EMPLOYMENT TRIBUNALS

Claimant: Mrs L Harris

Respondent: East Lancashire Hospitals NHS Trust

Heard at: Manchester **On:** 7, 8, 9, 10, 11, 14, 15, 16, 17 and 18 October 2019

Before: Employment Judge Franey (sitting alone)

REPRESENTATION:

Claimant: Miss M O'Rourke (Queen's Counsel)
Respondent: Mr T Cordrey (Counsel)

JUDGMENT

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

REASONS

Introduction

1. On 17 April 2018 the claimant presented a claim form which complained that she had been unfairly dismissed (by way of a "constructive dismissal") from her post as a Band 6 Sister with the respondent ("the Trust") when her resignation took effect on 25 February 2018. The claim form explained that she had been subjected to disciplinary action following an incident on 22 February 2017 when she administered blood to a patient ("Patient X") who was being transported in an ambulance between Blackburn and Burnley hospitals. The disciplinary proceedings had resulted in a written warning, and an appeal against that had been unsuccessful. A complaint which the claimant made about bullying and harassment had not been properly investigated. She had not received the report of the investigation into that complaint

by the time she resigned on 1 January 2018. Eight breaches of the implied term of trust and confidence were identified.

2. The response form of 8 June 2018 denied that there had been any fundamental breach of contract which had entitled the claimant to resign. There had been significant issues with the claimant's conduct during the ambulance incident which had warranted a disciplinary investigation. The claimant had failed to engage with it or with the investigation into her complaint of bullying and harassment. Efforts to redeploy the claimant had been unsuccessful. There had been no dismissal.

3. The case came before Employment Judge Howard at preliminary hearing on 25 September 2018. By consent permission was granted for the claim form to be amended to add in an allegation about the way the claimant had been treated between May 2016 and February 2017. That reflected the content of a suggested List of Issues prepared by the claimant, who by this stage was representing herself. However, the claimant subsequently instructed alternative solicitors in April 2019, and on 31 May 2019 they wrote to the Tribunal enclosing amended grounds of complaint, seeking to focus the claims and simplify the issues. On 20 June 2019 Employment Judge Howard gave permission for this amendment.

4. At a further preliminary hearing before Employment Judge Holmes on 1 July 2019 it was ordered that the final hearing should deal with liability only in the first instance, and provision was made for the parties to agree a List of Issues.

Issues

5. At the start of my hearing I was presented with an agreed list of factual issues which was broadly drawn. There were 19 specific allegations of conduct said to form part of a breach of trust and confidence. Miss O'Rourke had been instructed only shortly before the hearing, and she indicated that a number of those matters would no longer be pursued. Following the conclusion of the claimant's evidence some further issues fell away. Those matters remained relevant as background evidence, but the effect was that the agreed amended List of Issues for determination by the Tribunal was as follows:

1. Did the respondent without reasonable and proper cause conduct itself in a way calculated or likely to destroy or seriously damage trust and confidence in any of the following alleged respects, taken individually or cumulatively:

1.1 Unreasonably instigating a formal disciplinary process without offering face to face informal counselling with the claimant's line manager to resolve a genuine mistake;

1.2 Failing to offer a face to face meeting in respect of the claimant's completed reflective statement and thereby pressuring the claimant into changing her version of events in respect of the incident with Patient X;

1.3 Escalating the matter by failing to arrange a one-to-one face to face meeting, by restricting the claimant's duties without proper justification and for what turned out to be an inordinate period of time in the circumstances;

1.4 Unreasonably subjecting the claimant to formal disciplinary action at an early stage without investigating alternatives, and acting disproportionately in all the circumstances where there had been a genuine mistake by the claimant, whilst absolving others who also made mistakes in the relevant incident, and/or

1.5 Causing the claimant to anticipate further unwarranted mistreatment of her and/or indicating a settled intention on the part of the Trust to undermine her by requiring her to accept a desk bound role or suffer a humiliating demotion?

2. If so, was the claimant's resignation caused by a "final straw" in the form of:

2.1 The letter from Jarrod Walton-Pollard to the claimant dated 20 December 2017 rejecting her bullying and harassment complaint;

2.2 The letter from Mark Wilson to the claimant dated 21 December 2017; and/or

2.3 The failure of the Trust to respond to the claimant's "without prejudice" email dated 22 December 2017?

3. If the resignation constituted a dismissal under section 95(1)(c) Employment Rights Act 1996, the respondent accepts that it was unfair. The remedy issues to be determined at this hearing are:

2.1 Should there be any reduction in the basic or compensatory award by reason of contributory fault?

2.2 Should compensation should be limited or extinguished on the basis that the claimant's employment would have terminated in any event pursuant to Polkey v A E Dayton Services Ltd [1988] ICR 142?

2.3 Should any compensation should be increased on account of an unreasonable failure by the Trust to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015?

Evidence

6. The parties had agreed a bundle of documents in five lever arch files which exceeded 2,500 pages. Neither side objected to the inclusion of certain "without prejudice" emails. A number of documents were added to that bundle by agreement during the hearing and given page numbers. Any reference in these Reasons to a page number is a reference to that bundle unless otherwise indicated.

7. The claimant gave evidence herself, and called her two former colleagues, Julie Ostiadel, who accompanied the claimant at the disciplinary hearing, and Hilary Fish, who accompanied the claimant at the appeal hearing.

8. The Trust called the following witnesses. Mark Wilson was the Acute Care Team Leader who conducted the initial "Rapid Review" of the incident and who managed the sickness absence process. Jane Dean was the Acute Care Team Leader who was the claimant's line manager. Yvonne McKean was the Practice Educator in the Acute Care Team who was involved in the aftermath of the incident. Jonathan Smith was the Assistant Director of Nursing – Surgery & Anaesthetics who

decided that there would be a disciplinary investigation. Jennifer Bebb was the Matron in General Surgery and the Emergency Department who conducted the disciplinary investigation. Angela O'Toole was the Head of Midwifery and Divisional Director of Nursing for Family Care who chaired the disciplinary hearing and decided to administer the written warning. Jane Pemberton was the Director of Nursing – Integrated Care Group who heard the appeal against the written warning. Tracy Pinner was the Senior Human Resources ("HR") Business Partner who supported Angela O'Toole at the disciplinary hearing. Hazel Whittle was the Assistant Director of Nursing Services in Medicine for Older People who investigated the claimant's grievance about a breach of confidentiality. Tracey Thompson was the Midwife Matron in Family Care who investigated the bullying and harassment complaint. Jarrod Walton-Pollard was the Divisional Director of Nursing who notified the claimant of the outcome of her grievance and bullying complaint in December 2017.

Relevant Legal Framework

9. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. The circumstances in which an employee is dismissed are exhaustively defined by Section 95. Section 95(1)(c) provides that an employee is dismissed by his employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

10. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat herself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

11. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

12. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

13. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

14. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
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> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

15. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However,

the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal affirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

Relevant Findings of Fact

16. This section of the Reasons sets out the broad chronology of events. Most of the primary facts were not in dispute. Any disputes of particular significance will be considered in the discussion and conclusions section.

17. Because of the way the case was put it is necessary to consider in detail events in the first three weeks after the incident; later events will be summarised more briefly where appropriate.

Background

18. The Trust provides acute secondary healthcare to the residents of East Lancashire and Blackburn. It employs approximately 7,000 staff. Its sites include the Royal Blackburn Hospital and Burnley General Hospital. They are about 13 miles apart by road.

19. The claimant was a Band 6 Nurse who had worked at the Trust since 2002 and who had been continuously employed from April 2005 as a qualified nurse. She worked in the Emergency Department ("A&E" or "ED") before joining the Clinical Response Team, and in May 2016 that team amalgamated with the Outreach Team and together formed the Acute Care Team ("ACT"). The claimant's role involved caring for acutely ill patients, predominantly at night and during the weekends. She was an experienced nurse with an unblemished record over her 14 years of employment, and was trained in advanced life support. The administration of blood was a common part of her clinical role.

20. In addition to work in the ACT, the claimant from time to time undertook "bank" shifts in A&E.

Medicine Errors Policy

21. The Trust's Policy on Management of Medicines-related Errors and Near Misses appeared at pages 1959-1972 (the "Medicines Errors Policy"). It made provision for immediate action following any medication error, including reporting it on an incident report form (known as the "IR1" or "Datix").

