EMPLOYMENT TRIBUNALS

Claimant: **Ms Esma Williams**

Respondent: **University Hospital Southampton NHS Foundation Trust**

Heard at: **Southampton** **On:** **18 - 22 August 2025**

Before: **Employment Judge Bradford**

Representation
Claimant: In Person
Respondent: Mr D Patel, Counsel

JUDGMENT having been sent to the parties on 12 September 2025 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

1. In this case the Claimant, Ms E Williams, claims that she has been unfairly dismissed, and that that the principal reason for this was because she had made protected disclosures. She additionally challenges the fairness of the dismissal process. Further, the Claimant claims that she suffered various detriments as a consequence of protected disclosures.
2. The respondent contends that the reason for the dismissal was misconduct, and denies the claims. It notes that the detriment claims are out of time, and accordingly invites the me to determine that I have no jurisdiction to hear them.
3. I heard oral evidence from the Claimant, and from to following witnesses on behalf of the Respondent:
    - Ms Louise Williams, Divisional Director of Nursing Professionals
    - Mrs Joanna Himsworth, Ward Manager on Paediatric Medical Unit (on secondment) at the time of concerns

- Mrs Nanette Kinnaird, Matron in Specialist Medicine (who dismissed the Claimant)
- Mrs Jennifer Milner, Associate Director of Patient Experience (who conducted the appeal hearing)

Time Limits

4. I begin by dealing with time limits in relation to the claim for protected disclosure and associated detriment, because all the detriments were, on their face, out of time, the majority being significantly out of time.

5. ACAS was notified of this matter on 18 January 2024 and issued a certificate on 29 February 2024. The ET1 was filed on 28 March 2024, within one calendar month. Therefore any act or omission before 19 October 2023 is potentially out of time, meaning that the Tribunal may not have jurisdiction to hear the complaint.

6. The disclosures relied on (as set out in the agreed List of Issues) were as follows:

   3.1.1.1 on 5 February 2019 by email to Louisa Green said that she had noticed on the Healthroster system that TR had claimed overtime for longer than the hours she worked;

   3.1.1.2 the Claimant forwarded her email of 5 February 2019 to Ms Green on to Sue Nicholls on 14 February 2019;

   3.1.1.3 two to three days after 14 February 2019 the Claimant raised the same point verbally with both Ms Green and Ms Nicholls;

   3.1.1.4 in September 2023 the Claimant raised this verbally again on the phone with Ms Green;

   3.1.1.5 on 14 September 2023 the Claimant raised this again by email with Ms Green and said that she felt that she needed to go externally as it had not been handled properly;

   3.1.1.6 on 16 October 2023 the Claimant reported to Steve Harris via email that TR had made fraudulent overtime claims and that the Claimant was prepared to whistle-blow to external sources regarding this and being subjected to bullying. The Respondent agrees this disclosure factually took place.

7. The Detriments claimed were as follows:

   4.1.1 [withdrawn]

   4.1.2 [permission to amend refused]

   4.1.3 a grievance raised by the Claimant against Ms TR on 28 June 2019 was not taken seriously by the Respondent;

   4.1.4 [withdrawn]

4.1.5 on 23 December 2022 Ms Himsworth interviewed the Claimant for a band 6 position and did not give the Claimant the position;

4.1.6 Ms Himsworth did not give the Claimant feedback for the interview above;

4.1.7 on 17 March 2023 Ms Himsworth marked the Claimant as having unauthorised leave and deducted pay for the Claimant when the Claimant had told the sister in charge that day that she was unwell;

4.1.8 in the dismissal process, Ms Himsworth referred to unspecified concerns raised about the Claimant in the Claimant's previous team in the day ward; and/or

4.1.9 Ms Himsworth stated in the dismissal process that the Claimant came to a team building activity two hours late, when she had actually been half an hour late.

8. Time limits for detriment claims are dealt with by s 48(3) Employment Rights Act 1996 which provides that an employment tribunal shall not consider a complaint unless it is presented

> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures the last of them, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months

9. S48(4) states that where an act extends over a period, the date of the act means the last day of the period.

10. All whistleblowing detriment claims have, on their face been brought out of time. The Claimant additionally claimed that her dismissal was accelerated due to her most recent protected disclosures. As a matter if fact, I do not find that the timing of the dismissal was in any way related to the asserted disclosure(s). Reasons are given below. This concern is included in the List of Issues and considered as one of the Claimant's challenges to the fairness of the dismissal process.

11. Since none of the detriment claims, been brought in time, and acceleration of dismissal has not been proved as a fact (see below), there is no basis to consider whether there was a continuing act or conduct extending over a period.

12. I therefore need to determine whether it was reasonably practicable for the Claimant to have brought her detriment complaints in time.

13. Guidance as this test has been given in caselaw. It is a question of fact for the Tribunal to determine. As was stated in *Wall's Meat Co Ltd v Khan 1979 ICR 52, CA*: '*The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province*.'

14. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. According to *Porter v Bandridge Ltd 1978 ICR 943, CA* '*That imposes a duty upon her to show precisely why it was that she did not present her complaint'*.

15. In *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'. Lady Smith in *Asda Stores Ltd v Kauser EAT 0165/07* explained it in the following words: '*the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done*'.

16. Even if a claimant satisfies a Tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The Tribunal must then go on to decide whether the claim was presented within such further period as the tribunal considers reasonable.

17. I had regard to the reasons the Claimant gave in evidence for the delay in bringing her complaints. They were as follows:

    4.1.3 In June 2019 her grievance against TR was not taken seriously

18. The Claimant said she was unaware had a claim. She wanted to take the matter further so she contacted the freedom to speak up guardian. She also said that she did not know she had made a protected disclosure at the time.

    4.1.5 The Claimant's interview for a band 6 post was unsuccessful – 23 Dec 2022

19. The Claimant's evidence was that she was not in a clear state of mind to think about what her rights were at the time. When it was put to her that she could have brought a claim earlier than she did, she said she felt her concerns were being silenced, but in essence had not decided whether or how to take the matter further.

    4.1.6 The Claimant was not given feedback following the interview in Dec 2022

20. The Claimant said she did not know if this qualified as a detriment claim.

4.1.7 On 17 March 23 Joanna Himsworth marked the Claimant as having unauthorised leave and deducted pay

21. The Claimant said she was unaware at the time that her pay had been deducted; she did not know until it was picked up by her Royal College of Nursing (RCN) representative during the internal investigation. It was put to the Claimant that in September 2023 she was able to lodge two grievances and attend a disciplinary hearing. It was suggested that she could have brought a claim then about the March deduction of pay. The Claimant stated that at the time her mental health was poor. She referred to having taken an overdose in August 2023. She said she wanted closure.

4.1.8 Joanna Himsworth, in the dismissal process, referred to unspecified concerns about the Claimant when she worked with her previous team

22. These concerns were referred to in the supplementary information appended to the investigation report which was sent to the Claimant with the invite to the disciplinary hearing dated 21 June 2023. When asked why she did not bring a claim at that time, the Claimant said in evidence that she could not concentrate due to her mental health.

