliary nurses. The senior leadership comprises a CEO, a finance manager, a facilities manager and matron.

12. The claimant was managed by matron, Mrs Waine. The claimant described her working relationship with Mrs Waine as good. Mrs Waine confirmed that for most of her employment the claimant was a very caring member of staff. In 2023 Mrs Waine noticed a performance deterioration which she attributed to the claimant's personal issues.

13. The claimant was given a written warning for using equipment without the

assistance of another employee in April 2023 (7 sup). She had a performance support review for taking unauthorised breaks on 15 September 2023 followed by a disciplinary on 27 October 2023 (7 to 8 sup). She was given a final written warning for taking unauthorised breaks on 27 October 2023. It was reduced to a verbal warning by Mr. Burden on 23 November 2023 (56).

14. The disciplinary policy (116-128) indicates that an oral warning usually expires after 4 months and a written warning after 12 months, meaning that both warnings were still in force at the time of the dismissal.

15. The allegations that led to the claimant's dismissal arise out of 5 events; neglecting a patient, taking an unauthorised break, failing to test for covid, lifting without assistance and failure to follow management instructions when asked to assist with a lift. I will deal with each of these in turn, followed by an analysis of the investigation and disciplinary procedure. As I deal with each event I keep in mind that my task is not to substitute my own view as to what happened but to decide whether the respondent's actions were within the band of reasonable responses.

16. Neglect of patient on 3 January 2024. On 3 January 2024 there was an incident with a palliative care patient which resulted in a complaint from a family member who had visited the patient in the afternoon. The claimant had been responsible for looking after the patient in the morning. When staff attended the patient following the complaint, they found him with very "Soiled and dry urine and feces" (1 sup) indicating that he had not been changed in the morning.

17. The respondent says that the claimant should not have left him with a soiled pad and should have informed one of the nurses in charge (Marcella or Janice) that the patient had refused personal care.

18. The claimant's explanation for the incident was that she attended to the patient twice in the morning. He was not able to speak but he could wave his arms and legs, and he made it clear that he did not want personal care. She put cream on his feet. She wrote on the notes, 'He didn't eat breakfast and only drinking well himself, declined washed, dressed, changed pad, applied cream, made comfortable in his bed and only assisted with given food and drinks, call bell within reach and checked frequently on'. For personal care she selected to say he had consented, for method of hygiene that he had declined (102). The entry appears ambiguous as to whether she had changed his pad or he had declined it, but someone reading it is likely to think she had changed it. Mrs. Burden's evidence was that the patient was unable to drink unaided, so that part of the note was also misleading.

19. In the investigation and disciplinary meetings the claimant admitted that she failed to change the pad and failed to inform one of the nurses in charge. She was aware that she should have informed one of the nurses in charge and not just written in the notes. The claimant said she was "scared" of Marcella after a previous incident and Janice, the other nurse in charge, was not around at the time.

20. In a statement subsequently obtained for the investigation dated 15 January

2024 Janice confirmed that the claimant had been assigned to care for the patient that morning. She herself had seen the claimant several times that morning (1 sup) and there was ample opportunity for the claimant to speak to her about the patient.

21. The investigation gave the respondent reasonable grounds on which to believe that the claimant had failed to change the pad, that she knew that she should have told one of the nurses in charge and she had the opportunity to do so.

22. Unauthorised break on 5 January 2024. The claimant next came into work on 5 January 2024. Mrs Waine went to look for the claimant at around 2.30pm to discuss the 3 January incident. She could not find her on her designated floor. She then found her in the dining room, taking a break. When asked why she was taking a break without permission, the claimant said she had asked Ganga, the Senior Auxiliary Nurse, whether she could take a break. Ganga denied this (2 sup). The claimant later admitted in the disciplinary meeting on 19 January 2024 that it was a mistake to take the break without permission (68).

23. The claimant had been accused of taking an unauthorised break shortly before on 20 December 2023 (6 sup). There was a discussion about this at a disciplinary hearing on 22 December 2023 (59-66). She had also received a verbal warning for taking unauthorised breaks in November 2023, following a period of performance management (see paragraph 13 above).