22. After a heading "Subsequent Actions" on page 1962 the following appeared:

> **"3.2 Where a line manager is of the opinion that an administration error is serious enough to warrant that no further medicines administration may be carried out by the individual concerned, the practitioner will be relieved of the duty of medicines administration until a full review of the incident has taken place. Advice must be sought from the overall service manager or equivalent for that service as soon as possible where there are potentially serious conduct issues relating to the management of medicines and where disciplinary action is being considered, and where the ultimate outcome could be referral to the relevant professional regulatory body.**

3.3 In less serious administration incidents, i.e. a near miss or where no harm to the patient has occurred the line manager should take into account the best interests of patent safety and the emotional impact on the practitioner and consider relieving the practitioner of any further involvement in medicines administration until an opportunity for reflection has been facilitated. The practitioner may also wish to stop themselves from administering medications and this must be respected by the line manager who will need to make alternative arrangements. This should also be addressed within the reflective process with timescales for the practitioner's development.

The Incident Decision Tree can be useful in either circumstance to enable the manager's decision-making process.

4. <u>Improving medicines-related practice</u>

4.1 In all cases of medicines-related errors or near misses, the line manager will undertake a reflective review of the incident with the healthcare professional using the template in Appendix 2. The Pharmacy Service is available to provide advice and support in the review as required.

4.2 The reflective review should take place as soon as possible within 7 days of the incident. The Reflective Practice Report completed by the health care professional and the Environmental Factors Review completed by the line manager using the template in Appendix 3 should form the basis of this meeting, and both documents should be retained together with the agreed action plan using the template in Appendix 4 (including agreed timescales for the achievement of competencies) arising from the meeting. If as a result of this reflective review it is then felt that the staff member should abstain from medicines administration or other areas of concern are raised the overall service manager must be consulted."

23. Appendix 2 to the policy was headed "Reflective Practice Report" and contained six different sections with a preamble to help the practitioner complete her report. The first was an outline of the incident, the second and third required reflection on actual practice and the environment at the time of the incident, the fourth required consideration of the information available to the practitioner, the fifth asked about difficulties in implementing organisational policies and procedures, and the sixth enabled the practitioner to include anything in her personal life which may have had an impact on her ability to practice.

24. The Incident Decision Tree appeared in a separate document issued by the National Patient Safety Agency (page 2065D). The first question was whether there had been any deliberate harm to the patient, the second was whether there was evidence of ill health or substance abuse, the third was whether the individual departed from agreed protocols or safe procedures, and the fourth was whether another individual from the same professional group would behave in the same way in similar circumstances. Referral to disciplinary investigation was one possible outcome.

<u>Incident 22 February 2017</u>

25. On the night of 21/22 February 2017 the claimant was working a bank shift at A&E at Blackburn.

26. At around 2.00am she was asked by a Band 7 Nurse, Chantal Ormerod, to assist with the emergency transfer of Patient X from Blackburn to Burnley General Hospital. Sister Ormerod informed the claimant that the Major Haemorrhage Protocol ("MHP") had been initiated, and that there would be a two-person paramedic crew with the ambulance. The claimant was told that she was needed to continue the administration of blood.

27. The claimant went to meet the patient who was distressed at the frightening situation. She already had two units of blood running "stat", meaning the blood was running into her fast and freely. There was also plasmalyte running through a second cannula. The claimant familiarised herself with the A&E records, checked the patient's identity wristband, asked her about what had happened and took a previous history. Amongst the records she saw the blood transfusion document known as the "purple form".

28. The purple form appeared in the bundle at pages 403-406. According to the blood transfusion policy of the Trust (pages 1891A-1891III) it was mandatory for it to be completed whenever blood was administered. The purple form identified the patient and her blood group, and had to be completed by the person administering blood or blood products. Each bag of blood had a "luggage label", and each time a blood product was administered part of the luggage label would be detached and stuck onto the purple form as a record.

29. The claimant saw from the purple form that two bags of blood had been administered by Nurse Hey at 1.15am. She understood that she was required in the ambulance to administer a third blood bag if the first two ran out. Crucially, this was a misunderstanding and in fact the third and fourth blood bags were simply to be transferred in the ambulance for possible use at Burnley if the need arose.

30. Nurse Hey told the claimant that when the ambulance arrived she had to go to the laboratory and collect four fresh frozen plasma bags ("FFP"). The claimant did as instructed and when she returned the patient was transferring herself onto an ambulance trolley. She collected the red cold bag from the nurses' station. There were already two units of blood matched to Patient X stored inside, and she placed the four FFPs into the bag.

31. The MHP had been initiated by Dr Sarin. The claimant asked him what he wanted her to do. He simply told her "just go now". She took the red cold bag and boarded the ambulance. Also in the ambulance was the paramedic, Cameale Miller, and the patient's mother. In the front of the ambulance was the paramedic driver, Sam Doyle, and the patient's husband.

32. The claimant had not seen the patient's documentation since leaving the bedside to go to the laboratory to collect the FFP. She assumed that it had been provided by the nurses at Blackburn to the paramedics. In fact the purple form was not amongst the documentation handed over to them.

33. The weather was particularly bad that night due to a severe storm. The ambulance was travelling at high speed and conditions in the back of the ambulance were difficult. The claimant was under the impression that the MHP was still in place

and that she was to administer a third bag of blood when the first two ran out. That happened a few minutes away from Burnley.

34. In her later bullying and harassment statement (page 282) the claimant recorded that the existing blood and fluids had run out and the paramedic advised her that if she was to change them she should do it immediately before the ambulance "started hitting roundabouts."

35. The decision to replace the blood supply was made following the claimant's observation of Patient X using her clinical judgment and experience. She was hampered by not having access to all the documentation. She had seen in the records at Blackburn that the patient had had an obstetric bleed following a miscarriage two days earlier, and a lot of blood loss including loss of consciousness. The patient was a young woman, and in the experience of the claimant such patients could conceal how ill they were before suddenly crashing. She saw that the patient was very pale and although she was still talking she was noticeably less chatty than when the journey began. She decided to administer the third bag of blood. She did not run it on stat, but at a minimal level simply to keep the blood flowing.

36. The claimant was not able to attach the sticker from the blood bag to the purple form because the purple form was not in the ambulance. She was not able to follow the procedure on the blood transfusion checklist (page 405) because that was part of the purple form and was not available. The procedure requires blood to be checked by two people before being administered. That did not happen.

37. The ambulance arrived at Burnley and the patient was rushed into theatre. The claimant informed the anaesthetist, Mr Cox, of the administration of the third blood bag as part of a verbal handover to him. That blood bag was temporarily halted and then resumed. The fourth blood bag was also used at Burnley. The emergency procedure went well and the patient was discharged from hospital the following day.

38. The claimant was unable to complete any documentation at Burnley. She and the paramedics were ushered out of the room where Patient X was initially assessed, and the paramedics were then called to another blue light incident and the claimant accompanied them.

39. The Theatre Nurse at Burnley, Stacey Nelson, completed an IR1 at shortly after 5.00am (pages 85-92). It recorded that the label on the blood indicated that it had expired at 3.00am, shortly before it was administered by the claimant. The detachable sticker was still attached to one of the units of blood and there was no documentation of the required checks. The IR1 also noted that no blood had been prescribed on the prescription chart.

40. During the afternoon there were some emails about the incident. Lynne Mannion, the Manager of the Blood Transfusion Service, sent an email about the IR1 noting that there was no sign of a third blood unit being prescribed. There was no purple form in the notes (page 92F). She emailed Suzanne Cowin in A & E asking her to investigate how blood had been given without a valid prescription or completion of the required documentation.

Thursday 23 February 2017

41. Ms Cowin responded at shortly before 6.30am on Thursday 23 February (page 92E). The ambulance crew had said no blood products had been given in the ambulance. Her email forwarded earlier emails saying that there had been no prescription and was copied to the claimant at her work email address. However, the claimant had not been able to access her work emails for some time, as she told Fiona Chetwood of HR in an email on 2 March 2017 (page 2326). She did not see this email exchange.

42. That morning the claimant spoke on the telephone to Mary Solokowski from the Blood Transfusion Department who told her that an IR1 had been raised due to the blood not being documented. The claimant was told she would need to re-sit her blood transfusion training and speak to Lynne Mannion. She was not told that the third unit of blood had not been prescribed.

43. The claimant rang Lynne Mannion who confirmed that an IR1 had been raised and said it was because the claimant had not documented when she had administered the third unit of blood. The claimant explained there had been no paperwork in the ambulance for her to complete. Ms Mannion told the claimant she would be recommending that she repeat the blood transfusion training. She informed the claimant that the MHP had been stepped down prior to leaving Blackburn, something of which the claimant had not been aware.