4.1.9 Joanna Himsworth stated in the disciplinary process that the Claimant was 2 hours late to a team building day

23. The statement by Ms Himsworth that the Claimant had arrived at the team building day in June 2023 had been raised shortly after the event. It was suggested to the Claimant that she could have brought that claim in June 2023. The Claimant said she was unwell at the time.

24. I find in relation to the first three detriments that the Claimant was unaware that these were detriments and hence could give rise to a claim. The duty is on the Claimant to seek advice, she failed to do so. I find that it was reasonably practicable to bring those in time.

25. In relation to the remainder, these arose in March and June 2023. The Claimant says that she was so unwell that she could not have contacted ACAS within three months of those events. She in fact made no effort to contact ACAS until almost three months after her dismissal. This indicates an intention to bring a claim arising out of her dismissal, but nothing else.

26. The Claimant has relied on her health, specifically her mental health, but has provided no evidence in this respect. A case with a number of parallels is *Cygnet Behavioural Health Ltd v Britton 2022 EAT 108*. An employment tribunal had concluded that it was not reasonably practicable for the Claimant to have brought his unfair dismissal claim in time because of depression and dyslexia, combined with ignorance of the time limit. He said he had limited mental and physical energy and his primary focus during the relevant time was on a regulatory investigation into his fitness to practise as a physiotherapist. Overturning the ET's decision, the EAT observed that, notwithstanding the claimant's conditions, he had been able to do a number of things during the period between his dismissal and the expiry of the time

limit, including appealing against his dismissal, contact ACAS about his potential claims, work as a locum and then in a temporary post, move house and engage in detail with a regulatory investigation. While he had been very busy, the EAT considered that it would be 'the work of a moment' to ask somebody about unfair dismissal time limits or to type a short sentence into a search engine. There was no rational explanation or justification in the tribunal's judgment as to why his conditions prevented him from finding out about the time limit. Thus, the tribunal's decision was perverse and the claim was dismissed as having been presented out of time.

27. Whilst I do not underestimate the Claimant's mental health in August 2023, she was able to engage constructively in the disciplinary process in September 2023, and also raise a grievance at that time. I do not find that there was anything to prevent her from researching time limits for ET claims at that time. This would have enabled her final two detriment claims to be brought in time. Going back further, to March 2023, and then 2022 and in turn to 2019, there is no good reason for the Claimant not to have made enquiries as to the nature of a potential claim, and the associated time limits. The Claimant was signed off work from 1 April 2023, but there is no evidence as to her health at that time and the reason would appear to have been work related stress. This would not prevent the Claimant from researching her rights and the associated time limits.

28. The reasonably practicable test is a high bar, as demonstrated by the caselaw I have referred to. The Claimant has not provided any evidence or submissions which would enable me to conclude that it was not reasonably feasible for her to bring her whistleblowing detriment claims in time. She has provided no medical records and the evidence is that she was able to engage fully in the disciplinary process. The Claimant has failed to satisfy me that it was not reasonably practicable for her to bring these claims in time. As such I cannot extend time.

29. The protected disclosure detriment claims are dismissed as they have been brought out of time, it was reasonably practicable for these complaints to have been brought in time, and as such, the Tribunal has no jurisdiction to hear them.

Facts – Unfair Dismissal and Automatically Unfair Dismissal

30. There was a degree of conflict in the evidence, largely I find due to the passage of time and fading memories. I assessed the reliability of the witness accounts with reference primarily to contemporaneous documentation, and then consistency of their accounts. There were a number of factual disputes that I did not need to determine as they were not directly relevant to the matters I need to decide. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

31. There is no dispute that the Claimant was dismissed on 23 October 2023.

32. The Respondent asserts that the reason for the dismissal was conduct. I will therefore work through the conduct relied on. I will then deal with the Claimant's asserted reason; protected disclosure.

33. A disciplinary investigation was carried out by Ms Himsworth. This followed a meeting 19 October 2022 where the Claimant's conduct was discussed as follows:

- Concerns that had been raised by Healthcare Assistant (HCA) about lack of support from the Claimant in relation to connecting a patient's PEG (feeding tube). The HCA had reported that the Claimant was demanding and short with them, and told them to go home 15 mins before their shift ended, as they were not doing their job. The Claimant's response to this concern was that the HCA was asking too many questions;
- A separate incident where a HCA reported that the Claimant had asked them to administer medication. They had refused as they were not permitted to do so as a HCA. The Claimant then asked them again and then became angry when the HCA refused. The Claimant acknowledged asking the HCA to give medication, but disputed that she had spoken to them inappropriately;
- The Claimant had allegedly, on another occasion, agreed to allow a HCA to undertake a central line dressing. It was put to the Claimant in the meeting that this was not something HCAs were permitted to do in accordance with Trust policy. The HCA had then struggled and asked for help, however the Claimant was dismissive and not helpful. This meant that another trained nurse supported the HCA. The Claimant's response was that she felt it was unlikely she had asked the HCA to do a central line dressing, and if they had asked for help she would have responded;
- There were three reported occasions of the Claimant arriving late, including to the team building day.

34. The conclusion of the meeting was that there were concerns about how the Claimant supported junior staff, how she communicated with staff and unsafe practice in asking a HCA to administer medication. The Claimant was asked to reflect and there would be a review meeting on 20 December 2022. The Claimant was told that should her conduct not improve then the matter would go to next stage of disciplinary process.

35. Within the document file was a Letter of Concern dated 5 December 2022, which related to the matters set out above. There was a dispute as to whether that had in fact been sent to the Claimant at the time. It was accepted during the disciplinary process that it probably was not sent, there being no evidence. I do not need to make a finding on the point, because the letter summarised the October meeting and I find that the Claimant was fully aware of the concerns with her practice, as outlined in the letter, irrespective of whether she received the letter.

36. There was then a further incident reported, that the Claimant had documented a patient's inability to swallow in the wrong patient's notes. An incident form dated 22 November 2022 was forward to Ms Himsworth, another nurse having identified the error.

37. A further meeting took place on 20 December 2022 between Ms Himsworth and the Claimant. No note of this meeting was contained in the documents before me, however the Claimant sent an email on 3 February 2023 which referred to this meeting. She says one of the concerns was about asking a HCA to give medication via a PEG. She says that another nurse asked the HCA to report the matter to Ms Himsworth. The Claimant said the conversation about this incident was two days before her interview (with Ms Himsworth) for a band 6 role, and the timing of the meeting negatively impacted on the interview.

38. On 23 December 2022 the Claimant was interviewed for a band 6 role. She was unsuccessful.

39. On 28 December 2022 Ms Himsworth sent a request by email to meet with the Claimant on 20 January 2023 to discuss all the concerns to date, including documentation for a patient on a morphine infusion, documentation for a patient who had been on the wrong IV fluids, and recording in the wrong patient's notes. The meeting was to review the Claimant's conduct and any improvements.

40. On 17 January 2023 the Claimant was the nurse in charge of the shift. Three nurses made complaints about her conduct, saying that she was rude and unsupportive. The Claimant's account was that she was not respected by the nurses.

41. Also on 17 January 2023 the Claimant replied to Ms Himsworth's email of 28 December 2022 to say that she was unable to take part in the meeting scheduled for 20 January; she wanted to speak to the matron and possibly HR first.