24. I find that the respondent believed on reasonable grounds that the claimant took an unauthorised break on 5 January 2024. Although the claimant initially denied it the respondent, in the light of the claimant's previous history, reasonably preferred Ganga's version of events. The claimant later admitted she had taken the break without permission.

25. Failure to test for Covid on 5 January 2024. At the first investigation meeting on 5 January 2024, Mrs Waine noticed that the claimant was coughing a lot. The claimant told Mrs Waine that she had been ill the day before (her day off).

26. The guidance in place at the time, which the claimant accepted she was aware of, was that anyone with covid symptoms should take a test either at home before leaving or, if that was not possible, they should use one of the tests on the nurses' desk.

27. The meeting itself took about 20 to 30 minutes. They were in the library, and they were socially distanced. At the end of the meeting Mrs. Waine told the claimant to take a covid test. The claimant came back after five minutes and reported that she had tested positive for covid.

28. The claimant has maintained throughout, including in the tribunal, that she did not think she had covid symptoms, only pain in her leg or foot. I find that the claimant was displaying symptoms of covid, otherwise Mrs. Waine would not have asked her to take the test.

29. The claimant's account of the incident was contradictory. Although she said that she did not think she had symptoms, she also said that no lateral flow tests were

available when she arrived at work (64). If it did not enter her thoughts that she had covid why would she have looked for tests? In any event I accept the respondent's evidence that tests were available on the nurses' desk because the claimant was able to take a test immediately after the meeting, and even if claimant had not seen them on the desk, she could have asked for one.

30. I find that the respondent believed on reasonable grounds that the claimant neglected to take a test when she knew she ought to have done so.

31. Lifting without assistanceThe disciplinary allegations state that the claimant 'used sara steady and rota stand alone', 'recently'" On 22 December 2023 a disciplinary hearing was held (61-62) in which this was discussed. She had a previous warning for it (see paragraph 13 above). Her mitigation was that other people did it. That was corroborated by Shanti Rai. However I find that this was clearly not a practice condoned by the respondent; the claimant had been warned about it before.

32. Failure to follow management instructions. On 2 January 2024 the claimant was asked by a nurse to help lift a patient with a hoist. She refused. She was then asked by the nurse in charge, Kinglsey, She refused and went upstairs. Kingsley had to leave what he was doing to do assist with the hoist (3 sup).

33. Th claimant did not deny that happened as alleged but said that she refused because it was her lunch break (71). The respondent counters that staff are paid for lunch breaks, and they expect flexibility when tasks need to be carried out.

34. I find that the respondent believed on reasonable grounds that the claimant had failed to follow management instructions, without a sufficient reason.

35. Investigation and Disciplinary Procedure The respondent has a Disciplinary policy (116-128). The claimant was provided with a copy. It was attached to a letter dated 12 January 2024 (8 sup). It provides that an employee can be suspended where gross misconduct is alleged (120), dismissed for serious misconduct and summarily dismissed for gross misconduct. Refusal to carry out instructions and leaving a place of work will normally lead to disciplinary action. Gross misconduct includes 'The persistent and wilful refusal to carry out instructions despite warnings of the consequence of continued refusal' and 'The commission of a serious breach of duty prejudicial to the Hospital's relations with patients....'

36. The respondent held 2 investigation meetings, a disciplinary hearing, and an appeal hearing. The claimant was accompanied for all of them save the first investigation meeting. The investigation and the disciplinary was carried out by Mrs. Waine and the appeal was heard by Mr. Burden.

37. Investigation. On 5 January 2024 Mrs Waine had an initial discussion with the claimant about the care of the patient. The claimant was not accompanied. Minutes were taken by Joshua Peake (Facilities Manager) (64-66).

38. At that meeting the claimant admitted she had not changed the patient and that she should have reported the situation to the nurse in charge. She said she had

felt unwell the day before (her day off). She admitted she had refused to assist with the transfer of the patient on 2 January 2024 because it was her lunch time.

39. As indicated above, the claimant tested positive for covid immediately after the meeting. She then had to take sickness absence. On 10 January 2024 a letter confirming her suspension on contractual pay was sent to her while further Investigation was undertaken (87-88).