44. Ms Mannion emailed Jane Dean at noon on 23 February (page 92E) to confirm that her colleague, Ms Solokowski, had spoken to the claimant but forgotten to ask about the prescription of the blood.

45. On the afternoon of 23 February the IR1 form was assigned to Jane Dean (page 115). The email alerted Mrs Dean to the fact that the third unit of blood had not been prescribed.

46. Ms Dean spoke to the claimant on the telephone later that afternoon. She said that an IR1 had been raised and that the claimant was not to administer any medication. She said she had emailed the Assistant Director of Nursing, Jonathan Smith and was awaiting a response. The claimant was not asked any questions about the incident.

47. After that telephone call the claimant rang Lynne Mannion again and asked if she knew why she had been stopped from administering any medication. Ms Mannion said she did not understand why and that her recommendation was simply that the blood transfusion training be undertaken.

48. That same day the Practice Educator, Yvonne McKean, texted the claimant (page 92C). Her text said:

> **"Hi Leona, I have heard about your drama this week, wanted to make sure you are ok? We will have to chat about what's next, training needs, etc. on Tuesday. Don't want you to be worried about it, if you want to talk you know where I am. xx"**

49. The claimant responded by saying she was not ok and said she would tell Ms McKean more when she saw her. The claimant said she was really upset that she was not able to dispense medications until further training.

50. There was also an exchange of text messages on the afternoon of 23 February between Mrs Dean and the claimant. Copies appeared at pages 2320-2321. Mrs Dean texted the claimant at 3.30pm to say she was going to look into how to manage the matter as quickly as possible but the claimant should try not to worry. There was no choice to follow the process because of the IR1. The claimant responded at 3.42pm saying that it was stressing her out and she felt when she did anything wrong it was "blown up" but when others made mistakes they were brushed under the carpet. Mrs Dean responded to say that she had acted according to the policy and had no option, but guaranteed to be fair.

Friday 24 February

51. On the morning of 24 February the claimant received a telephone call from Rachel Coffey, a Band 7 Nurse in ACT, who said that Jane Dean had asked her to ring the claimant. The claimant was supposed to be working that night and the following two nights, but was being removed from those shifts. The claimant could not understand why Mrs Dean had not told her this herself or provided any explanation. Ms Coffey said that if the claimant wanted to come in and work days she could work under supervised practice but she would understand if the claimant did not want to. The claimant said that she would never harm a patient and Ms Coffey said that she knew that, and it would become obvious when the investigation had been carried out. This was the first the claimant had heard about there being an investigation.

52. The claimant sent an email at 11:57 (page 97). It came from her home email address, which was shared with her husband. Her email said that in view of the restriction on administering medications, she did not feel professionally competent enough to perform her role. Administering medications was a fundamental and frequent aspect of her role. She went on to make clear that she accepted she should have documented the administration of the blood during the incident but had had no time to do it and there was no documentation available. She was awaiting instruction about her training needs. Her email ended by saying:

> **"I have discussed this with Karen Narramore, Unison rep, and informed her that as this matter is now under investigation I will be off sick until such time that my ability to perform my role properly be reinstated."**

53. Ms Narramore had told the claimant (page 2322) that the decision to restrict her from doing medications was "complete overkill and totally unnecessary".

54. The response from Mrs Dean appeared at pages 96-97. It said that the training would commence on Tuesday 28 February. The claimant was asked to confirm whether she could attend work to commence that training.

55. Mr Smith also responded that afternoon (pages 93-94). He said it would not be normal for him to be involved in clinical incidents like this at this stage. It would

be addressed within the team. He asked the claimant not to copy him into any further emails. He noted that she had support from the union and reminded her of access to Occupational Health ("OH"). He encouraged her to work closely with her team leaders.

56. The claimant responded to these emails at just before 6.30pm. Her email appeared at page 96. By this time she had seen the electronic rosters which showed that she was being treated as on sick leave with anxiety. Her email to Jane Dean said:

> **"I am reviewing my position having spoken with my husband. I have been placed on sick leave with purported psychiatric issues, which is now documented on my personal record.**
>
> **I cannot express how disappointed I am by the treatment I have received and the dismissive and unprofessional attitude of Jonathan Smith.**
>
> **As I have been told I have not to attend my work tonight or for the following two nights, please confirm I have been suspended from my role. I am not sick for the record."**

Saturday 25 February

57. Ms Dean emailed her colleague, Mr Wilson, the IR1 assignment email, asking him to deal with it in the first instance. Her email (page 114) said that if it required a full investigation she would ask someone else to do it. Mr Wilson embarked on a "Rapid Review". This did not include speaking to the claimant.

58. Mrs Dean also replied that day to the claimant's email from Friday evening (pages 104-105). She said she was sorry that the claimant felt distressed but was confused as to her intentions. Her original email had said she was going to be off sick but she had now said for the record that she was not sick. The email went on as follows:

> **"The process…which you need to undertake is clearly outlined in the Management of Medicines-related Errors Policy, which I have attached for your information. Based on this process, you were asked to work days instead of nights, in order to support you and allow for the required supervision to take place. As per your email, you felt unable to work based on these restrictions and therefore, following your instruction, you were recorded as sick. Rachel [Coffey] had put you on e-roster as sick under the heading of anxiety as it is the only one that had any relation to the situation, there is no suggestion of you requiring psychiatric assessment. If you are now telling me that you are not sick and wish to return to work, then you are able to resume, on days with immediate effect. There was never any suggestion of you being suspended from duty, simply that you needed to work days whilst the above processes were carried out – which is a Trust-wide policy that applies to all staff."**

59. The Medicines Error Policy was attached to the email.

60. The claimant responded a couple of hours later (pages 103-104). Her email said she never denied not signing for the blood and she accepted the need for retraining. She asked whether A & E were also involved in retraining given that but for their error she would not have found herself in that situation. She said that Rachel Coffey had told her there was an investigation but she had not been asked to

provide a statement or informed formally of any such investigation. She maintained that in effect she was suspended because she had been told she could not work the night shifts for the weekend. Her email said that:

> **"My recorded error was not the improper administration of drugs or blood but the failure to complete documentation that was not supplied…"**

61. It was evident that the claimant had still not been informed that the blood had been administered without a prescription.

62. Mrs Dean responded on the afternoon of 25 February (page 117). She reiterated that the claimant had not been suspended and that it had been her own initial email that said she was sick. She had been asked to work day shifts so the necessary support to comply with the medicines management policy could be in place.

Monday 27 February 2017

63. On 27 February 2017 Mrs Dean and the claimant spoke briefly on the telephone to confirm that one day of training was required on 28 February.

Tuesday 28 February 2017

64. Mr Wilson completed his rapid review (pages 98-100). There was a timeline of events on the evening in question. The MHP had been stepped down at 02:23 but that had not been documented in the A&E records. No blood had been prescribed on the prescription chart.

65. He expressed his views in a covering email (page 114) when sending the rapid review to Jane Dean and Jonathan Smith. He said:

> **"Whilst the patient had fortunately not come to any harm and was discharged home on 23 February 2016, there are some very significant gaps in practice by the [registered nurse] involved in the transfer which include:**
>
> - **No documentation completed related to the transfer**
> - **No documentation completed related to the blood transfusion**
> - **Blood transfusion checklist not completed**
> - **No evidence of any blood product identification checks being completed**
> - **Blood product was not prescribed**
>
> **This constitutes a breach of Trust transfusion and medication policies."**

66. The same day the claimant arrived at work for her training with the Practice Educator, Yvonne McKean. Before the training the two of them spoke briefly in the canteen. The claimant's case was that Mrs McKean started criticising her, accusing her of "blowing up". She said that Mrs McKean did not ask her a single thing about what had happened. Mrs McKean explained the training schedule for the day and

the need for a reflection piece to be written. She told the claimant how important it was and that it would be read by a lot of people. If she was happy with it there was no reason why the claimant could not return to work.

67. The claimant then underwent the blood transfusion with a different Practice Educator. Mrs McKean sat in on the training. After it Mrs McKean told the claimant that she had to complete a written reflection and emphasised it was very important. She said if she was happy with what the claimant wrote there was no reason why the claimant could not return to night shifts on 1 and 2 March. Ms McKean set the claimant up at a computer and opened a blank Word document for her and told her to write a reflection of what had happened.

68. It was the claimant's case that there had been no discussion at all about the incident and she was given no guidance or information on how to write a reflective statement. I will return to that issue in my conclusions.