42. The meeting took place on 3 February 2023. The concerns discussed were set out in a follow up email of the same date from Ms Himsworth and the Claimant was asked for her reflections by 10 February 2023. The concerns were:

    - Documenting swallowing in the wrong patient's notes;
    - A complaint by a HCA on another ward where the Claimant had worked a night shift. The HCA was not signed off on nasogastric tubes (NGTs) and felt unsupported by the Claimant and made to feel worthless. The HCA also raised that the Claimant had changed 1 hourly observations to 4 hourly observations for a patient on intravenous (IV) morphine;
    - Concern regarding the care of a post-op patient who was on IV fluids, replacement fluids and IV morphine. The Claimant did not complete

the hourly fluid balance chart and handed the patient over knowing the wrong fluids were running;

- Concerns raised by 3 nurses on the shift of 17 January 2023 (noted above), specifically that a nurse did not go on a break when the Claimant suggested because she felt it was more important to help her colleague on the other part of the ward with a deteriorating patient. This nurse felt the Claimant inappropriately challenged her decision not to go on her break;
- Concerns from a parent of a child in isolation about the Claimant's lack of personal protective equipment (PPE).

43. The Claimant provided her response on 15 March 2023 (significantly after the date set by Ms Himsworth), but did not send it to Ms Himsworth. In summary this was:

    - She had not been provided with the notes where she was said to have incorrectly documented swallowing. She would try to avoid repetition by not writing all the patients' notes at the same time;
    - She disputed that she had or would reduce observations to 4 hourly for a patient on IV morphine;
    - As to the IV fluids, she had not been given much detail. She noticed incorrect fluids were hanging on the IV stand, which she had not started or checked. She only noticed this when the Sister from another ward came to collect the patient. As such, the Claimant had no time to take the fluids down, but pointed out that they were incorrect. The fluids were paused. She was unsure what had happened with the morphine infusion for the same patient;
    - As to the concerns raised by three nurses about the shift on 17 January, the Claimant felt they were not taking her seriously as the nurse in charge
    - As to the central line, the Claimant said this was not the first time Ms Himsworth had made an accusation along these lines;
    - As to PPE, the Claimant had lowered her mask to talk to parents.

44. In the meantime, on 9 February 2023 an incident was reported in which the Claimant had moved a patient to the kitchen area.

45. On 12 March 2023 the Claimant did not give the full dose of epilepsy medication, because there was insufficient available, but documented that the full dose had been given.

46. On 14 March 2023, as the Claimant had not provided her reflection on the concerns discussed with Ms Himsworth on 3 February, nor had she attended the review meeting Ms Himsworth had scheduled for 7 March 2023, Ms Himsworth decided to proceed to a disciplinary hearing. She informed the Claimant of this decision by email.

47. On 17 March 2023 the Claimant did not attend work. This was recorded an unauthorised absence on HR advice.

48. On 23 March 23 the Claimant emailed and spoke to MA, the sister who had collected the patient with the incorrect IV fluids. The Claimant asked about her recollection of the child.

49. From 1 April 2023 the Claimant went on sick leave and did not return to work.

50. On 17 April 23 the Claimant posted comments on the RCN Facebook page which are alleged to have been inappropriate.

51. By letter of 21 June 2023 the Claimant was invited to a disciplinary hearing. The letter set out the allegations she faced, which included the above matters.

52. The disciplinary hearing was chaired by Mrs Kinnaird and took place over 2 dates, because it could not be concluded on the first date, 7 September 2023. The concerns about the Claimant's conduct, in so far as they are relied on by the Respondent as reasons for the dismissal, were discussed as follows:

Allegation 1 - Inappropriate care of a post-operative patient

53. This was the concern that the patient had the wrong IV fluids running and the fluid balance chart had not been correctly updated so fluid balance could not be calculated. The note of the disciplinary records that the Claimant initially said she did not know why the fluids were incorrect, and later said they had been put up by another nurse. She could not explain which fluid losses were being replaced. She told the nurse taking handover that the fluids were incorrect but did not stop them or change them or complete an adverse incident report (AER).

54. The fluid balance chart in question was sent out to the Claimant in the hearing pack. The Claimant questioned it during the hearing and said it was not the chart relating to the patient in question. Therefore Ms Himsworth looked into the matter further and a different chart was reviewed during the reconvened hearing on 12 October 2023. The Claimant did not see that in advance but was given opportunity during a break in the hearing to review it with her RCN representative.

55. The Claimant again disputed that this was the chart for the correct patient, saying it was a chart for a 1.5 year old and the patient with the incorrect fluids was 8. This concern was considered by Mrs Kinnaird, and whilst the position could not be definitively established, the meeting proceeded on the basis that this was the correct chart. Indeed that was Ms Himsworth's position. Ms Himsworth acknowledged in evidence that she was not able to establish definitively whether the fluids were running, and explained how terminology is used differently by different people. She understood that saying fluids were 'hanging' or 'up' both meant that they were running, but acknowledged that not everyone used this interpretation. The limited documentation in the fluid balance chart showed that the fluids had, for some of the shift, been running.

56. At the reconvened hearing in October the prescription chart for the fluids was not available. This was because Ms Himsworth, having seen it at one stage, then could not find it on the electronic system. She and Mrs Kinnaird explained how the way in which documents are stored makes it very difficult to find a particular document for a particular patient; hundreds of documents have to be searched through.

57. At the October hearing Mrs Kinnaird established that there was no named nurse system in place and the Claimant was not the only nurse who had been caring for the patient. There were two nurses and a HCA on the shift looking after around 10 patients, some of whom were high acuity.

58. Mrs Kinnaird said in evidence that due to the confusion and the Claimant's concerns that the correct fluid balance chart had not been identified, she did not rely on that in her outcome letter. However in evidence she accepted that she had in fact done so, in stating that the patient had been fluid overloaded, and that replacement fluid continued to run despite fluid loss not having been calculated.

59. There was a dispute as to whether the fluids were running on handover. Mrs Kinnaird said that she had understood from what the Claimant said at the disciplinary hearing that this had been the case. However the Claimant in evidence stated that her clear recollection was that the fluids were paused, and she only realised that the incorrect fluid bags were in place when a sister from another ward came to collect the patient.

60. Mrs Kinnaird also stated in the outcome letter that the Claimant attended the patient hourly to complete pain scoring (the patient was on IV morphine), but did not complete the other observations at the same time. When asked about this in the disciplinary the Claimant said she may have completed the pain scoring when she handed over the patient. This was concerning because it indicated that the Claimant had not reviewed the patient at the required intervals, and further called into question the accuracy of the pain scores.

61. The allegation was upheld on the basis that, whilst the Claimant was not solely responsible for caring for the patient, she was the nurse in charge so had overall responsibility for care; she could have delegated this patient's care. The Claimant was also the one to hand over the patient, so should have corrected the fluids and completed an AER at that stage. The fluid balance chart was relied on in finding that the patient was fluid overloaded, and the Claimant had admitted that she may have filled out the pain chart as the patient was being handed over.