40. In the letter dated 10 January 2024 5 allegations were set out (now including the failure to test for covid and taking an unauthorised break). Confusingly, the letter refers to a disciplinary hearing on 12 January 2024. This did not take place. Instead, there was a further investigation meeting on 17 January 2024. The reason for this was that the respondent was advised to have a second investigation meeting rather than move straight to a disciplinary hearing. That enabled them to investigate and put to the claimant matters which arose out of the 5 January 2024 meeting, namely unauthorised absence and failure to take a covid test.

41. The investigation meeting on 17 January 2024 was attended by the claimant, Mrs. Waine and Mr. S. Mebrahtu (Finance manager) who took minutes. The claimant was accompanied by her nominated colleague, Bridget Herbert (SNA staff), (67 and 71).

42. Mrs. Waine read out each allegation, which now included the ones arising out of the meeting on 5 January 2024. She had received short emails in the course of her investigation from other staff involved and she read these out. They were from Ganga Limbo (regarding the unauthorised break), Janice Soriano (regarding the neglect of the patient) and Kinglsey (regarding the failure to follow management instructions). The claimant commented on each allegation.

43. With regard to neglect of the patient the claimant admitted she did not do anything other than cream his feet and did not report that she had been unable to change his pad to the nurse in charge. With regard to covid she maintained she did not think she had symptoms. With regard to taking a break she admitted it was a mistake to go without permission. With regard to using the lifting equipment alone she admitted she knew she should not have done so but had seen other staff do it alone. She admitted she had refused the request of a more senior nurse to help a colleague lift a patient, saying she was not feeling well and had not had breakfast.

44. Disciplinary The claimant was invited to the disciplinary hearing by letter dated 17 January 2024 (89-90). The letter listed the 5 allegations and informed the claimant that she had the right to be accompanied. It warned the claimant that the outcome could be dismissal.

45. The meeting took place on 19 January 2024 and was attended by the claimant, Mrs. Waine and Mr Mebrahtu (note taker). The claimant was accompanied by Bridget Herbert again. The 5 allegations were put to the claimant and the emails of GL, JS and KA referred to in paragraph 42 above were read to the claimant again. The claimant was given an opportunity to comment on each allegation

(68-70).

46. The claimant said essentially the same as at the meeting 2 days previously but with regard to neglecting the patient she said she had discussed it at the time with her colleagues Biru and Pex. On checking the rota it transpired Biru was not working that day. Mrs. Waine checked that the claimant felt well enough to continue in the light of her apparent confusion. The claimant said she did and admitted it was her own failure not to report it to the nurse in charge.

47. Mrs. Waine decided to dismiss the claimant without notice and a letter informing the claimant was issued on 23 January 2024 (91-92). The reason for the decision was set out clearly. Mrs. Waine found all 5 allegations proven. She decided that the neglect of the patient was gross misconduct. She also considered that failure to take the covid test was probably gross misconduct but a written warning could have been appropriate if she took into account that the claimant may have been feeling unwell. Against that she found the claimant's 'mitigation' that no tests were available unsatisfactory. In respect of the unauthorised break she pointed out that it was not a first offence and would at least justify a final written warning. She decided the allegation regarding lifting and the failure to follow management instructions constituted serious misconduct.

48. In her evidence to the tribunal Mrs. Waine expanded on her reasons for deciding summary dismissal was the appropriate sanction. Her main reason was the claimant's neglect of the patient. She felt the claimant had not taken proper care of the patient at a difficult time (end of life) and that was upsetting for his relatives and distressing to her. The note the claimant made (102) suggested the claimant did not understand or ignored his needs in that it stated he could drink unaided but he was not able to do so.

49. The claimant was dismissed with effect from 23 January 2024 but in recognition of her long service she was given 4 weeks' pay.

50. Appeal On 24 January 2024 the claimant appealed her dismissal (103) and on 26 January 2024 the appeal was heard by Mr. Burden (CEO) and Joshua Peake (Facilities Manager) who took notes (72-79). The claimant was accompanied this time by Div Sunuwar (a Nepalese speaker).