69. The claimant typed out her reflective statement as best she could. It took over two hours. She informed Ms McKean that she had done it, and Ms McKean read it on screen. She said, "No, I'm not happy". The claimant's case was that Ms McKean required her to remove any reference to the actual speed of the ambulance, and to record that it had been an unsafe transfer not a safe transfer. She told the claimant to include a statement that a doctor should have been present. There were some other changes which the claimant felt pressured into making. The claimant was left to finish the reflective statement. Mrs McKean would be leaving work at 3.00pm, but would return later before the claimant's shift ended at 7.30pm to read the second version. The claimant said that in total this conversation took about ten minutes: there was no detailed discussion.

70. The claimant emailed her reflective statement to Ms McKean at just after 3.30pm. The email appeared at page 120A. It said:

> **"Please advise if any additional information needs to be added as I feel I have documented all I can."**

71. The revised reflective statement attached to the email appeared at pages 120B-120D. Most of the first two pages was a factual account of what had happened. It acknowledged that the third unit of blood had not been prescribed. In a section marked "Reflection on the above incident" the claimant noted that she had not carried out the correct procedure, and on reflection should have administered further fluids and no further blood. The blood pressure of the patient was stable and they were only five minutes away from Burnley. It ended by saying that she would ensure the correct procedure was followed in future.

72. After emailing the statement the claimant said that Jane Dean came into the office and criticised her for "blowing up" and for not attending staff meetings. There was mention of possible disciplinary action for a comment made on a group WhatsApp in the previous year. Once again, the claimant said that she was not asked at all about the incident or offered support. There was a dispute between Mrs Dean and the claimant about the extent of their discussion on 28 February, and whether it occurred around lunchtime (as Mrs Dean maintained) or around 3.00pm

(as the claimant maintained). Mrs Dean said they spent ten or 15 minutes discussing the incident. The claimant maintained that she was not asked a single question about it. I will return to that in my conclusions.

73. That same afternoon (before emailing the statement) Mrs McKean had told the claimant that she was being taken off her night shifts for 1 and 2 March. She was offered day shifts over the next few days, but the claimant had other commitments that meant she could not attend, save for Thursday 2 March. The part of the training relating to intravenous fluids was going to take place on another day.

74. The claimant was upset by not being allowed to return to her night shifts. After emailing her reflective statement she could not continue. She left at shortly after 3.30pm, about four hours before the end of her shift.

75. Mrs McKean came back into the office that evening. At just after 8.00pm she forwarded the reflective statement to Jane Dean with an email (page 157B) which said:

> **"I am forwarding a copy of Leona's reflective statement, she has added some more reflective elements to it but there is still an element of involving others in the problem/blame. Most of the text is descriptive of the situation. We will have to see if she goes off sick now or if she fronts it out…"**

Wednesday 1 March 2017

76. At just before 8.00am Ms Dean forwarded the email from Yvonne McKean with the reflective statement attached to Mark Wilson, saying she was not sure it was adequate.

77. In the meantime Mr Smith had been considering the rapid review provided by Mr Wilson. He had a discussion with Jane Dean, then at just after 9.30am he emailed Mr Wilson, Mrs Dean and HR to say:

> **"This needs to be managed in line with the Trust disciplinary policy as well as being investigated as an incident (these can complement each other)."**

78. He asked Jane Dean to speak to the claimant and he would then send a letter outlining the investigation.

79. The decision to move to a disciplinary investigation formed the crux of the claimant's case and I will return to it in my conclusions.

80. Mrs Dean rang the claimant that morning. Mrs Dean said she had heard the claimant had gone home upset the previous day and that HR had asked her to get the claimant's home address as Jonathan Smith had instigated a full investigation of the incident from start to finish. The claimant was shocked and upset at this news.

81. Jane Dean referred to the call in an email to Mr Smith a short while later (page 113). She said that she believed the claimant would go off sick as she appeared very fragile on the telephone. Her email said:

> **"I reiterated to her that the investigation was independent of the [ACT] and from our point of view she should continue her ongoing learning/training requirements with a view to this resulting in her resuming normal duties when the training was deemed complete. Again I emphasised (when questioned) that she was not suspended from duties."**

82. At 2.00pm the claimant emailed Jane Dean (page 290). She said that in the circumstances it would be inappropriate for her to return to work. She had not received any information about the investigation other than through the call. She said:

> **"I feel there has now been a total breakdown in trust and confidence on my part which has placed me in an impossible position. I would be grateful if you could advise how to proceed on this basis while the investigation is live. I do, however, welcome a full investigation as an opportunity to lay on the table wider issues that I feel need to be addressed. I was made to feel humiliated, degraded and intimidated yesterday which led to me leaving early (again in tears) – this included being coerced to change my reflective statement to something I don't agree with. I will raise this issue during the investigation."**

83. At around 3.00pm Ms Dean rang the claimant and her husband answered. They spoke about the situation.

84. Just before 3.30pm Mr Harris sent an email from the email address he shared with the claimant (page 103) saying that he assumed that Ms Dean had the claimant's prior consent to discuss her situation with him, as otherwise it would raise a serious issue of confidentiality being breached. He asked her to confirm that she had indeed obtained consent from his wife to discuss her circumstances with him.

85. In fact Mr Harris had already involved himself in the matter by sending an email just before noon that day to the Chief Executive (pages 109-110) in which he gave details of how he perceived his wife had been treated. He said he had written the email without his wife's knowledge. The email was in strong terms. He referred to an "escalation of bullying tactics", systematic tactics being used to force his wife out of her role, and to the department being run by a "cancerous clique". The email was copied to the Director of HR, Kevin Moynes. On 6 March he emailed Mr Harris to invite him to a meeting. That meeting eventually took place on 17 March.

86. Having received Mr Harris's email of 1 March, Ms Dean immediately forwarded it to HR and to Mr Smith (page 116). She said that she had told Mr Harris that she needed to discuss the matter with the claimant and he said he would pass the message on but it was unlikely she would speak to him. There was clearly a difference as to what if any details had been discussed in that telephone call.

87. Finally, on 1 March terms of reference for a disciplinary investigation to be undertaken by Jennifer Bebb, Matron for General Surgery, were drawn up (pages 101-102). Under the disciplinary policy (pages 2028-2043) in force on 27 February 2017, the investigation process was to take no longer than four weeks, but clause 3.2 on page 2035 recorded that where that was not possible the reasons for the delay would be recorded and the expected date for completion of the investigation process communicated in writing to all concerned. The possible outcomes of a disciplinary hearing included the case being dismissed or no action required, a

requirement to attend counselling or retraining, and three levels of formal disciplinary sanction: a first written warning, a final written warning or dismissal.

Thursday 2 March 2017

88. At just after 8.30am HR emailed the union (page 152) to say that the claimant had contacted the office to say she was not coming into work but was not sick. The email said the claimant had been aware that a formal investigation was about to take place and was refusing to attend work, so was potentially absent without leave.

Friday 3 March 2017

89. Mr Smith wrote to the claimant (pages 107-108) to inform her that an allegation had been made. The allegation was put in the following terms:

> **"(1) Administering medication without a prescription, therefore without authority – namely a blood product whilst en route to Burnley Hospital.**
>
> **(2) Failure to adhere to Trust policy on administering blood products."**

90. The letter went on to say that if the allegation was proven it could lead to disciplinary action. Jennifer Bebb was to investigate by interviewing the claimant and if necessary any other witnesses. Upon receipt of her report Mr Smith would decide a disciplinary hearing was necessary.

91. The same day Ms Bebb wrote to the claimant to invite her to an investigation meeting on 14 March (pages 122A-122B). The allegation was recorded in the same terms as in Mr Smith's letter.

Confidentiality Grievance

92. On 3 March 2017 the claimant complained by email about Jane Dean having discussed her situation openly with her husband (pages 127 and 128). She said she was unhappy about it because she never gave anyone permission to discuss her situation with anyone. She wanted to escalate it as a formal complaint that her confidentiality had been seriously breached. Mr Smith acknowledged the email later the same day and said it would be dealt with as a grievance and investigated by Hazel Whittle, Assistant Director of Nursing for ICG.

93. The course that grievance subsequently took was not at the heart of this case and therefore I can summarise it briefly. Ms Whittle contacted the claimant on 6 March (page 111) seeking to meet her. Eventually the meeting took place on 20 July (page 557A). Ms Whittle then interviewed Mark Wilson and Jane Dean in September and November 2017, and prepared her report on 19 November 2017 (pages 1292-1301). Two other allegations of breach of confidentiality had been added to the grievance, one relating to a telephone call on 24 February 2017 and the other relating to an incident in the ACT some time earlier.