62. The associated risk was that the patient could have become haemodynamically unstable.

<u>Allegation 2 – incorrect documentation of a patient's swallow in the wrong patient's notes</u>

63. The Claimant was not provided with the entry in question either when the matter had first been discussed in February 2023 or at the disciplinary hearing. Ms Himsworth had reviewed the note, which had been signed by the Claimant. It was not sent to the Claimant prior to the disciplinary hearing, as she had not disputed the matter when it was previously raised. At the disciplinary the Claimant accepted this could have happened as she writes all her notes at the end of a shift. To avoid repetition she would try to write notes in real time. The allegation was upheld.

64. It was noted significant harm could have come to the patient.

Allegation 3 – standard of care and support provided to a HCA

65. The concern was that the Claimant had not made time to support a HCA when asked, and the HCA had also raised concerns that the Claimant was not carrying out hourly observations for a patient on IV morphine. Ms Himsworth said that when she asked the Claimant about this shift, the Claimant used phrases such as ‘this girl’ and ‘telling me what to do’ and ‘a girl who gave me attitude’, when referring to the HCA.

66. At the disciplinary hearing the email from the HCA was reviewed at the Claimant’s request. The Claimant stated that her workload on the shift had been increased because the HCA could not do NG feeds. She said she was fully aware of the need to carry out hourly observations for patients on morphine, however she did not get round to doing these hourly. She did however do 4-hourly general observations. It was unclear whether what the Claimant had said at the disciplinary hearing was that she had only done the hourly observations every 4 hours (when she did the general ones), or whether she did the hourly observations more frequently than that, but not every hour. However, as the Claimant admitted to not having carried out hourly observations, it was not considered necessary to review the observations charts at the disciplinary hearing. The evidence of the Respondent’s witnesses was that the Claimant did dispute matters where she did not accept allegations or concerns. Had she not accepted this concern, the charts would have been reviewed.

67. The allegation was upheld. The Claimant had said it was not her intention to keep the respiratory observations 4 hourly. The Claimant had said the HCA could have supported her with these observations. That suggestion was deemed inappropriate by Mrs Kinnaird. During the disciplinary hearing the Claimant raised that she had asked the HCA to do NG feeds, which was outside their remit. The HCA reported that she did not feel supported, further, the HCA said she had highlighted outstanding tasks and did not find the Claimant to be receptive.

Allegation 4 – Concern around nurse in charge skills, particularly poor prioritisation and delegation

68. This arose from the shift on 17 January 2023 referenced above, following which 3 nurses had raised concerns about how the Claimant had managed

the shift, particularly in relation to a deteriorating patient, whose care they felt should have been prioritised. The three nurses said they needed to support each other and did not get the support they needed from the Claimant. The Claimant said her recollection was different and she did not abandon her colleagues.

69. Within the Claimant's account of the shift given at the disciplinary hearing, she raised that an oncology patient needed to have bloods taken. This concerned both Ms Himsworth and Mrs Kinnaird as the method that the Claimant described using to take blood, which involved putting a tourniquet above the PICC line (Peripherally Inserted Central Catheter), was not a recognised method and could potentially harm the patient.

70. The allegation was upheld. All the nurses on the shift felt unsupported. The Claimant had left the unit to support another area when the team was managing a newly admitted deteriorating patient. As to taking bloods and PICC line management, the Claimant had volunteered that she used a tourniquet above the PICC line; this was not an appropriate technique.

Allegation 5 – moved a patient from their bedspace to the kitchen with their bedding

71. This took place when the estates department requested access to the patient's bedspace. The Claimant did not escalate this request, and made the decision to move the patient to the kitchen where patients' food is served. The Claimant said she realised almost immediately that she had made a bad decision.

72. The allegation was upheld. There had been no risk assessment as part of the Claimant's decision, and there were significant risks involved, both to the patient, those moving him, and in terms of infection control.

73. Allegation 6 is not relied on by Respondent as a reason for dismissal.

Allegation 7 – failing to give the full prescribed dose of epilepsy medication

74. This was reported by a parent; there had not been a full dose remaining in the bottle, so the Claimant gave the 8ml available (instead of the prescribed 10ml). However she recorded that the full 10ml dose had been given. An incident from was raised by nurses on the next shift, as the mother was asking for the missed 2ml to be given when the medication was administered that evening.

75. The Claimant said at the disciplinary that she spoke to a doctor after she had tried to get hold of more of the medication. She said the doctor told her just to give what was available and sign that the full dose had been given. In the same meeting the Claimant then said that the doctor did not advise her to falsely document that the full dose had been given. In her evidence to the Tribunal the Claimant confirmed that she did not contact the pharmacy to get more of the medication.

76. Ms Himsworth had relied on the incident report and had not reviewed the notes. Those had been reviewed after the incident was reported, and the report stated that the 8ml dose was not documented, nor was any explanation of what had taken place recorded. The Claimant had not been shown her notes and could not recall if she had documented her conversation with the doctor. She could not recall the name of the doctor. Mrs Kinnaird said that whether a doctor had documented anything needed to be looked into.

77. This was upheld. The Claimant's position was understood to have been that she had spoken to a doctor who had instructed her to give what was available and chart it as a full dose. She had not entered any comments in the administration record. There was no evidence that the conversation with the doctor had taken place. The Claimant had failed to raise the matter with the pharmacy who may have been able to source the medication. When the parents raised their concern, as there was no documentation of the reduced dose, no further administration could be made. This could have significantly impacted on the patient's seizure risk.

78. Allegations 8 and 9 were not relied on as reasons for dismissal

Allegation 10 – attempts to have a colleague revisit their statement regarding allegation 1

79. The Claimant did not dispute that she had contacted the nurse who took handover of the patient referred to in allegation 1, however she was asking this nurse to retrieve her original message about the incident and email it to HR, as Ms Himsworth's understanding was different to the Claimant's recollection of events. The Claimant had not seen that nurse's statement.

80. This was upheld albeit that the Claimant had not in fact asked the band 6 sister to change her statement. The band 6 sister had been asked by the Claimant to consider points that she could not recall. The Claimant had admitted approaching the band 6 sister.

Allegation 11 – inappropriate use of Facebook

81. This arose out of a post on the RCN's Facebook page in which the Claimant accused senior staff of being lazy, saying they did less work than band 5s, and voted against the strikes. Other members of the group took offence. The Claimant responded to replies saying that she had been physically assaulted by a band 7. (The evidence was that this related to a door closing on her heal, which was raised as a grievance). Her posts escalated when members of the group disagreed with her. The Claimant said that at the time she was signed off work with stress.

82. This was allegation upheld at the disciplinary. Whilst the Claimant's original post could be considered to be voicing her opinion, subsequent comments were outside the Trust's social media policy. That included that employees must not argue with colleagues, make offensive comments about the organisation or any of its employees, and make remarks that could be

considered bullying in nature. Whilst the Claimant had not identified herself as a University Hospital Southampton employee, her registration could be tracked to the Trust.

83. These matters taken together were said to represent gross misconduct due to the associated risks to patient safety. The Claimant's conduct further meant that the Respondent no longer had trust and confidence in her and her ability to carry out her role. The Claimant's employment was terminated with immediate effect on 23 October 2023. Due to the serious risks to patient safety, a referral to the Nursing and Midwifery Council (NMC) would be made.

84. In the period between the disciplinary hearing concluding on 12 September 2023 and the outcome letter being sent, the Claimant says she made protected disclosures which accelerated her dismissal. She says that, on a date she cannot recall in September 2023 she verbally raised the matter of TR's overtime with Mrs Green, and that she followed that up by email on 14 September 2023.