51. Mr. Burden put each allegation to the claimant again and she was given opportunity to comment. The claimant also set out her case in a letter (109-115) which he took into account. The claimant's explanations were the same as before, except that she said she felt dizzy when she went to take paracetamol on 5 January 2024 and that is why she sat down in the dining hall. She said that she did not tell the nurse in charge about the patient because they were 'always busy'. She acknowledged that the miscommunication about the patient was her mistake and she apologised (111). She said she had lifted a patient on her own because the patient was distressed. She had tried to get help and had used the emergency call button (a subsequent investigation of the electronic records revealed she had not). She had not assisted in the transfer because of a

misunderstanding, Ganga having agreed to it but not told Kingsley.

52. Mr. Burden clarified in his evidence to the tribunal that his role was to read the appeal and the documents accompanying it, listen to the claimant and decide whether the sanction was fair, taking into account mitigating circumstances that might reduce the penalty (he had done that previously in the claimant's case when he reduced the penalty for taking an unauthorised break from a written to a verbal warning, see paragraph 13 above).

53. I find that Mr. Burden gave the matter careful consideration. Following the appeal he carried out some more investigations, including whether the emergency call bell was used. He took into account the claimant's length of service saying in view of it he 'did not want to be unkind but has to protect the business' (79). He upheld the decision to dismiss.

54. Claimant's understanding of allegations. I considered whether the procedure followed had enabled the claimant to fully understand the allegations against her in the light of her need for a Nepalese interpreter during this hearing. Mrs. Waine confirmed that the respondent employs a lot of Nepalese speakers so she could have asked them for help and to accompany her to meetings. At the investigation meeting on 17 January 2024, and at the disciplinary hearing she was accompanied by Bridget Herbert (SNA staff), an English speaker. At the appeal she was accompanied by a Nepalese speaker and at one point during the meeting asked her to translate a phrase (77).

55. Mrs. Waine said she had not noticed a language barrier in the 9 years that she worked with the claimant. A certain standard of English is needed for patients. In one case the respondent took a nurse on initially as a domestic to improve her English, before she was allowed to work with patients. The claimant's typed note (102) appears to indicate a basic level of English. The claimant did not suggest at any time that she did not understand the allegations against her and from the answers recorded in the notes of the meetings I find that she did understand the allegations and was able to participate fully in the process.

The law

56. An employee's right not to be unfairly dismissed is set out in section 94 of the Employment Rights Act (ERA) 1996.

57. Section 98 (1) ERA 1996 provides that it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Section 98 (2) provides that conduct is a potentially fair reason for dismissal:

58. In misconduct cases guidance was set out by the Employment Appeal Tribunal (EAT) in British Home Stores Ltd v Burchell 1980 ICR 303, EAT. A three-fold test applies. The employer must show that:

1) It believed the employee guilty of misconduct

2) It had in mind reasonable grounds upon which to sustain that belief, and

3) At the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

59. The burden of proof rests with the employer for the first ground but it is neutral for grounds 2 and 3. The employer need not have conclusive direct proof of the employee's misconduct, only a genuine and *reasonable* belief. Reasonableness is neutral test.

60. When assessing whether the Burchell test has been met, the tribunal must ask itself whether what occurred fell within the 'range of reasonable responses' of a reasonable employer. The Court of Appeal has held that the 'range of reasonable responses' test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached. In J Sainsbury plc v Hitt 2003 ICR 111, CA, the Court found that a tribunal had substituted its own decision as to whether an investigation into alleged misconduct was reasonable. This was an error of law. The relevant question was whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted.

61. In a case where the tribunal decides that there has been an unfair procedure the employer is unable to argue that even if it had followed a fair procedure, it still would have dismissed the employee. This was established by the House of Lords in Polkey v AE Dayton Services Ltd 1988 ICR 142, HL, However, the issue of whether a failure to follow a proper procedure made any difference to the decision to dismiss could be taken into account when calculating the compensatory award at the remedies stage. A tribunal may reduce such an award proportionately to the chance that the employee would have been fairly dismissed in any event had a proper procedure been complied with.

62. The ACAS code of practice on grievance and disciplinary procedures sets out guidance for the conducting disciplinary investigations and meetings. It provides that tribunals can take the size and resources of an employer into account and it may sometimes not be practicable for all employers to take all of the steps set out in the Code.

63. The following provisions at paragraphs 5 to 9 are relevant:

5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

7. If there is an investigatory meeting this should not by itself result in any disciplinary

action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.

.....

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.