94. Ms Whittle concluded the grievance was not upheld. She accepted Jane Dean's account about the limited nature of her telephone conversation with Mr

Harris. The outcome was notified to the claimant in a letter from Mr Walton-Pollard of 20 December 2017 (page 1449) to which I will return below.

Monday 6 March 2017

95. Shortly before 5.30am the claimant emailed Jonathan Smith (page 126) to say that she had heard nothing about the investigation and was finding it really stressful. She emphasised that the reflective statement was not her true statement and that she had been made to change it by Yvonne McKean. Mr Smith forwarded that email to HR later than morning. Fiona Chetwood of HR responded to the claimant at 9.00am (page 125). She said Mr Smith had been on leave. A letter regarding the investigation had been sent out the previous week. The invitation to an investigatory interview had gone out on Friday as well. If the correspondence did not arrive the claimant should email Ms Chetwood.

96. On 6 March the claimant was certified unfit for work by her GP for a period of three weeks (page 1699). The reason given was "stress at work". That remained the case on the fit notes that followed for the remainder of 2017, culminating in a fit note for six weeks dated 20 November 2017 (page 1704).

Tuesday 7 March 2017

97. The claimant received Mr Smith's and Mrs Bebb's letters of 3 March on 7 March 2017.

Thursday 9 March 2017

98. On 9 March (page 157A) Mr Wilson forwarded the reflective statement to Jennifer Bebb, enclosing the emails from Yvonne McKean and Jane Dean in which they expressed reservations about it. He said he thought that Yvonne McKean had discussed the reflection with the claimant but could not be sure. He said:

> **"Skim reading it, Leona acknowledges many valid points but essentially I think it would need to more fully reflect the implications for the patient of giving unchecked blood products and unnecessary blood products. The fact that they were alright at the time does not mean it is ok that it happened. Secondly, the implications for her resignation and understanding of responsibilities related to the NMC are not included so I would certainly be asking her to give it more consideration."**

99. Mr Wilson also wrote to the claimant (page 159) raising the point that her absence from 2 March had not been covered by any fit note. He said he would make a referral to OH.

100. That morning the claimant emailed Jennifer Bebb to say that she was unable to attend the meeting on 14 March. She said:

> **"I am currently off work sick as this whole situation and other issues are making me ill. I am not sleeping or eating. I do not think I am in the right state of mind at the moment and feel sick [at] the thought of coming in. I am asking if it will be possible to forward you via email [my] statement of events of the incident on 22 Feb instead."**

12 – 29 March 2017

101. In an exchange of emails on 12 and 13 March (pages 168-170) Ms Chetwood confirmed to the claimant again that she was not suspended.

102. On 14 March the claimant expressed concerns in an email to Mr Smith (page 177B) that Jennifer Bebb was not impartial because she reported to him. She asked for an independent matron to deal with the investigation. Mr Smith responded (pages 179B-179C) assuring the claimant that the investigation would take place in line with Trust policy and with integrity and professionalism. The claimant's response the next morning (page 179B) said that she had little faith in any of those hollow words, and she emphasised that not one single person had asked her one question about the incident. She asked for a copy of her reflective statement for her records. In his reply the same day (page 179A) Mr Smith confirmed that she had not been suspended and said that "action short of suspension" had been initiated.

103. Also on 15 March, Ms Bebb wrote to the claimant to say that she preferred to meet in person rather than deal with the matter in writing, and would wait to hear from OH before arranging another meeting.

104. In the meantime the claimant remained off sick. On 24 March Mr Smith wrote to her (page 189A) in a letter headed "Resolution following Incident". He invited her to meet him with an HR Business Partner to review the case, reflect on the incident and explore options to enable her to return to work. A meeting on 30 March was proposed.

105. On 28 March the claimant had a consultation with OH which resulted in a report of that date at pages 193-196. The OH nurse advisor/practitioner recorded the claimant saying she was experiencing bullying in the workplace which left her with anxiety and stress. Support from the wellbeing specialist was declined. The claimant was accessing support from her own GP. She was not currently medically fit to return to work until the outcome of the investigation was known and the perceived bullying and harassment resolved. She was, however, able to attend meetings.

106. That evening the claimant emailed Mr Smith (pages 198-199) to say that she could not attend the meeting on 30 March. She did not give any reason but said she could rearrange it for any other day or evening next week. The meeting eventually took place on 4 May. She reminded him that she was waiting for a copy of her reflective statement. She wanted to be accompanied by her husband at any meeting.

107. Mr Smith responded on 29 March (page 217) saying that it was not within policy to allow a family member to accompany a member of staff to such a meeting, but offering the services of the staff guardian, Lynne Barton. He would ask Jennifer Bebb to send the reflective statement through. A new date was offered.

April 2017

108. On 2 April 2017 (page 200i) the claimant emailed Mr Smith querying why the disciplinary investigation had begun only after the reflective statement, and not

immediately following the incident. She asked whether others involved were under investigation too.

109. That day Jennifer Bebb obtained brief initial statements from Chantal Ormerod, Danielle Turner and Suzanne Cowin (pages 200-202). They gave the impression that the additional bags of blood were to be transferred with the patient to Burnley rather than administered in transit.

110. On 6 April (page 223) Mr Smith replied to the claimant. He confirmed that others were being interviewed as well. The claimant responded on 7 April (pages 222-223) emphasising that not one single person had asked her a question about being bullied or about the incident, but saying that she was pleased that other staff were also subject to investigation.

111. That same day (pages 221-222) Mr Smith sought advice from Kate Quinn in HR. He was frustrated by the claimant's refusal to attend the proposed meeting unless her husband could accompany her. Ms Quinn responded on 10 April (page 221). She recommended that the claimant be asked to complete a form for lodging a complaint under the bullying and harassment policy, and that the disciplinary investigation proceeded with written input from the claimant.

112. That was proposed by Mr Smith in a letter to the claimant of 11 April (pages 227-228). He attached the policy on harassment and bullying (pages 2015-2027) so a formal complaint could be made.

113. The claimant was invited to a sickness absence management meeting on 25 April by Mr Wilson (page 229) but responded on 20 April to say she would not be attending (page 236). She also reiterated that she was not sick. That meeting eventually took place on 30 May.

4 May 2017

114. In the meantime the claimant and her husband met Mr Smith on 4 May 2017. The notes appeared at pages 246-249. They recorded that the claimant started to explain the incident but Mr Smith stopped her and said there was a separate investigation into that. According to the notes, it was agreed that the claimant would submit a formal bullying and harassment complaint by 9 May, and would attend an investigation meeting over the incident. Temporary redeployment would be explored. These points were confirmed in an outcome letter from Mr Smith at pages 254-255.

115. Having been informed that the claimant had told Mr Smith that she was willing to attend an investigation interview, Jennifer Bebb wrote to the claimant on 10 May inviting her to an interview on 18 May (pages 260A and 260B).

116. Instead of attending the interview on 18 May the claimant preferred to provide her written account of the incident in a document at pages 391A-391C. It was in very similar terms to the reflective statement. It did not expressly acknowledge, however, that the third bag of blood had not been prescribed.

Bullying and Harassment Complaint

117. The formal complaint of bullying and harassment was submitted on 8 May. The form appeared at pages 1356-1364, and the statement from the claimant which accompanied it appeared at pages 281-313.

118. The complaint was brought against Jane Dean and Yvonne McKean. The statement began with an account of the incident. It went on to set out the communications since the incident itself. It gave a detailed account of events on 28 February 2017.

119. In a section headed "Bullying" the claimant then made a number of allegations about inappropriate treatment in 2016 and early 2017. The claimant made the allegation that Jane Dean had manipulated the whole situation arising out of the incident on 22 February 2017 to serve her purpose of bullying the claimant and catching her out.

120. On 7 June 2017 Tracy Thompson, the Midwife Matron, wrote to the claimant to confirm that she would be investigating the bullying and harassment allegation. The claimant was invited to a meeting on 14 June. That meeting was delayed over the summer and eventually took place on 13 October 2017. The notes appeared at pages 941-948. Miss Thompson was advised by HR not to interview the 11 witnesses identified by the claimant (page 1144) as able to provide information about former Outreach Team members being favoured for promotion within the ACT rather than members of the Clinical Response Team, and unfavourable treatment of the latter. Her report was completed in December 2017. The letter informing the claimant of the outcome was said to be one of the final straws in this case and I will return to it below.

