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EMPLOYMENT TRIBUNALS

Claimant: **Miss K Sawyer**

Respondent: **East London NHS Foundation Trust**

Heard at: **East London Hearing Centre** **On: 5-8 September, 12 September & 13 September 2017 (Tribunal only)**

Before: **Employment Judge Prichard**

Members: **Ms M Long**
Mr M Rowe

Representation

Claimant: In person

Respondent: Mr N Caiden (counsel, instructed by DAC Beachdroft LLP, Leeds)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1) **The claimant's claim of unfair dismissal fails and is dismissed.**
2) **The claimant's claims of disability discrimination fail and are dismissed.**

REASONS

1 Karen Sawyer, the claimant, is 54 years old. She qualified as a nurse when she was 30 in 1993. She worked for the respondent Trust for 13 years from 6 May 2003 to 13 September 2016 (we presume), when she received a letter informing her that she was to be dismissed with 12 weeks statutory pay in lieu of notice.

2 She was dismissed as the result of alleged misconduct occurring on 2 December 2015 at which time she was subject to a live final written warning given to

her on 29 September 2015 for conduct-related reasons.

3 The first incident happened on 23 March 2015 where it was suggested that, as a staff nurse, she had failed to intervene when a health care assistant called Coreen Allick had said: "fucking patient" on the ward and an incident where she had said, (as she apparently thought, under her breath), to a colleague, "are you going to punch him or shall I", referring to the patient whom they were jointly nursing. The "fucking patient" allegation was not upheld but what was upheld following that allegation was that she had originally not provided any witness statement when asked several times about the incident, and then subsequently that the witness statement she did provide was inadequate.

4 The later conduct which activated the final written warning and led to the claimant's dismissal was an incident where a patient at breakfast time had requested to be toileted (a double-handed operation involving a hoist) and the claimant considered the patient did not really need the toilet but that it was a ploy on the patient's part to go back to bed in breach of her care plan. She therefore, initially, failed to toilet the patient, to put it neutrally.

5 The claimant was a staff nurse on ward 1 in Grays Court which is a community hospital in the Trust. She was band 5. Ward 1 is a rehabilitation ward. The majority of patients on that ward have suffered strokes. There are other patients there with different rehabilitation needs. Most patients have come in from the separate acute NHS Trust for the area. The stroke victims often had cognitive impairments. There were other patients who had cognitive impairments from other causes, some diagnosed as learning disabled. A large proportion of patients require hoisting and a minimum of two staff are needed to move them safely. In the hospital there is a multi-disciplinary team including physiotherapists and occupational therapists with specialised rehabilitation skills.

6 At the time of the original incident the claimant's line manager and ward manager was Sister Subha Chandran. Jovita Prigo appeared to be the clinical sister, also on band 6. Above them was Nashreen Seebundhun, band 7. She was the Modern Matron of 3 wards:- Foxglove Ward, and Japonica Ward, 2 wards at King George Hospital, Ilford, and Ward 1 at Grays Court Community Hospital, Dagenham where the claimant was. Above Ms Seebundhun was Debbie Feetham. At the time she was the Interim Community Hospitals and IRS Manager. She in turn reported to Caroline O'Haire, an Occupational Therapist by profession, who is the Assistant Director for the Frailty Division.

7 In East London, acute services in that area are run by Barking, Havering & Redbridge University Trust. The respondent NELFT (now ELFT following a merger) is a combined mental health and community services Trust.

8 Ward 1 is a 17-bedded ward. On a typical shift the ward would be divided into uneven halves and there would be a Band 5 Staff Nurse allocated to each half of the ward. The rest of the complement is made up by Health Care Assistants (HCA's).

9 In these proceedings the claimant brings complaints of unfair dismissal and disability discrimination. These complaints have been refined through the tribunal

process at successive preliminary hearings. There were case management hearings on 6 March and 22 May 2017 both before Judge Foxwell. On 23 June 2017 Judge O'Brien held an open preliminary hearing. He struck out certain claims, refused certain amendments, and recorded dismissals upon withdrawal of various aspects of the disability discrimination claim. That left 3 allegations that the respondent failed to make reasonable adjustments, as follows:-

1. The claimant should have been given more notice of her disciplinary hearing on 31 August 2017.

2. Investigatory and disciplinary hearings should have been delayed until the claimant was fit.

3. The respondent should have made allowances for any inconsistencies by the claimant.

Only 1 of those has been pursued to the end of this final hearing. It is no 2 above - the respondent should have delayed the investigatory and disciplinary hearings until the claimant was fit. That will be described more at the end of these reasons.

10 Stepping aside from the list of issues (which can sometimes distort the parties' perceptions, in order to fit them more neatly into a legal process), the claimant stated that she had a poor working relationship with her line manager Ms Chandran. That was well known to all the managers whom we have heard from at this hearing.

11 The tribunal heard evidence from the claimant on her own behalf, Caroline O'Haire who decided to impose the first written warning, Sue Patterson the manager of the Long-Term Conditions Centre who conducted the disciplinary investigation into the allegation for which the claimant was dismissed, Karen Shepherd who was the disciplinary decision-maker who dismissed the claimant, Dr Claire Williams a Consultant Clinical Psychologist who heard the claimant's disciplinary appeal and dismissed it, Nashreen Seebundhun, and Debbie Feetham.

12 The disabilities which the claimant relies upon are diabetes and vertigo. The claimant was diagnosed with type 2 diabetes in 2015. She was at one stage treated with Metformin oral mediation. Apparently she now has no medication at all for her diabetic condition.

13 The claimant now mentions stress but that is always a difficult condition to take into account and, for what it is worth, "stress" is not a medical diagnosis.

14 Of more substance was a vertigo attack which the claimant experienced in April 2016. It affected her eyesight but, more acute than that, was a hearing loss which seemed to be consequent on her vertigo and labyrinthitis. I have seen a medical report following an MRI scan which diagnosed the claimant as having BPV (benign positional vertigo). She is currently prescribed medication for that - Betahistine. She also has a hearing aid although she was not using that at work at the time the incidents which we describe occurred.

15 During the hearing the claimant had observable difficulty with hearing in her left ear.

16 The claimant is currently receiving Jobseeker's Allowance (JSA) which means

that the DWP has deemed her fit for sedentary work at least (i.e. not nursing). If she were unfit for work she would be given Employment & Support Allowance (ESA). She has now let her NMC registration lapse.

17 Despite this being a range of relatively low level impairments, it became more focussed when, in response to a request from Judge O'Brien, the claimant stated for the purpose of proceedings:

> "I am relying on vertigo (tinnitus, balance problems, hearing impairment) caused by stress and anxiety and diabetes as my disability".

18 The claimant had some periods of sickness absence. In November 2015 she had an informal sickness meeting with her manager having had 27 days of sickness in a rolling 12 month period, hitting a trigger point under the Trust's policy. There was flu, and a chest infection.

19 The claimant was referred to occupational health. We have now seen occupational health reports which give background, for the purposes of the claimant's subsequent grievance and disciplinary processes. There were reports on 15 January 2016, 18 May 2016, 17 June 2016 (work related stress), and 15 August 2016. The occupational health reports give routine opinions on the claimant's ability to cope with work and latterly her fitness to attend a meeting / disciplinary hearing.