64. Where a claimant admits wrongdoing the EAT has given guidance on the scope of the investigation. In CRO Ports London Ltd v Wiltshire EAT 0344/14 the claimant admitted responsibility for an accident. The EAT stressed that where the grounds relied on by the employer to justify dismissal include the employee's admission of misconduct, the question is whether the employer acted within the range of reasonable responses in limiting the scope of its investigation in the light of those admissions.

65. In Philander v Leonard Cheshire Disability EAT 0275/17 the EAT confirmed that misconduct can be deliberate or inadvertent. Gross negligence, as well as deliberate wrongdoing, can amount to misconduct and can constitute repudiatory conduct even where the behaviour is not wilful or blameworthy.

66. The Acas Code states that the employer's disciplinary rules should give examples of what the employer regards as gross misconduct, i.e. conduct that it considers serious enough to justify summary dismissal. A failure to list a type of act as gross misconduct may mean that the employer cannot rely on it to dismiss summarily (Basildon Academies v Amadi and anor EAT 0343/14). In Hewston v Ofsted 2025 EWCA Civ 250, CA, the importance of forewarning employees of the types of conduct that might attract dismissal was emphasised, particularly for a single offence, either through a clear disciplinary policy or through guidance and training.

67. An employment tribunal hearing an unfair dismissal claim does not necessarily have to consider whether the employee's conduct amounts to gross misconduct in the contractual sense. In Hope v British Medical Association 2022 IRLR 206, EAT, Mr Justice Choudhury, President of the EAT, held that the test for determining whether a dismissal is fair or unfair within the meaning of section 98(4) ERA 1996 involves consideration of all the circumstances, which might include the fact that the conduct relied on involved a breach of contract amounting to gross misconduct. In that case, no contractual analysis was necessary: the claim was not one of wrongful dismissal and the tribunal had been entitled to find that BMA had acted reasonably in treating the employees conduct as being a sufficient reason to dismiss in all the circumstances.

68. It is possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between an employer and employee to justify summary dismissal, even if the employer is unable to point to any particular act that, on its own, amounts to gross misconduct (Mbubaegbu v Homerton University Hospital NHS Foundation Trust EAT 0218/17).In that case, the EAT held that there was no authority to suggest

that there must be a single act of gross misconduct to justify summary dismissal or any authority which states that it is impermissible to rely on a series of acts, none of which would, by themselves, justify summary dismissal.

69. In Quintiles Commercial UK Ltd v Barongo EAT 0255/17 the *EAT* pointed out that section 98 (4) does not lay down any rule that even where there are no earlier disciplinary warnings, a conduct dismissal for something less than gross misconduct must be unfair. It may be that in most cases a tribunal will find that dismissal falls outside the band of reasonable responses but it should be careful not to simply assume this is so.

Submissions

70. Following the hearing I received written submissions from the claimant and the respondent.

71. The claimant's submissions focused on the effects of the dismissal on her. The respondent's submissions argued that the respondent had no choice but to dismiss the claimant, prioritising the needs of patients.

Conclusions

72. In reaching these conclusions I have been careful not to substitute my own view about what happened. I have assessed whether the respondent's actions fell within the range of responses of a reasonable employer. I considered whether the respondent reasonably believed the claimant had committed misconduct, the reasonableness of the investigation, whether a fair procedure was carried out, and the reasonableness of the decision to dismiss.

Reasonable belief

73. I find that the respondent had a genuine belief in each of the allegations of misconduct. These were neglect of a patient, failure to take a covid test, taking an unauthorised break, using the lifting equipment alone, and refusing to help transfer a patient.

74. I decided that the respondent held these beliefs on reasonable grounds. In the case of taking an unauthorised break, using the lifting equipment alone and refusing to help transfer a patient, the claimant admitted the conduct.

75. In respect of neglecting a patient, the claimant admitted that she did not change the patient's pad, she did not inform the nurse in charge that he had refused assistance, and she was aware that she should have done so. That constituted neglect of the patient because he was found with a soiled pad which should have been changed earlier in the day.