Sickness Absence May 2017

121. The claimant saw OH on 18 May and a report was produced at pages 263-266. It confirmed that the claimant was not currently medically fit to return to work, and it had been agreed that any return would be detrimental for her mental wellbeing until the outcome of the investigation was known and the bullying and harassment complaint resolved.

122. The sickness absence meeting with Mr Wilson took place on 30 May. The outcome was confirmed in a letter at pages 277-278. The process would not be moving to stage two and the matter would be reviewed in eight weeks.

Bebb Investigation Report 27 June 2017

123. On 27 June 2017 Jennifer Bebb wrote to the claimant to confirm that her report had been supplied to Mr Smith. The claimant did not see it at that stage. The report itself appeared at pages 344-355 with appendices between pages 356-407. The appendices included notes of the various interviews which had been conducted. There had been no interview of the claimant, but her written statement had been taken into account. Ms Bebb had also received answers by the claimant on 16 June

(pages 331-332) to four written questions sent to her by Ms Bebb on 10 June (page 158).

124. On 27 March 2017 (page 190) Mrs McKean had emailed Fiona Chetwood enclosing the approved notes of her disciplinary investigation interview with Jennifer Bebb on 14 March 2017. The approved notes attached appeared at pages 191-192. When produced as an appendix to Jennifer Bebb's report, however, the notes were different. They appeared at pages 372-373. In the approved version Mrs McKean said that the reflective statement contained things that were "factually incorrect"; in the Bebb report version that had been changed to things that were "untrue". In the approved version Mrs McKean described the claimant as "quite unpredictable and often [adopting] a defensive disposition"; in the Bebb report version the claimant was described as being "quite aggressive and [not taking] responsibility for her actions. The approved version also had a sentence which was omitted from the Bebb report version, being that the claimant had offered no reason for administering the blood other than what the paramedics had said about the time being now to change it, and that she said the patient was haemodynamically stable and was five minutes away from the destination.

125. The findings of the investigation appeared at pages 353-355. They included that each of the A&E nurses had assumed that the other had given the claimant a handover when neither had done so. There appeared to be issues under the NMC Code of Conduct. That included the following:

> **"There is no acknowledgement from Leona that she identified any risks with administering blood alone without prescription and checking patient's identity…"**

126. There were also criticisms of policy and training within the Trust. Some A&E staff carrying out transfers had not been transfer trained. The MHP needed to be amended and the A&E documentation was not in line with the relevant recordkeeping standards. Nor had the prescribing of blood been consistent with best practice.

127. The conclusion was as follows:

> **"In light of the information gathered, there are several human factor errors along with procedural inadequacies which have impacted on the events before this incident took place. Furthermore, it is noted that there are gaps in Leona's training and understanding of the systems and processes, her professional limits and adherence to the NMC Code of Conduct which have resulted in this incident occurring. Despite Leona's experience in [A&E] and her role as a Band 6 Acute Care Practitioner there appears to be a lack of insight into the risks surrounding administration of blood and limited ability to reflect. It is recommended that the commissioning manager consider whether a disciplinary hearing is convened in order to determine whether further action is necessary."**

<u>Disciplinary Charges 17 July 2017</u>

128. On 17 July (page 474) Mr Smith wrote to the claimant to confirm that the matter would be proceeding to a disciplinary hearing. The disciplinary allegations were contained in a letter of 20 July at pages 492-493. They were:

- **"Administering a medication without a prescription, therefore without authority – namely a blood product whilst en route to Burnley Hospital.**

- **Failure to adhere to Trust policy on administering blood products."**

129. The Bebb investigation report and appendices were attached to the letter. The Divisional Director or Nursing and Head of Midwifery, Angela O'Toole, would be hearing the case. The letter said that the disciplinary sanction could go as far as dismissal.

130. The claimant responded to the charges on 23 July (pages 577-578). She said that Jennifer Bebb was not impartial because she had been brought in from a different Trust by Mr Wilson, having previously worked with him. She said there were omissions in the evidence gathered by Jennifer Bebb. She asked what steps had been taken against A&E staff in relation to the incident. She asked for confirmation of the status of the bullying investigation.

131. Her concerns about the impartiality of Jennifer Bebb were reiterated in an email of 30 July at pages 609-610. In that email she also made points about how long the investigation had taken, and the absence of any reflective review with her line manager as required by the Medicine Errors Policy.

Without Prejudice Discussions August 2017

132. There had also been some "without prejudice" emails. On behalf of his wife Mr Harris made a proposal by email of 30 July 2017 at page 625. It involved discontinuation of the disciplinary proceedings, redeployment of the claimant, and Mr Smith resigning from his position.

133. The Director of HR, Mr Moynes, responded on 4 August 2017 (pages 650A-650B). He suggested a meeting to discuss how matters could be resolved. There was no proper basis for the suggestion that Mr Smith should resign. His email said:

> **"The Trust's main concern in the disciplinary proceedings has been to encourage Leona to reflect on her actions on 22 February. If she is prepared to accept that she should not have given the patient blood in the circumstances that arose on that night, and accept the disciplinary action of a first written warning, the hearing scheduled for 11 August could be cancelled and the Trust would consider the matter closed."**

134. No resolution was reached. The claimant went onto half pay on 6 August 2017.

Disciplinary Hearing and Written Warning

135. On 9 August 2017 Mr Harris circulated documents for the disciplinary hearing on 11 August which included some text messages from the paramedics on duty on 22 February. They indicated that the paramedics were seeking to retract their statements to the Bebb investigation because the wording had been changed "to make it look malicious".

136. That same day the claimant provided a formal response to Jennifer Bebb's report (pages 408-452) which included character references. She sent it by email on 9 August (page 681).

137. The disciplinary hearing before Angela O'Toole took place on 11 August. The Trust notes appeared at pages 682-683. The claimant recorded the meeting and a transcript appeared at pages 2229-2248. After a brief adjournment Mrs O'Toole confirmed her decision to administer a first written warning which would remain on file for 12 months.

138. This was confirmed by a letter of 14 August 2017 at pages 708-709. The letter recorded that during the hearing the claimant had not answered any questions or provided clarification on points raised. Mrs O'Toole concluded that the claimant had administered blood without a prescription on 22 February 2017, and had not followed Trust policy for the administration of the blood. Taking into account the mitigation regarding the circumstances in A & E at the outset of the transfer, she decided a written warning was appropriate.

139. The claimant appealed the written warning on 27 August (pages 727-731). That appeal was acknowledged on 25 August (page 741).

140. On 5 September the claimant was invited to a disciplinary appeal hearing on 19 October before the Director of Nursing, Jane Pemberton (page 749).

Sickness Absence August - September 2017

141. On 14 August 2017 there was further sickness absence meeting with Mr Wilson. The outcome letter was issued on 24 August (pages 737-740). Redeployment to the Urgent Care Centre at Burnley was a possible option. The claimant was asked to consider it further and to let Mr Wilson know if she wanted to have a trial in that role. A return to work in her current role was not possible given the ongoing bullying investigation. There would be a further meeting once additional OH advice had been received.

142. A further OH report was prepared on 11 September 2017 (pages 767-769). It confirmed that the claimant was fit to attend meetings relating to ongoing work issues and had been discharged from OH, and was medically fit to carry out the role of a nurse, but was unable to return to work in the ACT due to the ongoing unresolved work situation. Redeployment was therefore possible.

143. The OH report was discussed at a further sickness absence meeting with Mr Wilson on 25 September (pages 804-808). The outcome was recorded in a letter at pages 809-810. There had been correspondence with Mr Moynes regarding an alternative role in the Clinical Flow Team. The claimant had reservations about whether that role was a clinical role, which she preferred, but was willing to consider that as a possibility.

October 2017

144. The job description for the Clinical Flow role was sent to the claimant on 5 October 2017 (pages 842-854). A meeting was arranged for 11 October to discuss it. The meeting took place with the HR officer, James Walsh, and with Donna Worrall, the Head of Patient Flow.

145. On 10 October (page 933) the paramedic, Cameale Miller, emailed Mrs Pemberton in advance of the appeal hearing to say that her request for notes of her interview to be retracted from the investigation had been ignored. She said she had not been given permission for it to be used in that context.

146. On 12 October (page 940) Mr Wilson wrote to the claimant saying that she needed to make a decision about the Clinical Flow role and pay under the sickness absence policy would cease if she did not return to work by 23 October.

147. On 16 October (page 971) Mr Harris emailed asking for more time to consider that decision, setting out the reasons. One of them was that the claimant had thought it was a temporary position but it now seemed that it might be a permanent redeployment.