85. Ms Green had no recollection of a conversation with the Claimant in September 2023. That in itself does not mean a conversation did not take place. However, if the Claimant had raised the matter with Ms Green in September 2023, I would expect it to be referenced in her subsequent email to Ms Green on 14 September 2023. That is a lengthy email in which the Claimant talks about a lack of support from Ms Himsworth, lack of appraisals and a 'toxic culture'. The Claimant talks about concerns being raised about her work, about losing confidence and being signed off sick. This email does not refer to TR's overtime claim, and as such contains no disclosure of information that aligns with the Claimant's claim. It follows that there is no evidence from which I could conclude that this matter was raised verbally at the time with Ms Green, and I find it was not. The evidence is that it was not raised by email. I do not find that a disclosure was made to Ms Green at that time.

86. The Claimant emailed Steve Harris on 16 October 2023. She says this was her final protected disclosure and that it accelerated her dismissal. The email included:

"*This particular manager also defrauded the department showing herself working overtime and approving her own overtime, where she did not work*".

87. The Respondent accepts that the email was sent and that it was a protected disclosure. However, the claimant has not shown any connection between this email and her dismissal, or the timing thereof. The Claimant had already been through the disciplinary process and was awaiting the outcome. Mrs Kinnard, who made the dismissal decision gave evidence that she had been unaware of it. I do not find that the dismissal was brought forward by this email. The Claimant would have been dismissed on 23 October 2023 had the email not been sent.

88. The Claimant appealed, and her appeal was heard by Ms Milner on 2 February 2024. She raised challenges to the fairness of the disciplinary process, in that the correct fluid chart relating to allegation 1 had not been provided, nor evidence of the documentation about swallow, the subject of allegation 2. She considered the Letter of Concern of 5 December 2022 was a 'fraudulent document'. The Claimant said data had been manipulated. She also said staff shortages had not been recognised by management.

89. The key matters reviewed at the appeal were:

90. Allegation 1 and the correct patient's note. Mrs Kinnaird was of the view that the fluid balance chart reviewed in the October disciplinary was the correct one. She said "*It correlates with the concerns raised and the date was correct*". The Claimant disputed this, saying that chart related to a 1.5 year old, whereas the patient was 8 years old. There was also discussion as to whether the incorrect fluids were running at the point of handover. Ms Milner therefore proceeded without taking the fluid chart into account. This meant the concern was that the fluid bag was incorrect and no AER had been raised to document the error.

91. The Claimant raised staffing issues, saying that she had 10 high care patients and her fellow nurse was inexperienced. Ms Milner would look into that before reaching her decision. The Claimant said in evidence that the situation was extra-ordinary, given the pressures due to the number of high acuity patients. In evidence Ms Milner confirmed she had looked into the matter and there were no acuity escalations from the ward on the day in question. She accepted that the ward had been busy, but not to a level where there were safety concerns.

92. Mrs Kinnaird raised the matter of pain scoring, which according to the chart the Claimant had done this hourly, but the Claimant had then volunteered that she may have done the pain scores at the end of the shift, retrospectively.

93. Ms Milner asked the Claimant if she had done pain scores retrospectively for a patient on a morphine infusion. This was asked twice at the appeal hearing and the Claimant's answers both times were ambiguous. First she said "*yes but it looks like real time*" then she said "*Yeah I have on a different patient, it doesn't look like it was done after though*". It was considered that if the Claimant had always recorded these scores when she should, and in real time, she would have been absolutely clear, but that was not the case. The Claimant then said that it was the wrong paperwork.

94. In evidence I heard that the same page, as produced for the disciplinary, had the pain chart on one side and the fluid balance chart on the other. Therefore irrespective of the patient that this related to, there was no explanation as to why fluid balance was not charted when pain was charted, unless the Claimant had not reviewed the patient at the times the pain scores were recorded. The Claimant had admitted, both in the disciplinary and appeal, that she had retrospectively charted pain scores. This was a

serious concern for her managers, and would explain why one chart was completed but the other not filled in.

95. The incorrect record of safe swallowing again raised the issue of retrospective notes, although it was acknowledged by Ms Himsworth that such practice for notes other than observations was common practice.

96. In relation to allegation 3, the Claimant said the HCA was questioning her, asking her if she had given antibiotics. The Claimant did not recall morphine being mentioned, and said she felt undermined by the HCA. As to the impact of not doing hourly observations for a child on morphine (which the Claimant had admitted as a fact), Ms Himsworth stated that their ability to breath could be suppressed. Respiratory rates had to be taken hourly. In evidence Ms Milner said that she felt at the appeal hearing she had to educate the Claimant on this; the Claimant had said she took respiration rates by watching patients from across the room. Ms Milner's evidence was that you cannot see the chest rise and fall from across the room. Respiration rates are important as they are the first indication that a patient is deteriorating.

97. The epilepsy medication concern was reviewed. The Claimant repeated her account of speaking to a doctor. She said it looked like she had not noted the dose given, and suggested that colleagues should have phoned or messaged her after her shift to establish the situation. The concern was that Claimant had under-dosed and not documented that.

98. In relation to the Facebook posts, the Claimant stated that her mental health, the dark place she was in, had not been taken into account.

99. Ms Milner took time to look into some of the matters further. She sent the Claimant an email on 10 April 2024 to say that her appeal against her dismissal for gross misconduct had not been upheld. A letter explaining the decision would follow.

100. The letter was sent on 21 June 2024.The Claimant's appeal was not successful in relation to all the above allegations save for allegation 10 – asking a band 6 to review their statement. There were also allegations which had been upheld a the disciplinary in relation to which the appeal was successful, namely a concern about how the Claimant wore PPE, and an allegation that the Claimant had failed to attend work.

101. Ms Milner concluded that the allegations that had been established cumulatively amounted to gross misconduct and the dismissal decision remained unchanged.

102. In evidence Ms Milner explained why the allegations found proved were serious, given the risks posed to patient safety. Retrospectively recording observations for patients on morphine was particularly serious given its potential impact on their ability to breathe. The documentation in the wrong patient's notes could have led to that child being given a bottle resulting in aspiration pneumonia or at worst, drowning. Taking blood in the manner the

Claimant had described, with a tourniquet above the PICC line could dislodge a clot, which could make its way to the heart. As to the epilepsy medication, this under-dosing increased the risk of the patient having a seizure. Ms Milner said that the patient was new to the medication and his seizure threshold was unknown. Had he suffered a seizure, the arrest team would have worked on the basis that he had received a full dose of medication. The mother was also impacted as she was waiting for a top up dose. This was in addition to the breach of Claimant's professional obligation to correctly document medication administered.

103. Ms Milner's evidence was that the culmination of these amounted to gross misconduct. The matter had not been dealt with as capability because the concern was that the Claimant knew what she should do, she was an experienced nurse, but made a choice to practice in an unsafe manner and sought to justify that when questioned.

Law

104. Having established the above facts, I now apply the law.

Unfair dismissal

105. The relevant statute is the Employment Rights Act 1996, which states at section 98:

98 (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—

(b)relates to the conduct of the employee,

…

(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.