20 There was a memo sent to all senior ward managers including Ms Seebundhun from Anne Motley who was their overall manager. It mentioned duties such as fire duties, staff sickness duties, bed management, patient flow, emergencies such as cardiac arrests, and relatives' complaints which she directed could now be dealt with by band 5 nurses such as the claimant. The claimant apparently refused to take on any of these extra roles. She states (and it has been a recurrent theme) that she did not have enough support from other staff on the ward for her to be free to do such extra duties. She therefore considered they should be carried out by her line manager, the clinical sister (Subha Chandran).

21 The narrative starts in March 2015. Although we have no contemporaneous documentation we know there was an incident when the claimant apparently heard the HCA Coreen Allick say "fucking patient" apparently quite loudly, outside the patient's room. As the band 5 nurse in charge she then did not take any action or have a word with Ms Allick about this conduct.

22 This incident had been investigated and, as part of that investigation, potential witnesses were interviewed. The claimant's simple stance was that she did not hear the comment. The primary complaint that she failed to take action on the HCA's conduct was not upheld, due to concerns over the claimant's hearing. However, the complaint that the claimant had been obstructive in the investigation was upheld. She failed to provide a witness statement, even a statement to say that she had not heard the HCA. This was a concept which had baffled the claimant. The matter was not, of itself, taken further with the claimant at the time. It was only when there was a subsequent allegation made against her that the obstruction allegation was revived and added to the new allegation.

23 The second allegation arose from an event on 12 May 2015. The claimant was caring for a patient with an HCA - Francis Figuerido. This was a demanding male patient with learning difficulties, who thinks nothing of swearing at the staff. The claimant remarked to the HCA: "Will you punch him before I do before I do it myself".

24 Francis Figuerido was asked to give a statement. When he reported the claimant's words that he laughed. He had subsequently gone to the patient's bedside and the patient had called him a "fucking cunt". The claimant, in her statement about this, described the patient's conduct:

> "PM constantly rang the bell ….. I went to him with Staff Nurse Anthony, he wanted suppositories and said "I have been promised these 2 hours ago", he had a plastic jug of water which he picked up – I thought he was going to throw it over us, but he threw it over himself and hit his head several times with the jug. Anthony tried to change the bed, but Peter refused."

Everyone accepts that this is a demanding ward to work on. Just because patients use abusive language it does not make it legitimate for the nursing staff to reply in kind, whether in jest or out of frustration.

25 The patient in question had a history of calling the emergency services, in particular the police. On this occasion, having heard the comment "will you punch him or shall I do it myself" he called the police yet again, a fact heavily relied upon by management in the subsequent process to show how threateningly the claimant had come across to the patient which aggravated the degree of misconduct in management's view. The patient seemed to think he was being held a prisoner on the ward. That was his theme.

26 An investigation was carried out. The claimant was suspended by Anne Motley on 14 May, 2 days after the incident, The following week, 22 May, by letter from Carol White, Deputy Director at Havering Integrated Care, the claimant was informed that the earlier allegation of the "fucking patient" comment was going to be added to the present investigation to be undertaken by Mr Stephen Singh-Khakian. The claimant was, and remains, highly suspicious of this decision. It is not hard to understand that suspicion. A reference was also made to the Nursing and Midwifery Council in June 2015, mentioning both incidents. The claimant was informed that had been done.

27 The investigation report was published on 22 July. It included a statement from the HCA Francis Figuerido. There was a statement about the first incident, and the subsequent witness statement from Sister Jovita Prigo, Ms Chandran, Sam Rokozynski, and others. There was a long interview with the claimant about all incidents.

28 There was a long interview with the HCA Coreen Allick in connection with the first incident. Ms Allick was qute supportive of the claimant. She said that the claimant could not have heard it. There was also a statement from Anne Motley who was asked, controversially so far as the claimant is concerned,

> "Anything else you want to add from Manager point of view?"
>
> "I don't think so. In relation to last question, I have heard rumblings of KS behaviour being out of kilter with the NMC Code of Practice in relation to language – I have been told she swears a lot

> on the ward…"

That was, as the claimant rightly said, hearsay, for what it is worth. She contrasted Sister Jovita Prigo who at least stated matters from her own recollection:

> "The behaviour of Karen. Sometimes she is very rude to the staff. She is always rude, since St George's, always been rude to me since St George's. She changed when she came here to Grays Court …. better."
>
> "Anything else you want to add from Manager point of view about Karen's Performance at work?"
>
> "Basically I was with Karen in Foxglove. I managed her – yes some of her performance and documentation and care plans are not really good. She left things incomplete, and would say "I am not doing that"."

This was a direct observation from a nurse more senior than the claimant.

29 St George's Hospital which is where they were where the claimant worked with Jovita Prigo on Foxglove Ward closed almost overnight because of an outbreak of legionella. Confusingly, many patients were then transferred to King George Hospital, Ilford, and staff followed them.

30 The claimant objected that the comment, particularly the hearsay comments of Anne Motley, found their way into an investigation report at all as they were unduly prejudicial. There is little doubt that they were prejudicial to the extent that Ms Prigo was saying things from her own experience. Her evidence was relevant but also historic.

31 The claimant, already suspended, was invited to a disciplinary hearing, a month after the publication of the investigation report on 26 August 2015. The disciplinary hearing was to take place on 14 September.

32 Before that on 7 September the claimant sent a formal written grievance. She made several allegations against members of the team and management. These arose from the disciplinary process that was happening and the hearing she was about to go to.

33 She complained principally of the hearsay statements in the investigatory report of all the incidents referred to by Anne Motley of refusal to: (1) apologise to a patient; (2) the running together of 23 March and 12 May incidents in a reference to the NMC; (3) ignoring the claimant's stress and being unsupported in circumstances of staff shortage, affecting her morale at work and home; (4) being condemned without a right of reply. She went into detail about all the people she complained about - Anne Motley, Subha Chandran, Jovita Prigo, and Samantha Rokoszynski. In conclusion, she asked:

> "I would like the disciplinary report to be rewritten to exclude all those allegations hearsay/rumblings that I have addressed above. This has been an incredibly difficult time for me. I believe my suspension has become protracted. I feel isolated, scared and anxious. My future is at stake and I don't believe that my treatment in this matter has been fair."

34 The disciplinary hearing took place. Contrary to what has been argued, it is quite clear that the grievance was directly related to the disciplinary process. It arose directly, and solely, out of it.

35 The hearing was held in Harold Wood, it was conducted by Caroline O'Haire, with HR support. The investigator Stephen Singh-Khakian was there. The claimant was unrepresented. The claimant attended with her sister who was not allowed into the hearing room, even to attend as a non-participant.

36 Following the meeting an outcome letter was sent 2 weeks later on 29 September 2015.

37 It strikes the tribunal that both accusations related to the claimant's hearing. First, whether she did actually hear the words "fucking patient" and second, because many people who are hard of hearing can underestimate how loudly they are in fact talking and can be overheard when they think they are out of earshot.

38 At this hearing the claimant told the tribunal that she was expecting to be dismissed for the "punch" comment and was quite surprised not to be. It was clear from her comments throughout the process that she showed remorse for the comment. She has never sought to deny or minimise it. She did not realise that the comment could be heard by the patient.