76. In respect of failing to take a covid test, the claimant knew that she should take a test if she suspected symptoms. Mrs. Waine could see clear symptoms, including coughing. The claimant denies knowing she had symptoms, but I find it was the reasonable belief of Mrs. Waine that the claimant knew she had symptoms. When asked why she had not tested the claimant said tests were not

available, rather than deny she had symptoms.

Investigation

77. The extent to which the claimant admitted the conduct is relevant to the scope of the investigation. In light of those admissions, I find that the respondent could reasonably limit the scope of its investigation. The ACAS code provides that it is not always necessary to hold an investigation meeting as well as a disciplinary meeting. The respondent nevertheless held 2 investigation meetings on 5 January 2024 and on 17 January 2024 in which details of the allegations were put to the claimant and she had an opportunity to comment. When the claimant raised points in her defence at any stage of the procedure these were investigated (eg. that she told Biru about the patient refusing help, and that she used the emergency call button).

78. The ACAS code provides that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing. I am satisfied that the investigation and disciplinary were approached as separate stages, even though Mrs' Waine conducted the investigation and then went on to hold the disciplinary hearing. The fairness was not affected. As indicated above the claimant largely admitted the allegations. An investigation into what happened by a different person would have led to the same conclusions. The only decision was the degree of sanction and that was considered separately by Mrs. Waine and revisited by Mr. Burden on appeal.

79. I also take into account that the respondent employed relatively few senior staff who could conduct the proceedings.

Procedural fairness

80. The claimant was accompanied at all stages except the first investigation meeting. The allegations were put to her multiple times. I was satisfied that the claimant was fully aware of the allegations, even though English was not her first language. She had the option of taking a Nepalese speaker to each meeting and was accompanied at the appeal hearing by a Nepalese speaker.

81. Mrs. Waine checked that the claimant was feeling well enough to continue when she appeared confused at the disciplinary hearing. Mr. Burden took into account the letter the claimant had written to express her explanations for the appeal.

82. The ACAS guidance provides that it would normally be appropriate to provide copies of written evidence, which may include any witness statements, in advance of hearings. The claimant does not appear to have been supplied with copies of the emails which were read out to her in the meetings and hearings, but I am satisfied this did not affect the fairness. They were relatively short and in any event the claimant admitted the conduct they referred to.

83. The Acas Code states that the employer's disciplinary rules should give examples of what the employer regards as gross misconduct, i.e. conduct that it considers serious enough to justify summary dismissal. The conduct regarding failing to take a covid test and the neglect of a patient is not specifically listed in

the disciplinary policy. However, I find that the claimant could reasonably expect the respondent to regard her conduct as gross misconduct or gross negligence. The disciplinary policy refers to a 'Serious breach of duty prejudicial to the Hospital's relations with patients'. The claimant was very experienced and would have been expected to know the implications of her conduct.

Sanction of summary dismissal

84. Having found that the claimant could reasonably have been expected to foresee that neglect of a patient and the failure to take a covid test was gross misconduct, I have nevertheless gone on to consider whether the respondent acted reasonably in treating the conduct as a reason for summary dismissal.

85. I decided that a reasonable employer would consider that the accumulation of conduct, even if none of the acts in themselves amounted to gross misconduct, was a sufficient reason to summarily dismiss.

86. The claimant's actions, when taken as a whole, could reasonably undermine the respondent's confidence that the claimant would keep patients safe in the context of a care setting. The respondent could not be confident that she would not act in the same way again, particularly in the light of previous warnings. Moreover, there was an inconsistency in her explanations during the disciplinary process which cast doubt on her credibility. For example, she wrote inaccurate information in the notes about the patient (that he was able to drink unaided and 'changed pad'); she said she had discussed the patient with Biru but Biru was not on duty that day; she said she had asked for permission to take a break but then admitted she had not; she said she was not feeling well and had not tested for covid because no tests were available when clearly they were; she said she had used the emergency call bell when records showed she had not.

87. It was within the range of reasonable responses to treat these matters as the reason for summary dismissal.

88. As I have decided that a fair procedure was followed I do not need to go on and consider Polkey.

89. Accordingly the claimant's complaint of unfair dismissal is not upheld and is dismissed.

Approved by:

Employment Judge S Matthews

29 May 2025

JUDGMENT SENT TO THE PARTIES ON
29 May 2025

FOR THE TRIBUNAL OFFICE