106. The reason for the dismissal is asserted to be conduct which is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996.

107. The starting point should always be the words of section 98(4) themselves. In applying the section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether 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.

108. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in conduct dismissals, following *British Home Stores v Burchell [1980] ICR 303* and *Sainsbury's Supermarkets Ltd -v- Hitt [2003] IRLR 23* is to identify:

- that the employer genuinely believed the employee to have been guilty of misconduct;
- that the employer had reasonable grounds on which to sustain that belief; and
- that the employer, at the stage at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case.
- The employer must also have followed a reasonably fair procedure.

109. As to the first of these the burden is on the employer; as to the remainder, the burden is neutral.

110. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

111. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole in accordance with *Taylor v OCS Group Ltd.*

Automatically unfair dismissal

112. Under section 103A of the Employment Rights Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

113. As to the burden of proof, the position was confirmed in *Kuzel v Roche Products Ltd 2008 ICR 799, CA*; the employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer.

Protected disclosure

114. Under section 43A of the Employment Rights Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

115. In *Simpson v Cantor Fitzgerald Europe 2020 ICR 236, EAT*, Mr Justice Choudhury (then President of the EAT) observed: '*If an employee sets out sufficiently detailed information that, in the employee's reasonable belief, tends to show that there has been a breach of a legal obligation, then the fact that such information is contained within a communication that can be described as a query will not prevent it from amounting to a qualifying disclosure. A straightforward example might be a communication to a manager in the following terms: "On 1 January 2019, I saw employee X manipulating and falsifying data to enhance the employer's year-end results. I consider this to be fraudulent conduct. Do you agree?". The query in that communication does not alter the fact that there is a disclosure of information which, in the reasonable belief of the worker tends to show that a criminal offence is being committed. However, the position might be different if the employee had merely said as follows: "On 1 January 2019 I saw employee X access the year-end results. Could you let me know if that raises any concerns?". In the latter example, the information probably lacks sufficient factual content to amount to the disclosure of information within the meaning of S.43B*'.

116. In assessing whether the worker reasonably believes the disclosure tended to show a relevant failure, the tribunal must assess a) whether the worker subjectively believed that the information tended to show a relevant failure; and b) whether that belief was reasonable. The EAT has stated in *Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4* that the word 'belief' in s43B establishes a low threshold.

117. The leading case on the meaning of 'public interest' under s43B above is *Chesterton Global Ltd v Nurmohamed [2018] ICR 731*. This established that a disclosure may be in the public interest even if it relates to the worker's own contract of employment, and that the following factors may be relevant in determining if it is in the public interest:

    a. the numbers in the group whose interests the disclosure served

    b. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

    c. the nature of the wrongdoing disclosed, and

    d. the identity of the alleged wrongdoer.

118. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

Application of the law to the facts

S103A – Automatically unfair dismissal – Protected Disclosure

119. I will first deal with the Claimant's claim that her dismissal was automatically unfair, because the reason or principle reason was that she had made protected disclosures.

120. In so far as the Claimant may rely on disclosures made in 2019, I do not find that they were in any way related to her dismissal, given the intervening period of over 4 years.

121. In so far as the Claimant relies on disclosures in September 2023, verbally and by email to Ms Green, I have found as a fact that no protected disclosures were made.

122. The Claimant also relies on her email sent to Steve Harris on 16 October 2023, quoted above.

123. Whilst the manager is not named in the email, I find that it is sufficient to amount to a disclosure of information, in accordance with *Simpson* above, because it is an allegation that a particular manager made one or more fraudulent overtime claims. The Claimant set out her belief that this tended to show a breach of a legal obligation, and that it was in the public interest

because the NHS is funded with taxpayers money. The Respondent accepts that this was a qualifying disclosure and I agree.

124. The disclosure was made to the employer and was therefore a protected disclosure.

125. As the Claimant had more than two years' service she does not need to prove the reason for the dismissal. It is for the Respondent to prove the reason (it relies on misconduct). However, the Claimant needs to show facts or produce some evidence capable of establishing that a protected disclosure was the reason or the principal reason for her dismissal. Her case was that this disclosure accelerated her dismissal. She did not actively assert that this email was the reason or principal reason for her dismissal. Indeed, the Claimant does not allege that she would not have been dismissed had she not sent this email. As noted above, the Claimant had, by the date of the email, attended a disciplinary hearing and was awaiting the outcome. The Claimant has not shown any connection between this email and her dismissal. I do not find that it was the principle reason for, or indeed in any way related, to the dismissal. I do not find that she was unfairly dismissed because she made a public interest disclosure.

Detriment in that dismissal brought forward

126. This was not set out as a detriment in the list of issues, but the Claimant's case at the Tribunal was that her dismissal was brought forward because of protected disclosures to Ms Green and Steve Harris. The Claimant appears to have conflated her assertion that her dismissal was brought forward due to a protected disclosure with her claim that her dismissal was automatically unfair. I have found as a fact no disclosure was made to Ms Green and that the email to Steve Harris had no bearing on the timing of the dismissal. It follows that any associated detriment claim fails.

'Ordinary' Unfair Dismissal

Genuine belief in misconduct:

127. The Respondent's evidence, in so far as the allegations related to clinical care, was that the Claimant was an experienced nurse (indeed she did not dispute that and she had, in December 2022, been interviewed for a band 6 role). The Claimant had more than once in recent years, had concerns raised about the standard of her documentation, including not making notes in real time. These concerns were documented in November 2017 and February 2018. In June 2019 she was placed on a Performance Improvement Plan (PIP), with areas for development being taking charge of the ward, managing workload, medicines management and professional communication. Whilst the Claimant's evidence was that she did not recognise the PIP in the bundle, I find that this was due to the passage of time. I have no reason to question the veracity of the document, particularly as it is referenced in an email sent on 28 June 2019 from Rosemary Green in HR saying that a meeting to discuss those issues had taken place.

128. The Respondent's evidence was that when such matters were raised with the Claimant she would improve for a time, but her improved practice would not be sustained. I accepted this evidence as it was supported by the contemporaneous documentary evidence. Further, the Respondent's evidence was that the matters that led to the dismissal decision related either to the Claimant's attitude towards colleagues, or in so far as they were clinical practice issues, she knew how things should be done, and deliberately decided not to follow established procedures.

129. In relation to each of the clinical issues raised, the Claimant did not dispute, or say she was unaware of the expected standard of practice. She accepted that fluid balance, and certain observations, such as respiration for patients on IV morphine, should be carried out hourly. She was aware these should be documented in real time, and indeed documentation generally should be completed at the time. She was aware that tasks such as the administration of medication are outside the scope of practice of HCAs, and that medication administration records should reflect the dose given. She was also aware of the steps to take, including contacting the pharmacy, where a medication is needed.

130. The 'facts' section above demonstrates that the Respondent had taken the Claimant through its disciplinary process. It had found serious allegations upheld, and indeed additional concerns came to light during the internal hearings, when the Claimant stated that she had acted in ways that breached trust policy, for example her technique for taking blood. In addition, she admitted to matters that could have had serious patient safety implications, such as not taking hourly observations in circumstances where these were, according to the Respondent's witnesses, imperative.