39 As stated the first charge in respect "fucking patient" only resulted in Caroline O'Haire upholding the charge that the claimant had been obstructive in not providing a witness statement in the course of the investigation. Ms O'Haire found as follows:

> "The Panel also heard that there was a delay in providing a statement regarding the incident and that after 3 requests, the statement that was provided was of poor quality. You claimed you have had no formal training on writing statements and submitted that in 22 years since registering as a nurse … you have written only two statements.
>
> Management's view is that you demonstrated a poor attitude towards management during the period after the alleged behaviour took place."

40 Of the "punch" comment, which was fully admitted, the claimant said she was sorry. The police had attended in response to the patient's telephone call and conducted a "peacekeeping" process, part of which was that the claimant openly apologised to the patient and the patient accepted the apology.

41 At the disciplinary hearing, the claimant was told that she would be getting a final written warning. She had an outcome letter, giving her a right of appeal.

42 In the course of the outcome letter she was told that the final written warning would remain live for 12 months. There was also a 7-point training professional development plan set out by Caroline O'Haire:

- Enhanced Safeguarding Adults
- Conflict Resolution
- Managing Stress
- Change Management
- Supporting the person with dementia

- Working with an adult with Learning Disabilities
- Dealing with difficult people/behaviour

There it was left.

43 It turned out that these training proposals were only partly implemented. The claimant had still been off work at this stage, as her suspension was continuing. She returned to work the day before the letter on 28 September. The letter mentioned the claimant's expressed wish to be transferred to another work area in the Trust. Caroline O'Haire said that this would be pursued by the service manager Debbie Feetham.

44 We heard evidence from Ms Feetham. Her evidence to the Tribunal was that she, Ms Feetham, had expressed a strong preference that the claimant go back to work on Ward 1, but did not say she could not move her. The claimant at that stage agreed to return.

45 We should mention this is not the first example we have come across in this case of the claimant being conciliatory, quick to agree, sometimes failing to put her preferences first, and then building up resentment. She was quite an easy person to manage. It was unfortunate because, as time progressed, after that her known resentment about Ms Chandran increased steadily, and she tended to portray Ms Feetham's reluctance to transfer her as a refusal to do so.

46 A return to work meeting was held with Ms Feetham, the claimant, Ms Chandran and Nashreen Seebundhun. The claimant took the opportunity to reiterate that she would not be doing the extra roles described earlier in that email before her suspension. She stated that they were not in her contract and she would not be doing them.

47 The claimant stated that she would not return to work until the hearing outcome letter was received. In the course of the hearing we found the outcome letter was dated the same date as the claimant's return to work meeting and the letter therefore arrived outside the predicted time when she was told she would receive it.

48 After some email exchanges Debbie Feetham wrote to the claimant on 9 October describing what had happened at the return to work meeting:

> "During the meeting you discussed that you didn't feel supported by management in terms of outstanding annual leave owing …"

And

> "We discussed that an action plan that will be in place to support your return to work and to address the recommendations from the hearing manager."

49 This does not mention that the claimant had raised that no-one had yet responded to her grievance dated 7 September, although it had been acknowledged.

50 The claimant appealed the final written warning on 19 October. The only ground of appeal, which is important, was the inclusion of the hearsay evidence in the statement relating to 23 March "fucking patient" incident, and the delay in the disciplinary

process. She disputed the extent to which she had been obstructive over the witness statement. As for the central incident, the punch comment, she stated:

> "The incident on 12 May 2015, where I uttered inappropriate words about and in front of a patient, I accept responsibility, and the hearing's decision, and am not appealing this outcome."

51 The appeal was promptly acknowledged on 20 October by Yvonne Hood. However, it was not dealt with in any way until 23 November when the same Yvonne Hood wrote:

> "My apologies for the delay in responding.
>
> Having reviewed the content of your letter, I remain unclear as to your actual grounds of appeal. Would you therefore, please send me your written grounds for appeal in order for us to take this request forward."

The claimant responded to that email stating:

> "I am appealing the fact that it was found that I deliberately delayed in providing a statement, I have stated the events as they happened. If you still do not understand maybe we can meet to discuss."

52 The next event was an incident on 2 December. The claimant was working on Ward 1. A different patient this time, a female, DM, asked to go to the toilet. The circumstances were that this was around breakfast time. The patients had been fetched from bed and dressed. The patient DM was very physically disabled, and she needed hoisting. This was a 2 person job. She is frail and small and had suffered some cognitive impairment. The business of getting patients out of bed involves toileting them as fully as possible. This patient DM could only go to the toilet by using a bed pan lying down; she could not sit on a toilet.

53 As part of her care plan she was required to remain in a sitting position for a required number of hours per day. This is the rehabilitation policy that patients are made to do as much as they are possibly capable of, lest that they lose their abilities altogether through lack of use. Extraordinarily inconveniently, after breakfast, the patient stated that she needed the toilet.

54 The claimant's description of this is telling. She said she responded to the patient that she had given her an anti-emetic because she complained of feeling a bit sick. It would have been dangerous to vomit in bed whilst lying down. The claimant expressed open scepticism about her wanting to go to bed. She said it was a bad idea and was against the care plan. The patient then responded that she wanted to go to bed because she needed the toilet. The claimant, not unreasonably, thought it was a ploy for the patient to get back to bed as she could only be toileted on the bed pan lying down in bed.

55 The claimant was also busy. She was doing the morning medicines round. The HCA's cannot do the medicine round; medicine has to be dispensed by a full qualified nurse. The medicines are kept on a trolley with a locked compartment. Nurses apparently wear a "do not disturb" notice on their aprons. It is important that they should be able to concentrate fully on giving the right medication to the right patients, at the right dose. If the medicine round is interrupted for any reason the trolley needs

to be re-locked to prevent loss of any medicines. (Patients sometimes help themselves).

56 Sister Chandran became involved. It had obviously been Ms Adeoye's instinct to do what the patient was asking. Ms Chandran got the impression that the claimant had actually forbidden Ms Adeoye from toileting the patient, (an accusation which was ultimately not upheld). The claimant obviously had no intention of helping in this process herself and wanted to carry on on her medicines round. When she arrived on the scene the claimant reiterated to Ms Chandran that this patient was like this and that she was capable of asking for the toilet as ploy to go back to bed, against her care plan.

57 Ms Chandran was of the clear view that the patient's request needed to be taken at face value; that was the duty of the caring team. Ms Chandran had become involved because the matter had been raised with her by Sinead Noonan who is a band 6 physiotherapist who was nearby. Rachel Adeoye had raised it with Sinead Noonan and Sinead Noonan in turn had taken it to the Ward Manager because it appeared to be a difficult situation that Rachel was in. Ultimately Sinead Noonan went there. She was told by the claimant that the patient was like this and would use a toilet request as a ploy for getting back to bed against her care plan. Ms Chandran was of the firm view that the patient's request should be taken at face value and she should be toileted. She asked Rachel to deal with it. When the claimant appreciated that the toileting was going to happen anyway she interrupted her medicine round, locked the trolley and went to help her. Both she and Rachel toileted the patient but when they did so the patient did not use the bed pan.

58 At this hearing the claimant ultimately acknowledged, with commendable humour, that she had felt vindicated by the fact that the patient had not needed to use the bed pan.

59 On the day, Sister Chandran took statements from Sinead Noonan, Rachel Adeoye, and she gave a written account herself. She did not take any statement from the claimant at the time. That has been a matter of criticism by all the managers subsequently, and by this tribunal. Nothing further was done on the incident on 2 December until the following year.