148. On 19 October Mr Wilson extended the deadline to 31 October (page 969) and clarified that the redeployment was permanent but Donna Worrall was happy for it to be used as a stopgap before returning to a clinical role.

Disciplinary Appeal Hearing and Outcome

149. The disciplinary appeal hearing before Jane Pemberton took place the same day. The notes appeared at pages 1047-1051. There was no decision on the day.

150. Mrs Pemberton decided to seek more evidence. On 25 October she arranged for questions to be put to the claimant and to Mr Smith (pages 1063-106A) about why it had become a disciplinary matter. She asked for evidence of the claimant being placed on restricted duties and how that was communicated, any response from the claimant, evidence of a timely reflective review taking place and the claimant's appropriate engagement with it, evidence of appropriate training/coaching being identified for the claimant and carried out, and evidence of any other action taken or recommendations made as a result of the actions of other members of staff.

151. The claimant provided her response to that on 5 November (pages 1084-1085) accompanied by a detailed chronology of events running to 55 pages (pages 1084-1140). She also copied to Mrs Pemberton an email of the same date to Tracy Thompson about the bullying investigation incorporating a draft statement and some relevant text messages (pages 1141-1167).

152. Mr Smith did not reply in writing to the request from Mrs Pemberton for more information. They had a conversation instead.

153. The disciplinary appeal outcome was issued by Jane Pemberton on 17 November 2017 (pages 1185-1187). The letter emphasised that it was not a re-

hearing of the original disciplinary hearing. Mrs Pemberton concluded that the written warning was issued because the claimant had delivered blood which had not been prescribed, and the unapproved statement from Cameale Miller had been irrelevant. The investigation was in line with the disciplinary policy despite being outside the timescales. The claimant had been placed on restricted duties, had completed training and had been supported in writing a reflective log. The decision to deal with it under the Medicine Errors Policy was correct, and other issues identified were procedural issues not relevant to the outcome.

154. As for the decision to escalate the matter, Mrs Pemberton concluded that:

> **"The decision to escalate this to a more formal investigation was taken due to your lack of acceptance and understanding of the reasons for and importance of restricting your duties, undertaking training and completion of the reflective written piece.**
>
> **It is vitally important that nurses continually reflect and learn from our mistakes and how to improve our practice. I recognise and appreciate that you are passionate and committed to our patient care. However that can sometimes make it difficult to accept feedback when things have not gone well.**
>
> **Your view remains that your actions were correct on the night in question and that, in the same circumstances, you would not act differently. This lack of reflection on your part, and your unwillingness to accept that your actions were not appropriate, when experts in this field had explained why, give me cause for concern.**
>
> **You have showed no genuine insight into the need to reflect on the incident, to understand what learning was needed as a result of this, and why you should not do this again. Had you done so, this would have been the end of the matter.**
>
> **I would strongly urge you to reconsider your position on this point, as your insight and reflection will be crucial in any role that you undertake on your return to work.**
>
> **It is for these reasons that the decision of the panel was to uphold the decision to issue you with a written warning under the Trust's disciplinary policy."**

155. Mr Harris sent an email on 22 November about the appeal outcome (pages 1189-1191). The email described the outcome as "true to form, expected and typically embarrassing". It challenged the way in which the investigation had been done and the conclusions reached at the appeal stage. He suggested that the conclusion was incompatible with the outcome being a written warning which left the claimant allowed to continue treating patients. He raised a number of other points about ongoing procedures, including the outcome to the bullying and harassment complaint.

156. Mr Moynes responded by writing to the claimant on 24 November (page 1192). His concern was some additional patient matters which had been raised in the email.

<u>Redeployment Discussions October – November 2017</u>

157. On 29 October the claimant had emailed Mr Wilson (page 1076) to say that she could not accept the Clinical Flow role by the deadline of 31 October. She said she was not able to return to work by 31 October. Her fit note was until 19 November

and she then had annual leave. She understood that there were going to be interviews for the post and therefore she was not eligible for it. If she did accept it would be "under protest" as she wanted to return to a clinical role.

158. On 6 November (pages 1180-1181) Mr Walsh wrote to the claimant about the redeployment opportunity. His letter said that the role was still a suitable temporary redeployment opportunity but the post would be filled by a candidate on a permanent basis without further delay. This confused the claimant and on 13 November she emailed asking for clarification (page 1183).

December 2017

159. On 7 December Mr Walton-Pollard sent the report of Hazel Whittle about the confidentiality grievance to the claimant (page 1291). He wanted to ascertain how the claimant wished to proceed and suggested a meeting to discuss it or the claimant could proceed to a formal stage two grievance hearing. He asked for a response by 20 December. The claimant emailed her response to the Whittle report on 17 December (pages 1337-1339). She said she was unsurprised at the outcome and thought it consistent with every aspect of the way she had been treated since March 2017. She made a number of comments and criticisms of the report and the information that had been gathered by Hazel Whittle.

160. The claimant had been invited to a further sickness absence meeting on 12 December but on 11 December she emailed to say that she was unable to attend (page 1325). She did not give a reason but referred to the lack of clarity about the Clinical Flow role. In response Mr Wilson wrote to the claimant on 12 December (page 1326) saying the meeting would take place on 18 December. The vacancy in Clinical Flow was going to be discussed at that meeting.

161. On 18 December that sickness absence review meeting with Mr Wilson took place. Notes appeared at pages 1327-1330. They recorded Mr Wilson saying that the Clinical Flow post was still an option. The claimant was informed that the bullying and harassment investigation had been concluded, although she had not received any notification of this. She had some queries about which interviews had been done which Mr Wilson could not answer. The claimant informed Mr Wilson she was "not sleeping and was crying all the time", and the notes recorded her saying that the Trust had destroyed her. She was reminded of options open for support. She was having to think about what to do next about a return to work.

162. It was clear that the Clinical Flow role was not a permanent position but a temporary means of getting the claimant back to work. There was also discussion of a possible Band 5 role in the Discharge Lounge with some element of pay protection. This would be a step down from the acute clinical work in which the claimant had specialised.

20 December 2017 Walton-Pollard Letters

163. On 20 December 2107 Mr Walton-Pollard issued two letters to the claimant.

164. The first letter appeared at page 1449 and was about the confidentiality grievance. He again asked for a response (by 29 December) as to whether the claimant wanted to have a meeting, or take it to stage two. He said if he did not receive that indication he would ask Mr Wilson to discuss it at the next sickness absence meeting.

165. The second letter appeared at pages 1452-1453 and was one of the matters which the claimant said triggered her resignation. It informed her of the conclusion of the bullying and harassment investigation conducted by Tracy Thompson. The letter told the claimant that her allegation that members of the Outreach Team were favoured for promotion by management once merged with the Clinical Response Team within the ACT was rejected. The allegation that the claimant had been bullied and treated unfairly by Jane Dean and Yvonne McKean from May 2016 was also rejected. The report concluded that there was no evidence to support that allegation. Nor was there any evidence found to substantiate the allegation that the disciplinary procedures were totally disproportionate to the incident in February 2017 and instigated by Jane Dean and Yvonne McKean with the intention of driving the claimant out of the ACT.

166. The letter offered the claimant a right of appeal against the process of the investigation, but not the outcome. It said that she was not entitled under Trust policy to have a copy of the report from Tracy Thompson.

21 December 2017 Wilson Letter

167. The following day Mr Wilson wrote to the claimant summarising the outcome of the sickness absence meeting on 18 December. It recorded the discussion about the Clinical Flow role, the Discharge Lounge role and some other matters, including the possibility of assistance from OH or the Employee Assistance Programme to help the claimant with her health. The letter went on to say that the claimant was cautioned that if she remained incapable of fulfilling her contract it could lead to a hearing at which dismissal would be considered. The letter ended by identifying two permanent and two temporary roles which had been identified, all of which had been declined as not suitable.

22 December 2017 Claimant Email

168. At shortly after 4.00pm on 22 December the claimant sent an email to Mr Moynes marked "without prejudice" making what was described as a final compromise offer with a view to resolving all matters. The email said that if the offer was not acceptable the claimant would construe it as being the final straw. She summarised the way she had been treated and made a final offer as follows:

> **"My Final Offer**
>
> - **The written warning on my employment record is removed and repaired.**
> - **My lost earnings are reimbursed in full to include lost pension contributions.**
>
> **In consideration for the above I would accept the role offered within the Clinical Flow team on a temporary basis until a suitable clinical role became available.**

My offer will remain open until 4.00pm on 31 December 2017."