131. I find that the Respondent held a genuine belief in the Claimant's misconduct.

    Was the Respondent's genuine belief in the Claimant's misconduct based on reasonable grounds following as reasonable investigation as was warranted in the circumstances?

132. Concerns were discussed with the Claimant on 19 October 2022, as documented in the Letter of Concern of 5 December 2022. It is immaterial to this decision whether that letter was in fact sent, because the Claimant had already been made aware of the concerns and the need to improve in terms of how she supported HCAs, and how she communicated with colleagues. I will say that I do not find that the letter was fabricated because it is consistent with a meeting having taken place on 19 October and the fact of that meeting is not disputed.

133. The Claimant was notified of concerns with her practice and given opportunity to remedy them, which I find to be reasonable. A review meeting was scheduled for 20 December 2022, by which time further concerns (allegations 1 and 2 above) had taken place. There was no note of that

meeting available to me, but in the disciplinary hearing the Claimant was clear that it took place.

134. A further meeting took place on 3 February 2023, the Claimant having declined to attend a meeting scheduled for 20 January 2023. The concerns discussed included a HCA having reported that the Claimant had reduced the observation frequency for of a patient on IV morphine from hourly to four hourly. The Claimant provided written reflections by email on 15 March. The Claimant blamed workload pressures and was annoyed that this had been raised with Ms Himsworth. She felt her hard work had not been appreciated. The patient on the wrong fluids was raised and the Claimant stated that she had not started the fluids and didn't know how it had happened.

135. The matters progressed in line with the Respondent's disciplinary process. The Claimant was formally notified on 21 June 2023 of the matters that would be discussed at the disciplinary hearing and was provided with a pack of relevant documents.

136. The hearing was not concluded within the time scheduled on 7 September 2023 and was reconvened on 12 October 2023. This ensured that all issues were fully addressed. At the hearings, Ms Himsworth as investigator presented her findings, Mrs Kinnaird who chaired the meeting asked for Claimant's account, and asked questions of both. Her reasons for upholding the allegations were given in the dismissal letter of 23 October 2023. I am satisfied that the Respondent's belief in the Claimant's misconduct was reached on reasonable grounds in view of the investigation and disciplinary hearing, which the Claimant participated in, with the support of her union representative.

Did the Respondent follow a fair procedure?

137. The Claimant was not provided with clinical notes and records relating to all the allegations, and it transpired at the September disciplinary hearing that the fluid balance chart for allegation 1 related to a different patient. The IV prescription chart was not available, but since there was no dispute that the wrong fluids were in place, this was not strictly necessary. Prior to the reconvened hearing in October 2023 the Respondent had identified what it believed to be the correct fluid balance chart. The Claimant was strongly of the view that this was also a chart relating to a different patient. Mrs Kinnaird relied on the chart in reaching her finding that the patient was fluid overloaded. However, this potential unfairness was corrected on appeal where Ms Milner disregarded the fluid chart and based her decision that the allegation was substantiated on other concerns about the patient's care and how the Claimant had managed the shift. Ms Milner concluded that the Claimant, as the nurse in charge of the shift, should have checked the fluids well before handover and corrected the situation at that point. Further, the Claimant having admitted to retrospectively written hourly observations for a patient on IV morphine, the finding that the Claimant delivered inappropriate and unsafe care was not overturned.

138. The Claimant was not provided with her incorrect entry in relation to allegation 2. The Respondent's reason, given in evidence, was that from the time this was first raised the Claimant accepted that she may well have written in the wrong patient's notes. It was therefore not considered necessary to provide evidence of something that had been admitted. I do not find this unreasonable or unfair, particularly as the Claimant demonstrated that she had no difficulty in challenging allegations that she did not accept.

139. With regard to the epilepsy medication, the Claimant was not provided with her administration record or the nursing notes she made on the shift. These had been reviewed by the person who made the adverse incident report, who stated that the reduced dose was not reflected anywhere in the documentation. The Claimant did not dispute that she had given a reduced dose as that was all that was available. She accepted what she was told in terms of not documenting it. The Respondent's position again was that had she disputed this, the notes would have been retrieved. Whilst best practice may have been to provide the Claimant with the evidence around her lack of documentation, particularly as she stated that she spoke to a doctor, I am satisfied that this did not undermine the overall fairness such as to call into question the finding that the allegation was substantiated. This is because where the Claimant had concerns that the correct documentation had the potential to demonstrate her 'innocence', she made direct requests for it. I find that the Claimant either knew or considered it very likely she had not correctly documented the dose or any explanation. I do not need to make a finding as to whether she spoke to a doctor, but I do not find her account credible that a doctor would have told her to document she had given the full dose when she had not. Nor do I find it likely that a doctor would have told her not to worry about the remaining 2 mls, in view of the nursing evidence as to the risks associated with underdosing, particularly in a patient who had only recently been started on the medication (as was the case). Indeed, such risks are consistent with the mother being keen for the missing 2mls to be administered later.

140. The Claimant has raised a number of issues with the fairness of the investigation and I deal with each in turn:

Ms Himsworth falsely claimed that the 5 December 22 Letter of Concerns had been sent to the Claimant and this undermined her credibility overall.

141. Whilst there is no clear evidence that the letter was sent, I am satisfied as above that it was written at the time. If there was an oversight on Ms Himsworth's part meaning it was not sent, I find that this was a genuine error, and as such, did not in my view impact on her credibility. I found her to be an honest witness, indeed she acknowledged she had made a mistake when she said that three people had been interviewed for a band 6 role, when in fact it had only been the Claimant and one other (in relation to the whistleblowing detriment claim) in December 2022.

The Claimant states that her bullying and assault allegations against Ms Himsworth were not appropriately taken into account.

142. Mrs Kinnaird confirmed that she investigated the alleged assault (as part of the Claimant's grievance) and determined that Ms Himsworth did not slam a door on the Claimant's foot. She reached this conclusion because the door in question was an automatically closing door. The Claimant raised a separate grievance against Ms Himsworth about bullying. Those concerns were separate from the matters Mrs Kinnaird was dealing with when making her disciplinary findings. Having reviewed Ms Himsworth's investigation report, I am of the view that it was evidence based, and as such, I find no basis for either Mrs Kinnard or Ms Milner to have questioned Ms Himsworth's motivation for her adverse findings against the Claimant in the course of the disciplinary investigation. Further, the grievances upheld against Ms Himsworth were administrative in nature – not following up/giving feedback/sending a letter. They did not suggest underlying bias.

The dismissal was accelerated dismissal as a result of whistleblowing.

143. The disclosure the Claimant relies on was on 16 October 2023, after the disciplinary hearings had concluded, and when she was awaiting the outcome. The outcome was due to be sent shortly after 12 October, and there is no logic to the assertion that dismissal letter was sent sooner than it would otherwise have been, because of this email.

The Claimant was not told before the disciplinary hearing that one of the allegations was the way she had obtained a blood sample from an oncology patient.

144. When responding to allegation 4 , nurse in charge skills, at the disciplinary hearing, the Claimant volunteered information about how she had taken blood from an oncology patient. The allegation about her management of the shift was upheld, and it was additionally noted that the way she had described taking blood was not an approved method, and as such, that was a further concern. I do not find that the Claimant faced an allegation that had not been notified to her in advance.