60 Ms Chandran raised the matter with her manager Nashreen Seebundhun who advised her to seek HR advice on this process. That proved to be extraordinarily difficult in the run up to Christmas. The best she could do was to attend an HR surgery to speak to HR on 18 December 2015 at which point she received what management regards as completely the wrong advice. She was told that it could be and should be treated informally, and should be the subject of a letter closing the incident.

61 The next point in the narrative was that the claimant's grievance dated 7 September 2015 was eventually acknowledged on 16 December, over 3 months later. An informal meeting was proposed for Tuesday 22 December. The claimant had a meeting with Ms Feetham who confirmed the details of the meeting, in an email to Carol White the Deputy Director, and Seline Svoma HR Manager. She recorded that the claimant had agreed that she was willing for Ms Feetham to try to review all the issues informally,that she felt happier, and that she considered Ms Feetham had

listened to her. She had raised a number of points of dissatisfaction which she needed to be addressed. It really concerned the hearsay evidence in the statements and extra duties but, predominantly, it was the extraneous historic allegations.

62 In the New Year, with the advice that she had received from HR before Christmas, Ms Chandran drafted a letter to the claimant dated 5 January (which was never in fact sent). It was to be cc' to Ms Seebundhun. Her conclusion after a detailed analysis of the incident and advice was:

> "I have now considered this matter carefully and have decided not to investigate this formally.
>
> However, I do not expect such an incident to occur again. Should there be an incident of a similar nature I will have no hesitation in investigating this formally in accordance with the Trust's disciplinary policy.
>
> I hope you understand the seriousness of your actions and are able to take appropriate action to address this in order to prevent any repetition."

Of the points to learn from, the most notably appropriate was: "avoid making assumptions and recognise diversity and individual choice" and "make sure that any treatment, assistance or care for which you are responsible is delivered without undue delay" and "respect and uphold people's human rights".

63 Coincidentally on the same day the NMC had contacted Ms Debbie Smith's PA Director of Nursing at NELFT and the NMC Lead in the Trust; she was their primary point of contact. They needed information as to: "whether the registrant has completed her return to work action plan and whether there were any issues in relation to this" where information was needed.

64 On 5 January 2016, there was a steady exchange of emails, the most important of which was one notifying Ms Smith's PA that there may have been a further breach in practice i.e. the 2 December incident. Subsequently Carol White, Debbie Feetham's manager, emailed and asked her why the new incident had not been escalated and discussed. That was on 12 January, at which point it seems that Ms Chandran started to draft another letter doing the opposite of what the original letter had intended, now taking the matter up formally.

65 The final letter we have been shown in this thread was from Ms Seebundhun dated 15 January which stated (with capitalisation and bold font):

> "I strongly believe that this incident should be formally investigated since there are many breaches to **The Code of Professional standards of practice and behaviour for nurses and midwives and Nelft Values**, whilst KS is already on a final written warning.
>
> … I consider **the incident of the 02/12/15 of similar nature where the comment made by KS**, about the patient who requested to go toilet, **should AGAIN NOT HAVE BEEN MADE**."

66 On 12 January 2016, Debbie Smith the Director of Nursing, had intervened:

> "It has been brought to my notice that a further incident re KS has occurred, am I right in my understanding that she was on a final written warning prior to this incident. If so would we need to consider the actions taken and whether they should be more than a letter? The NMC have asked if we have any further concerns re KS and will we need to forward the attached letter as a

> further concern."

This letter was, we believe, the letter of 5 January, the one which was never sent to the claimant stating that the matter was to be dealt with informally. Further downward pressure from the top was exerted by Carol White to Debbie Feetham: "Debbie can you look into this and also explore why it wasn't escalated and discussed please".

67 It seems to the tribunal that Ms Chandran's instincts on this were probably correct because she is recorded in an email from Debbie Feetham to Nashreen Seebundhun of 15 January to have said "when asked Sister Ms Chandran felt that this was an incident that needed investigation". In other words she herself did not instinctively go along with the advice that she had received from HR on 18 December. She was left in an isolated position with an important decision there without competent HR guidance or management support.

68 The point is that, like the last incident, this was another incident after which there was a long lull. Suddenly the claimant received a letter stating that it would be taken forward to a disciplinary investigation. The letter misleadingly was dated 12 January 2016. Everyone agrees that was wrong. It was in fact the date on which the letter had been first drafted. It went through several versions before sending, without amending the first date. The claimant did not receive it until 28 January 2016. We record the fact that the claimant commenced a period of sick leave on 1 February 2016 and never returned to work.

69 There was a repeat in the letter of the incident from Ms Chandran's recollection and states:

> "I would like to reiterate to you that as a qualified nurse, your actions and comments in this incident were inappropriate and unprofessional and are a potential breach of The Code …
>
> As you are aware, you are on a final written warning as an outcome of the previous disciplinary and the outcome letter informs that any further occurrences of the same or similar conduct may result in further disciplinary action taken against you, up to and including dismissal."

70 The next event was that there was an informal grievance meeting on 8 February between the claimant and Ms Feetham. Neither was accompanied because it had the status of an informal meeting. Ms Feetham subsequently sent a 3-page letter detailing what had been discussed. The outcome was substantially in the claimant's favour, as she saw it, as follows:

> "A discussion with matron Seebundhun and with Human Resources has taken place regarding your request to move ward and supervisor. A move to Foxglove ward at King George is possible and this has been agreed by you and Matron Seebundhun to commence from 21st February 2016".

That was of interest in the longer term future but not to the claimant at that point, because she was still signed off sick. The claimant was told that she could still pursue a formal grievance.

71 It was agreed therefore to report back to the NMC that there were currently ongoing disciplinary proceedings against the claimant. HR (Prathiba Bhat) said she notified the NMC about the new incident but also noted:

> "In the meantime, we will be carrying out the appeal process before we progress with the new incident in order to determine whether the appeal process changes the disciplinary outcome"

She was referring to the final written warning and the ongoing appeal against that. The appeal was not heard until 29 April.

72 The next event was the claimant received a notification from the NMC on 16 March 2016 stating that the NMC referral from the previous set of proceedings for which she had received the final written warning had been reviewed on the papers and the case examiners had concluded that there was no case to answer. The last incident, the "punch" comment, they stated:

> "The Registrant appears to have admitted to not being supportive to the patient and to her alleged comments. …There is no evidence of malicious intent by the Registrant rather she seems to have made a misjudgement. We submit that this incident does not amount to serious professional misconduct. This matter is being addressed by the employer. We submit that the evidence we have does not indicate the need for regulatory intervention."

> "There was no patient harm. Thus, the Case Examiners do not consider that the concerns raised are so serious that a hearing would be required on the grounds of public interest…".

The NMC then state:

> "Miss Sawyer received a final written warning, to remain on her file for 12 months and an action plan recommended addressing her professional development."

It seems that the NMC's awareness of what steps the Trust had taken to deal with the incident may well have been a significant influence on their own lack of regulatory action on these incidents.

73 The chair at the disciplinary appeal panel was Carol White, the Deputy Director. Caroline O'Haire presented the management case. It is usual to have the previous decision-maker presenting the case to the appeal panel. The claimant was represented by her UNISON representative Ross Wrenhurst.