The Claimant says that the Respondent did not take into account the bullying allegation she had made against SR (a colleague).

145. This was the subject of a separate grievance and SR did not feature in any of the allegations the Claimant faced. This was not a relevant consideration.

The Claimant says her mental and physical health were not taken into account.

146. There is no information regarding the Claimant's physical health. She went off work with stress on or around 1 April 2023. All the allegations that formed the basis of the disciplinary hearing pre-dated this. The Claimant had not provided the Respondent with any evidence that her health was affecting her work. Had she considered this to be the case she had a professional

duty to seek support, for example via occupational health, and limit her practice accordingly.

The Claimant suggests that the Respondent did not take into account that understaffing was a reason that the Claimant did not complete the IV fluid chart in allegation 1.

147. The disciplinary hearing found that the Claimant did not have sole responsibility for this as there was no named nurse system in place. Staffing was looked into in detail at the appeal stage and Ms Milner found that whilst the ward was busy, the staffing level did not make it unsafe. These matters were taken into account when the dismissal was reviewed.

The Claimant says that the Respondent should have postponed the appeal hearing as the Claimant had shingles.

148. The Claimant informed the Respondent by email of 31 January 2024 that she had been diagnosed with shingles but nevertheless wished the appeal hearing to go ahead. Ms Milner in evidence stated that before the hearing formally started, and before the recording started, the Claimant's singles was mentioned and she confirmed she wished to go ahead. The Claimant suggested in the Tribunal hearing that the transcript of the disciplinary appeal had been tampered with, because her recollection differed. I find no basis for such an allegation; the fact that recollections become inaccurate with time is the very reason formal hearings are recorded. Indeed the Claimant eventually accepted in evidence that she did not in fact request a postponement, and that she had embellished her version of events when she stated that she had made that request. As such, I find Ms Milner's evidence in this respect more reliable than that of the Claimant. I find that the Claimant wanted the hearing to take place when it did; she was fully aware that she could have requested, on health grounds, that it be postponed, and she chose not to.

The appeal outcome was pre-judged because Ms Milner made comments such as 'think again' and Mrs Kinnard, in relation to the fluid balance chart for allegation 1 said 'it fits what we're looking for so we're not going to change it'.

149. There was no evidence that either of these comments were made. Indeed, there would be no reason for Ms Milner to try to get the Claimant to change her responses by telling her to think again. There were times when the Claimant was unclear in her responses, and Ms Milner needed to establish the position, so she asked the Claimant the same question more than once. This was, I find, as Ms Milner stated in evidence, simply because she needed a clear answer, which she did not always get, even when asking direct questions. As to the fluid balance chart, whilst there is no evidence that Mrs Kinnaird made the comment alleged, given Claimant's concern that the chart was not the correct one, Ms Milner did not take the chart (or inferences that could be drawn from it) into account in reaching her decision.

The Claimant says she was not given time to put forward her position during the appeal hearing.

150. There is no clear evidence of this. The hearing was scheduled for 2 hours and last 2.5 hours. If the Claimant considered 2 hours was insufficient she should have raised that in advance. As Ms Milner stated at the outset, it was not intended to be a re-hearing, but was limited to the Claimant's points of disagreement with the dismissal decision. I do not find procedural unfairness here.

In relation to the Facebook posts, the Claimant says that it was not taken into account that there was no link to the Respondent.

151. Mrs Kinnaird had found that the Claimant's registration could be traced to Hampshire and the Isle of Wight on the NMC database, and the posts were recognised by Trust staff.

The Claimant says that the disciplinary panel failed to take into account that Ms Himsworth allowed band 2 and 3 HCAs to document IV volume.

152. This is not relevant to the Claimant's conduct.

Ms Himsworth made an unfounded allegation that another nurse, MA had written IV Morphine on the chart relating to allegation 1

153. This chart was ultimately not relied on given the uncertainty surrounding it. As such, there was no unfairness.

The Claimant relies on unprofessional conduct by nurse SM.

154. This is not relevant to the allegations against the Claimant

155. Having considered all the Claimant's concerns in the context of the evidence, I do not find unfairness in the process.

Was dismissal a fair sanction?

156. The question here is not whether I would have dismissed, but whether an employer acting reasonably could have dismissed, even if another may not have done so. Mrs Kinnaird's decision that the conduct amounted to gross misconduct was due to the risks to patient safety, combined with a lack of trust and confidence in the Claimant. Ms Milner echoed this and outlined the serious nature of the risks associated with the clinical matters. She was additionally significantly concerned about the Claimant's values and behaviours in view of the Facebook posts.

157. The Claimant raised contextual and staffing issues, which said in part explained why, for example, observations had not been taken at the required frequency. I find those did not impact on her failures to support HCAs, or her communication. Nor were they relevant to the Claimant's decision to incorrectly record the dose of epilepsy medication. The associated risk was significant as referenced above. Staffing or workload may have been justifiable mitigation for an isolated clinical incident. However the number of incidents over a relatively short period, with

common themes, such as failures to carry out observations as required for acutely unwell patients, and failures to appropriately prioritise to ensure the most important duties were attended to, along with the consequent serious risks to patients leads me to conclude that an employer acting reasonably could dismiss in these circumstances. Ms Milner was clear in her evidence that the Claimant's attitude was a relevant consideration; she attempted to justify unacceptable practice and was not open to constructive criticism. She did not appear to appreciate the risks inherent in her approach. As such, I find the Respondent's conclusion that it had lost confidence in the Claimant's ability to safely care for patients was justified. I find that summary dismissal was within the band of reasonable responses.

158. As to the procedure, I have not found that any of the Claimant's criticisms of it impacted on fairness. Further, the Respondent informed the Claimant of the concerns, asked her to reflect and gave her opportunity to improve. When she failed to provide a reflection by the date requested, and there having been further concerns raised by colleagues, Ms Himsworth informed the Claimant that the matters would progress to the next stage of the disciplinary process. She carried out an investigation and the Claimant was provided with evidence the Respondent relied on where she had disputed matters at earlier meetings. The disciplinary hearing was held over two dates in part to ensure that all the matters could be fully addressed, and in part so that the Claimant's concerns about whether the correct records were being relied on could be addressed. I find that the Respondent listened to the Claimant, and indeed agreed with her stance at the 7 September hearing that the fluid balance chart relied on in relation to allegation 1 was probably not the correct one. A second such chart was brought to the reconvened hearing on 12 October 2023. Whilst the Claimant maintained that this too was incorrect, any unfairness as a consequence was corrected at the appeal stage where allegation 1 was upheld for reasons unrelated to fluid balance. The Claimant was dismissed some 11 days after the reconvened disciplinary hearing, Mrs Kinnaird having taken time to consider the evidence and the Claimant's responses to the allegations. When the Claimant appealed, an appeal hearing was held, and I am satisfied that the Claimant's concerns were heard and considered. Indeed, Ms Milner gave evidence as to the enquiries she made with regard to staffing levels and whether escalations were raised from the ward (where there is concern that staffing levels are insufficient and patient safety is likely to be compromised as a consequence). I find that the Respondent followed a fair procedure and that the dismissal was fair.

Employment Judge Bradford
Dated: 14 October 2025

Judgment sent to Parties on
28th November 2025

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Simon Fraser
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