74 By letter of 22 March 2016, the claimant was then suspended from clinical duty. Although she was off sick at the time, this will have indirectly been a benefit to her because she would not have had to use up sick pay.

75 The claimant then sent a second grievance dated 29 March. She asked for this grievance to be combined with her previous grievance of 7 September 2015. This grievance included the 2 December incident and action taken on it. She stated:

> "The resolution that I am seeking is that I want to be treated fairly. Want to work in a safe environment without the risk of constantly feeling that I am being watched, and having to look over my shoulder and be unreasonably perfect. That NELFT follow their procedures fairly within the timeframes and take seriously all the issues that I have raised and act on them in accordance with their procedures."

76 The HR manager Ms Svoma proposed that this grievance should be run in parallel with the disciplinary proceedings as they largely overlapped.

77 In the meantime, although they said that they would hold up disciplinary process until the appeal outcome for the final written warning, they appointed a disciplinary investigator. There was no danger of the disciplinary hearing itself taking place before the outcome of the warning appeal.

78 Ms Feetham composed the terms of reference and she appointed Sue Patterson on 10 March 2016. Ms Patterson started her interviews promptly interviewing Sinead Noonan, Rachel Adeoye, and Ms Chandran on 18 March. She then held an interview with the claimant much later, on 14 June. The allegations were as follows:

> "1. It is alleged that on 2 December, 2015 Staff Nurse Karen Sawyer denied [sic] assisting a patient DM on Ward 1 to use the toilet when they requested help.
>
> 2. It is alleged that on 2 December, 2015 when the ward sister instructed an HCA to assist patient DM in question to the toilet, Staff Nurse Karen Sawyer intervened and instructed an HCA not to toilet DM.
>
> 3. It is alleged that on 2 December, 2015 Staff Nurse Karen Sawyer did not adhere to a reasonable management request when asked to assist the patient with their needs."

79 These charges were not finally upheld as formulated. There were some important distinctions that the claimant made and which were accepted. The phrasing "denied" was clumsy and not an appropriate natural word when "refused" is what they were meaning.

80 The disciplinary hearing outcome, sent on 18 May, was that the claimant's appeal against the final written warning for the refusal to provide a witness statement FOR "fucking patient" incident was refused. They determined:

> "You were asked four times to provide a statement. On the first three occasions it was confirmed that you needed to provide a statement both at the outset and conclusion of your conversation with your manager. This communication occurred over four calendar days and it was following receipt of the email on the fifth calendar day that you provided a statement, as originally requested, four days later – the ninth day after the request. You had mentioned that the email you received was unclear. Our view was that it was reasonable for Caroline O'Haire, Chair of the original disciplinary hearing to conclude that you delayed intentionally therefore deliberately, through being obstructive."

81 The appeal was really attacking the fringes of the charges against the claimant. It seems that the final written warning would have been imposed anyway, even if the incident of 23 March had not been included.

82 In addition, as it has been correctly pointed out at his hearing, the claimant's detailed grievance about hearsay evidence made on 7 September was beside the point because the claimant was never found to have heard the "fucking patient" comment although it may have impacted in ways on the decision on the more serious "punch" comment. The warning stood.

83 The claimant's first grievance had had a stop / start course, mainly stop. The second grievance was taken up more promptly. The grievance was 29 March. By letter of 5 May the claimant was invited to a formal grievance hearing on 13 May but for a variety of reasons it did not occur until 29 June.

84 In the meantime the disciplinary investigation report was published on 30 June 2016 by Sue Patterson. It described the claimant's version of events regarding allegation 1 ("denying" assisting DM). The claimant described how the conversation had happened. She had asked DM whether she needed to go to the toilet, or just wanted to go back to bed. At that stage DM had not answered and looked away. The claimant said that led her to believe that she was correct and it was a ploy.

85 The claimant admitted getting involved in the conversation between Ms Chandran and Rachel the HCA, but she did not admit that she had told Rachel not to toilet the patient. She explained in more detail at this hearing, which the tribunal found logical and credible, that she was offering information, not giving an instruction, as she knew this patient well. The patient (as many patients do) was known to use ploys and manipulation to get what she wanted. The claimant also denied that Ms Chandran had actually instructed her to toilet the patient. Ultimately the claimant's version of events has been upheld through the disciplinary process but, notwithstanding that, the *gravamen* of the charge was still sustained.

86 The second grievance was heard on 29 June. It was conducted by Ms Feetham who sent an outcome letter on 12 August, 6 weeks later. Ms Feetham said that she had widened the scope of her investigation into Ms Chandran's alleged bullying and case-building against the claimant to include her conduct on the day itself, 2 December, and that she had not taken a statement from the claimant about the incident.

87 The lack of a witness statement was regrettable. Ultimately the claimant's point of view, which could have been stated immediately, was not heard until the disciplinary hearing, months later. If a statement had been taken earlier the "charges" could have been drafted more appropriately i.e. identifying the correct alleged breaches of the code at an early stage.

88 In the end, some breaches survived, even accepting the claimant's version of events. The claimant did not deny the facts of the incident. She denied that she ever instructed Rachel not to toilet the patient, or that she herself had been "instructed" by Ms Chandran to toilet the patient. She also explained that she had offered information, from her experience of this patient, rather than instruction.

89 Subsequently, following a referral, an occupational health report was compiled dated 15 August. In answer to a specific question in the referral: "Is the employee fit to attend a meeting or hearing in accordance with the Trusts policies?" The answer is: "In my opinion Karen is fit to attend a meeting or hearing." The claimant said in evidence to the tribunal that she did not feel entirely fit to attend a hearing but a meeting would have been okay, whatever she understood by the distinction. There was then a certain amount of difficulty in fixing the final hearing for the disciplinary.

90 By letter of 9 August Karen Shepherd wrote to the claimant inviting her to a meeting on 17 August, Wednesday. The claimant responded quickly on the Thursday 11 August. However she misaddressed it by misspelling Shepherd by putting an extra e in between the r and the d of Shepherd. It was never delivered. Surprisingly it did not bounce to alert the claimant to the problem. Anyhow she said that she had a

doctor's appointment at 11 on 17 August and could not attend. Also, sensibly, she asked to know: "What level of misconduct this is". It was a fair request because the Trust's policy makes a distinction between misconduct, serious misconduct, and gross misconduct, and lists separate ranges of sanction. She also asked: "I would like copies of submissions made to the NMC". When the address mistake came to light the claimant apologised. She was asked to attend another meeting, by email dated 22 August. The claimant had confirmed that she would be available with her union representative apparently for any day on the week commencing 29 August 2016 (that was the Bank Holiday Monday).

91 By email of 23 August 2016 Rumi Thakur had asked the claimant and presumably her representative Ubaidul Hoque to block out 30 and 31 August for the hearing so the correct 5 days notice, provided for in the policy, was given.

92 On 24 August 2016 a letter was sent asking the claimant to attend a meeting on 31 August at 2pm at Goodmayes Hospital. At this stage the claimant was unable to organise the attendance of Ubaidul Hoque. She was able to organise the attendance of Ross Wrenhurst who had previously represented her at the grievance hearing. However, a complication had arisen because Ross Wrenhurst and some other union representatives had been suspended from their union role by UNISON. Therefore if Ross Wrenhurst attended with her he could only attend as a workplace colleague.

93 In some bizarre procedural twist which we never got to the bottom of, Karen Shepherd was under the impression that unless someone was an attested union representative they could not address the disciplinary hearing or question witnesses. They could only attend colleagues to give support. That is not made clear in the disciplinary procedure anywhere. The tribunal noted that, if anything is stated in the written procedure, it is precisely the opposite.

94 Both Ubaidul Hoque and Ross Wrenhurst work for the Trust. They are employees. Ubaidul Hoque is a podiatrist and Ross Wrenhurst has an administrative job. In the event the respondent found a workaround for this. The claimant represented herself but they allowed frequent breaks for Mr Wrenhurst to advise her on the best line of questioning or addressing the panel. This point does not get far because, as it seemed to the tribunal, and as the claimant accepted during the hearing, it is more of an unfair dismissal point than it is a reasonable adjustments point.

95 The claimant complained by email of 26 August addressed to Karen Shepherd (correctly):

> "At present I am unable to get a union representative for Wed 31 August 2016. I have contacted Ubaidul Hoque and he has advised that I should be given 5 working days notice and as Monday is a bank holiday, that is only two working days."

96 The formal disciplinary hearing took place on Wednesday 31 August, an hour later than scheduled, to accommodate Mr Wrenhurst. There was one witness to the hearing, Ms Chandran. There were these breaks to allow the claimant and Mr Wrenhurst to confer.

97 The claimant explained that the patient DM had a timed sitting care plan. The

claimant maintained throughout that she had done nothing wrong over the DM incident. At one stage of the investigatory interview the claimant had said that, in discussion with Ms Chandran, she had said: "lets agree to disagree" meaning the claimant had made a judgement call about the patient DM's need for the toilet, despite her professed wishes, and Ms Chandran disagreed with her. Ultimately the respondent's conclusion was this was more than a poor judgement call.

98 The outcome was announced at the disciplinary hearing. The outcome and the sanction were announced despite the fact that the charges were not phrased exactly as the findings came out. Charge 1 was upheld, charge 2 was upheld, charge 3 was partially upheld. There was an important finding that no actual "request had been made of the claimant" in other words the claimant did not disobey a reasonable management request. The unhelpful word "denied" of course continued. It had the import that the patient's rights were being denied.

99 There was a dismissal outcome letter on 12 September which confirmed the outcome. The qualifying findings were made clear like for instance "… you failed initially to support RA, HCA …" Part of the logic was this:

> "Your argument that this response was based on your assumption that patient DM only requested to be toileted so that she could return to bed does not place the patient's assessed needs as priority and in denying to support patient DM's expressed need, and your subsequent actions with colleagues this could be deduced as threatening behaviour and as such a breach of NELFT Safeguarding Audit Policy."

100 Karen Shepherd was pressed very hard by the Tribunal on what would have been the outcome to the toileting incident the conduct had it been freestanding had there been no written warning at all and she eventually answered she would have given a first written warning which coincidentally was the view of Claire Williams (disciplinary appeal). If that is the case this is likely to be the bottom end of serious misconduct or perhaps just misconduct as far as they were concerned. Ms Shepherd was following the views of Claire Williams.

101 Ms Shepherd, not unreasonably, put some weight on the fact that the physiotherapist Sinead Noonan was a band 6 professional. Therefore in terms of hierarchy, although she was not in the claimant's line of management, her views should have weighed more with the claimant than they did. It was Sinead Noonan who raised the concern to Ms Chandran in light of what she perceived as a flat refusal by the claimant (which the respondent ultimately found not to be as stark as that). The conclusion was:

> "The letter dated 29th September 2015 clearly indicates that any further occurrence of the same or similar conduct may result in further disciplinary action being taken against you up to and including dismissal. As a result it is my decision that your actions were sufficiently serious to warrant an additional sanction related to serious misconduct, and since you have a current final written warning for misconduct the level be escalated to dismissal with appropriate notice…"

The claimant was to be paid 12 weeks statutory notice pay. Ms Shepherd also stated:

> "I reiterated my concern that as a nurse I observed there to be a lack of insight and/or remorse relating to this incident, with you often referring back to the assumption that patient DM only requested to use the toilet to go back to bed, and when questioned on this further at the hearing you commented that you have been proved right to deny the patient to be toileted as when

> patient DM was later toileted the bed pan had not been used."

102 The letter written is clearly a template with fields left unchanged, as for instance the word "panel"; this was a decision which Ms Shepherd took alone. She was the sole decision-maker. Other bits of the template were inappropriate, for instance:

> "Debbie Smith, Director of Nursing needs to be informed of any warnings [sic] issued to nursing staff and she may refer the matter to the NMC who may wish to carry out their own investigation."

This was not a warning; this was a dismissal.

103 The claimant appealed by letter of 29 September 2016 again to Yvonne Hood. It is 6½ pages of close type. It was acknowledged on 3 October.

104 It was a busy time for the claimant. On 5 October she then appealed the grievance outcome decision of Debbie Feetham. One of the complaints on appeal was that the hearing chair, Ms Shepherd, had answered questions which were apparently directed to Ms Chandran. Ms Shepherd's response to this, (she gave in a detailed written response to the claimant's appeal), was that it was clear to her that the claimant had not understood the response that Ms Chandran was making and therefore she repeated what she understood Ms Chandran's response to be. We can see how such a perception might arise, but Ms Shepherd's explanation was logical.

105 Ms Shepherd's written response also made clear that Ms Chandran should have obtained a contemporaneous statement from the claimant on 2 December or the next day, straight after the incident, while it was fresh in her mind. Apparently, according to the claimant, Ms Chandran had said: "I have enough evidence already", portraying her as someone who was only interested in the case against the claimant rather than a full investigatory review. That fitted in with the claimant's perception of Ms Chandran as a case-builder.

106 It is an irony, and we say no more than that, that the person who originally did not want to take the matter up formally was Ms Chandran (albeit on HR advice). If she had felt really strongly about it, as Nashreen Seebundhun had done, she might have tried to get another opinion.

107 The next event was the grievance appeal. It was important to the respondent to get that completed before the disciplinary appeal could be heard because the links between the two had been acknowledged. Caroline O'Donnell, the Integrated Care Director, addressed the 10 concerns in the claimant's appeal letter. The appeal was not upheld. As far as the delays were concerned her finding was that the claimant's sickness had contributed and the claimant was being managed under the attendance at work policy.

108 The tribunal ultimately finds that the majority of the delay was probably due to HR. In the end, the delay and the causes of it have not been important to the determination that this tribunal has to make. It did not actually invalidate the fairness of the process. Indeed it is a depressingly familiar feature of many cases that indicative time lines in written disciplinary or grievance policies are exceeded, often by a long time.

109 At one stage, again ironically, the claimant complained that Karen Shepherd had tried to rush the proceedings through. This came about because of something that was disclosed in these tribunal proceedings.

110 On 23 August 2016, Karen Shepherd had written to Rumi Thakur and Prathiba Bhat:

> "Hi Rumi,
>
> I am not happy to hold the hearing this late in September since I am aware from the report that KS has an existing sanction on file for similar issues which ends in September. I would wish to hold the hearing before the current sanction expires."

It is sad to see senior management's ignorance of such basic procedure. It was also apparently compounded by Rumi Thakur, Senior HR Advisor, not correcting Ms Shepherd on this total misconception about the timings here. It is the timing of the misconduct relative to the final warning which counts, not the timing of the next disciplinary hearing. It would be utterly arbitrary and unworkable if it was in an employee's power to stall a disciplinary hearing for long enough that warnings expired. It is not the point. It is just like a criminal conditional discharge or a suspended sentence is triggered if offending takes place in the currency of the conditional sentence.

111 The HR department did not disabuse Ms Shepherd of this basic misconception. It is not impressive. The claimant said she only found that this was a misconception when it was explained by Mr Caiden during a preliminary hearing at this tribunal (he has represented the respondent here throughout).

112 The claimant appealed against the dismissal on 9 September 2016. The hearing was conducted by Claire Williams, Consultant Clinical Psychologist. This was a panel including 3 others:- an education training fellow, a health visitor, and a senior HR manager, Ms Radhakrishnan, who has attended throughout this hearing. Originally the plan was to have Debbie Smith the Director of Nursing on the panel but she was unable to fit in with the available dates and had to be replaced. That was a loss because Debbie Smith is the NMC Lead for the Trust. This case raised points under the code, as was spelt out in the dismissal letter. It was then more specifically spelt out in the appeal outcome letter in response to the claimant's justified complaint, on appeal, that the references to the code were too general and it seemed that the respondent was referring to the entire code in general.

113 A matter of wonder to the tribunal has been the fact that the claimant had in her possession an investigation report, sent to her by the NMC, dated 16 February 2016 stating that there was no case to answer either on the original complaints that had given arise to the written warning, or on this complaint about the events of 2 December. The only information the NMC had about the second complaint was the letter from Ms Chandran, wrongly dated 12 January, setting out the details of the incident and the fact that it was to be formally investigated. (One recalls that this formal investigation only came about after the NMC had made enquiries about the claimant's progress since her return to work after the final written warning).

114 According to the respondent the claimant never put this before the disciplinary hearing, and did not even put it before the appeal hearing. The claimant is insistent that she offered it but that it was refused by Karen Shepherd, and then by Claire Williams.

115 Ms Shepherd completely denied the suggestion that the claimant offered her that information. We are not clear either way on that because the evidence of Ms Shepherd was not compelling in the tribunal's view. It was up to the claimant to be more proactive in this. She had had opportunities prior to both hearings to present extra documentation. It is true that the appeal invitation letter did not specifically invite supplementary documentation perhaps because it was an appeal.

116 In her appeal letter the claimant had said:

> "Despite requesting information to be included prior to the hearing that was sent to the NMC by NELFT this was not included in the bundle neither was this given to me and my issue in relation to this it has been disregarded. In fact I was told by email it does not exist by the chair, although I offered to show my letter from the NMC where it was included."

117 This is, in the tribunal's view, yet another example of the claimant's lack of assertiveness and her failure to present important case material for herself. Although Mr Caiden has, in a legalistic way sought to say that this is "irrelevant", it would be quite astonishing if any hearing manager knowingly refused to see an outcome letter from the NMC concerning the very thing that they were having a disciplinary hearing about. Whilst it would not bind their decision one way, it is a step too far to say it is "irrelevant". It would have been astonishing if they were not even curious to read such a letter given that breaches of the NMC code were integral to the disciplinary charges.

118 When the claimant was asked why she had failed to put this before the hearing, she stated that she was stressed that day. In any event her representative Ross Wrenhurst at the disciplinary and then Ubaidul Hoque at the appeal had been in charge. It is evident from the written minutes that Ubaidul Hoque had done all the speaking at the appeal hearing. In the tribunal's view if either of those people had seen what the claimant had from the NMC they would have insisted that she put it before the hearing rather than just offering it.

119 An email dated 31 August 2016 from Debbie Smith's PA to Debbie Feetham and Karen Shepherd, shortly before the disciplinary hearing, confirmed to both of them that in respect of the final written warning, the allegations "fucking patient" and the "punch" comment, the NMC had advised there was no case to answer. It is not clear whether Claire Williams knew that or not, certainly she was not in the email chain at that stage, because she had not been nominated at that stage.

120 In the tribunal's view, even allowing for stress on the day, she should have insisted on putting this before the respondent whether they wanted it or not. It is true that the respondent made a basic error in replying that they did not possess this. They must have had it. We have seen a covering letter from the NMC to the respondent - a letter that Debbie Smith's office. It was addressed to her personally.

121 Debbie Feetham was contradictory. She said she did not know if there had been another referral to the NMC. She must have known there had been another

referral because she was instrumental in organising it, and she was the Trust's NMC lead.

122 The appeal hearing was well done, in our view. It was a better process than the disciplinary hearing had been. That was the claimant's perception too. She felt she had been "listened to" by Claire Williams and the panel. That was understandable. Claire Williams' approach showed real insight into the process and the purpose of disciplinary process. She had good insights into the context of incidents like this. She referred to the Mid-Staffs case, a lesson to all health professionals, to illustrate how apparently insignificant examples of attitude towards patients can actually lead to far more serious and obvious abuses. The highest standards of conduct for the dignity of patients and their right to choose (if they have cpacity) needed to be maintained. (It is not suggested that the patients on Ward 1 did not have capacity).

123 She gave a far more nuanced insight into the importance of "remorse", which can sometimes be a wooden mantra. She talked about a process of "reflection" which was a useful description on what the respondent was looking for. The all important insight was that the respondent needed a degree of trust that someone in a band 5 nursing position with considerable influence in a ward environment like this would not repeat the conduct which had been seen. There was no "remorse" in this case because the claimant really believed that she made a judgement call which at the time was correct, and her union supported her in her stance on that.

124 The appeal panel also took proper account of the similarity of the incidents and the final written warning and the incident this time that it concerned attitudes towards patients on the ward. A point of mitigation that could and should perhaps have been taken into account both by Karen Shepherd and Ms Williams was that if the claimant showed no remorse on this occasion, she was by no means incapable of remorse. She had shown a great deal of remorse over the "punch" comment in May 2015.

125 The appeal outcome letter stated:

> "Our view is that the current misconduct is similar to, but not the same as, the previous act of misconduct. Both relate to failures to treat patients with dignity, albeit in different ways and circumstances."

Claire Williams stated in the appeal outcome letter:

> "Although it is hypothetical to consider what sanction would have been imposed in respect of allegations 1 and 2 in the absence of the final written warning, the panel's view was that it would either have been a first written warning or a final written warning."

126 Dr Williams' outcome was also conscientious and thorough. In order to meet the timescales she sent a letter on 4 January basically announcing her decision on the outcome but not the sanction. The decision was that allegation 3 which had been partially upheld by Ms Shepherd was now not upheld at all. She therefore had to consider whether that made a difference to the outcome. She followed that up by letter of 24 January 2017 with her decision on the outcome. That stated that the dismissal would stand.

127 It has been our experience at this hearing that the claimant is quick to make admissions and concessions where she considers them to be due. The respondent considered that such a concession was due on this occasion and that remained their case.

Unfair dismissal

128 On that evidence we have to consider firstly whether the claimant was fairly or unfairly dismissed.

129 In this case, the tribunal has no reason to revisit the final written warning. In particular the main part of it, the "punch" comment, was not subject to internal appeal. The claimant was apologetic about it. We were referred to *Wincanton Group plc v Stone* [2013] IRLR 178 EAT which is a good up-to-date authority on how one treats written warnings in the workplace and when misconduct has occurred when a warning is live. This is not a case where revisiting the final written warning is appropriate. That is quite clear. We have to take the final written warning as it is. The process impressed the tribunal and Caroline O'Haire's handling of it was insightful and good management.

130 We have been concerned that if one looks from a distance at these incidents they do not appear to be gross misconduct.

131 Warnings mean what they say. The occurrence of misconduct during the currency of a warning does not automatically lead to dismissal. An independent decision always has to be made. The issue of similarity is important, and was important in this case. Ms Williams' finding on that was well observed and appropriate in our view.

132 Under section 98(2) of the Employment Rights Act 1996 this case relates to "conduct" in the broader sense. The conduct-related reason is demonstrated under section 98(4). The handling of the process and the sanction has to be reasonable. In our view the agreed delays, severe though they had been to the extent they had impacted on the claimant's health and stress levels, were not an important factor under s 98(4). Ultimately no-one convinced the tribunal that this was more than a sympathy point, rather than affecting the reasonableness of the outcome.

133 Procedurally the respondent went through the correct steps. Apart from the delays there were no obvious omissions. The failure of Ms Chandran to take a statement from the claimant on the day was before the disciplinary stage of this. There was delay in the whole disciplinary process starting. There was a pattern of incidents which appeared to have been forgotten which suddenly arose again as fresh disciplinary charges. We cannot read anything more significant into that than to observe it was a pattern, if a regrettable one. There were reasons, mainly differences of opinion between management and management, and management and HR.

134 Mr Caiden pointed out that the claimant's belief that Sue Patterson's investigation report had actually upheld the disciplinary allegations was based on a misreading of the conclusion of her report. It was an overlong sentence burdened with subordinate clauses which. When stretched out, it was in fact a recommendation that

a disciplinary hearing be convened to consider whether the allegations against Karen Sawyer … should be upheld. The tribunal had also misread it, upon our first reading. It seemed she had gone beyond her terms of reference in upholding the allegations rather than making recommendations. She had not.

135 The main question for the tribunal is the reasonableness of the sanction. We can see that there are some NHS employers who might have taken a more lenient and forgiving view, particularly with someone who has been qualified now for 24 years. However, the tribunal is satisfied that these high standards apply. It may be counter intuitive to people who do not work in health care that the consequences are so severe for apparently innocuous occurrences. There is real concern within the health service about incidents of this sort. The highest standards need to be upheld. In practice this can be achieved by training. Also, unfortunately, where breaches occur, they need to be upheld by using appropriate sanctions.

136 This sanction was appropriate in the sense that, at the point of dismissal and appeal, there was no reason to believe that the claimant would not act in a similar way in the future. That was a legitimate concern to an employer whose duty is to uphold strict standards.

137 We had been exercised about the relevance of the NMC finding that there was no serious professional misconduct. Was it unreasonable that the respondent should react so severely to events which the NMC described as "no case to answer"? We appreciate, as Mr Caiden spelt out at length that the criteria for the two sets of decision-making are different. Of course they are different. One is regulatory and the other is disciplinary. They will not necessarily go the same way. This is a good example of that distinction. We accept it is a valid distinction.

138 Perhaps it was unfortunate that the disciplinary outcome letter was phrased as it was. It could have created the perception that the respondent is responsible for upholding this professional code. It is not. It is responsible for upholding its own values as incorporated into a nurse's contract of employment. They did actually explicitly find the claimant in breach of the NMC code. They did not have to go that far, and it is very arguable that they should not have done. This is criticism of both Ms Shepherd and Ms Williams.

139 What we suspect is that HR are responsible for this. They look after the templates; they have a substantial input into outcome letters. This is a point from which the respondent might want to learn the difference where outcomes between the two bodies differ so starkly. There is plenty in the ELFT policies and code which they could have relied upon. It would have been better if they restricted themselves to that.

Discrimination

140 Finally we turn to the claimant's discrimination claims. We work from the final list of issues which numbered 3 claims as follows:

> "1 Give the claimant longer notice of the disciplinary hearing which took place on 31 August 2017.
>
> 2 Delay the investigatory and disciplinary hearings until the claimant was fit.

3 Make allowances for any inconsistencies made by the claimant."

These are cited as examples of the respondent's failure to make reasonable adjustments as disability discrimination. They are advanced only as failures to make reasonable adjustments. At this hearing the claimant, in our view, correctly conceded that point 1 about the notice of the disciplinary hearing was a procedural unfair dismissal point. Her point about the notice of the hearing i.e. less than 5 days, was that it deprived her of a full union representation from Mr Ubaidul Hoque as Ross Wrenhurst did not have rights of union representation after he had been suspended. This is not a complaint that had any bearing at all on any perceived disability of the claimant's and only relates to unfair dismissal. In the event also the respondent did propose this workaround. We have already stated at length that the entire restriction on representatives not being able to address the hearing if they are not union representatives may have been another of Ms Shepherd's misconceptions. It certainly was not contradicted by HR.

141 The second complaint was about delaying the investigatory and disciplinary hearings until the claimant was fit. We note that the respondent was alive to this point and obtained the occupational health report of 15 August stating specifically that the claimant was fit to attend a meeting / hearing. This is a precaution a wise employer will take when there is a medical question. There is very little more they can do than seek medical advice from occupational health and then take that advice when it is given, unless it is challenged. It was not challenged by the claimant in this case. In fact the delay in proceedings has itself been a matter of complaint by her in the course of the grievance and the disciplinary.

142 The claimant is not alleging any tangible disadvantage from this other than the fact that she states that she was muddled and confused. If it was being advanced as a case of reasonable adjustments, the claimant would need to demonstrate that the respondent had knowledge not only of the claimant's disability but her disadvantage in the workplace as a result of that disability. See paragraph 20, to Schedule 8 to the Equality Act 2010. In this case we do not see how the respondent could have had such knowledge.

> "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement …"

That refers back to section 20 of the Equality Act itself.

143 Accordingly we cannot uphold this claim for reasonable adjustments in respect of delaying the investigatory and disciplinary proceedings.

144 The tribunal is not making a finding one way or the other as to whether the claimant was a disabled person for the purposes of this act and we adopt the approach of Mr Caiden whose focus was not on the fact of disability at all but on the relevance of any claimed disability to the events that happened and to the remaining 3 issues under the Equality Act.

145 The third allegation of failure to make reasonable adjustments is: "make allowance

for any inconsistencies made by the claimant". That disappeared during the course of the hearing itself. The claimant was asked if she could give any examples of inconsistencies in her account which had been held against her. The claimant failed to mention any example and ultimately conceded that the complaint could not go forward in the absence of any evidence of inconsistencies or unfavourable treatment. Mr Caiden had even attempted to help the claimant by finding an example what he thought was an example of an inconsistency, but the claimant said that was not it.

146 The tribunal has read the case papers thoroughly during the course of this final hearing and there is nothing that occurs to us that appears to be an inconsistency held against her. It is possible that the claimant was hampered by her stress in presenting an effective case but that is not the same as the issue of "inconsistencies". It is the purpose of compiling a list of issues so that the final hearing can be focused on those defined issues. In this case they were defined and redefined in the succession of case management hearings.

147 In sum the tribunal cannot uphold the discrimination complaints either, and the claimant's claims are all dismissed.

Employment Judge Prichard

20 November 2017