169. The claimant did not put a precise figure on the lost pension contributions but the loss of earnings alone she thought were approximately £16,000 after tax.

23-31 December 2017

170. Having sent that email the claimant received the letters of 20 and 21 December on 23 December.

171. On 29 December she received a further letter from Mr Wilson dated 28 December (page 1461A) which invited her to a further sickness review meeting on 15 January 2018.

172. No response was received to the "without prejudice" proposal by 4.00pm on 31 December 2017.

1 January 2018 - resignation

173. On 1 January 2018 the claimant sent an email to Mr Walton-Pollard (page 1465) confirming that she did not want to proceed with an informal meeting or a stage two hearing.

174. She also resigned by letter to Mr Moynes which appeared at pages 1462-1464. The letter gave the Trust two months' notice. It said there had been a breakdown of trust and confidence. The final straw was the receipt of letters on 23 and 29 December. She believed the letters were deliberately intended to force her to resign. She made clear she would be pursuing her case outside the Trust.

175. The resignation letter went on to give background about how the claimant had been treated. She said the Trust had not followed a single one of its own policies. She gave a number of examples of treatment she had suffered, including the disproportionate disciplinary investigation, the fact no-one spoke to her about the incident until nine weeks afterwards, the delays in completing the investigation and being coerced to alter her reflective statement. She emphasised how much this treatment had affected her personal life as well as her career at work.

Submissions

176. At the end of the oral evidence each party made a submission summarising their case. Helpfully both advocates produced a written document. Miss O'Rourke produced a speaking note running to 14 pages, whilst Mr Cordrey produced a skeleton argument of 20 pages with different iterations of the List of Issues appended to it. Both advocates supplemented their written material with oral submissions.

177. Because the core propositions were reduced to writing I will summarise only briefly the position taken by each party.

Claimant's Submissions

178. The central case of the claimant was that the conduct of Jane Dean and Jonathan Smith, aided by Yvonne McKean, and later supported by HR instructions to Tracy Thompson, between 22 February and 1 March 2017 amounted to a fundamental breach of contract which entitled the claimant to resign when triggered into doing so by the final straws in December 2017. Miss O'Rourke invited me to conclude that Mrs Dean, Mrs McKean and Mr Smith gave untruthful evidence to the Tribunal to cover up their wrongdoing and behaviour towards the claimant. She did not make the same allegation against the other witnesses even though parts of their evidence were also in dispute.

179. The decision to escalate the matter to disciplinary investigation by Mr Smith on 1 March 2017 was said to be a breach of the implied term for a number of reasons. Those included the fact that the claimant was the only person who faced such an escalation despite others having committed errors during the incident, the claimant was never accused of having deliberately acted wrongly during the incident, the circumstances of the incident amounted to significant mitigation in relation to her mistake, the reflective review meeting required by the policy to be undertaken by the line manager within seven days of the incident was not done, the claimant was not given appropriate information and assistance to enable her to undertake that reflective review adequately, and managers had failed to correct the claimant's misconception that this was an issue about proper completion about paperwork. The request of the claimant for further assistance with her reflective statement had been ignored, and Mr Smith should have taken these matters into account (or been given the opportunity to take them into account) before deciding whether a disciplinary investigation was appropriate. In particular, Mrs Dean and/or Mr Smith were said to have acted maliciously towards the claimant.

180. The evidence of malice was said to be found in the comment made Yvonne McKean in her email at page 157B about whether the claimant would go off sick or "front it out", and in the failure to honour earlier assurances that the matter would be handled within the team and the claimant should not worry.

181. Miss O'Rourke also emphasised a passage of Mr Smith's oral evidence where he gave reasons for his decision which went beyond those in the witness statement. His evidence that he had learned from Jane Dean that the claimant was saying she would do the same thing again, had refused to engage with training and was frustrating the process simply could not be correct. There were only two possibilities: either Mr Smith had lied and he had never been told those things on the morning of 1 March, or Mrs Dean had misled him in order to persuade him to instigate a disciplinary investigation. Miss O'Rourke urged me to conclude that Mr Smith had deliberately lied on oath, a matter which would have serious professional consequences for him.

182. As to the events of December 2017, Miss O'Rourke did not attach any weight to the "without prejudice" ultimatum but emphasised the impact on the claimant of receiving the two letters from Mr Walton-Pollard and the letter from Mr Wilson about sickness absence. The most significant factor was being informed that the bullying

and harassment complaint had been rejected by the Thompson investigation when the claimant knew that Tracy Thompson had not interviewed the 11 witnesses that she had suggested in relation to the allegations of bullying in 2016-2017.

183. The claimant had not affirmed the contract or waived her right to resign over the fundamental breach on 1 March because she had not been in work in that period and continued to fight her case through the disciplinary and appeal procedure, and through her internal grievances and complaints.

Respondent's Submission

184. Mr Cordrey began by addressing the key allegation about the escalation to a disciplinary investigation. That was considered in paragraphs 29-47 of his written submission. He emphasised the need for the Tribunal to take an objective view and submitted that Mr Smith had taken the decision in a conscientious manner by speaking to colleagues and considering the information before him. It was a multifactorial decision.

185. As to the divergence between Mr Smith's written evidence and his oral evidence, he argued for a third possibility: that Mr Smith was acting genuinely but was mistaken as to what was in his mind on the morning of 1 March. That would be understandable given the fact that this was a decision made without being formally documentation some 2½ years ago. In any event, there was some basis for the perception that the claimant was not engaging properly with the process: she had been challenging it in the emails leading up to 28 February and had shown very little insight into the serious nature of her own conduct. He invited me to reject any suggestion the claimant had been bullied into changing her reflective statement or misled about management concerns.

186. Stepping back, Mr Cordrey submitted that the gravity of the situation plainly justified a disciplinary investigation. The instigation of such an investigation did not mean that a disciplinary sanction was inevitable. The claimant still had the opportunity to reflect at the investigatory stage in a way that would mean no formal disciplinary charges were pursued.

187. In any event, Mr Cordrey submitted that the abandonment by the claimant of a host of aspects of the List of Issues dealing with the period after 1 March left the claimant's case as one which was hopeless even on its own terms. The decision she now impugned had led to a fair disciplinary process and appeal. The assertion that the decision to instigate the investigation, as opposed to the way it ended, played any part in her decision to resign was untenable.

188. Further, even if the decision of Mr Smith had been "overkill", the Trust was entitled to err on the side of caution when investigating conduct related to patient safety. A robust decision to embark on a fair disciplinary investigation, hearing and appeal could not meet the **Malik** threshold. There were checks in the procedure that followed (e.g. the conclusion of the Bebb investigation) which could have prevented an overzealous decision by Mr Smith going any further. Mr Cordrey invited me to conclude that there had been reasonable and proper cause for the core decision in

this case and that nothing that preceded or followed it turned it into a breach of trust and confidence.

Claimant's Reply

189. As the burden of proof lay on the claimant I allowed Miss O'Rourke an opportunity to respond to Mr Cordrey's submissions. She opposed the suggestion that the decision to instigate the investigation had been vindicated, because both Tracy Pinner and Jane Pemberton had expressed surprise that the matter had been pursued in that way. Mr Smith himself had said that he hoped it would be dealt with in a pragmatic way. Further, although the claimant was not relying upon it as part of a breach of trust and confidence, she did not accept that the internal disciplinary process was all handled fairly.

190. Counsel also addressed me on the three issues relating to remedy but it is not necessary to record those submissions here.

Discussion and Conclusions

Introduction

191. This case turned on the answer to one question: was the claimant's resignation on 1 January 2018 to be construed as a dismissal under section 95(1)(c) of the Employment Rights Act 1996?

192. I had the benefit of a wealth of factual evidence, both written and oral. Not all of it proved to be relevant and not all of it was relevant enough to be mentioned in these Reasons. In considering the evidence I was assisted by the focus shown by both advocates. I took account of all the points made in submissions, both in writing and verbally, even if not expressly addressed below.

Self-direction

193. Applying the test derived from **Malik** I had to determine whether the Trust without reasonable or proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. There were two strands to that test:

(1) Was there reasonable and proper cause for the employer's actions?

(2) If not, were those actions serious enough to be likely, when viewed objectively, to destroy or seriously damage the relationship?

194. I reminded myself that the courts have emphasised that this is a test which is not to be applied too lightly. It is a stringent test for a claimant to meet. It was said in the **Tullett Prebon** case that the employer must have demonstrated objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. Those are words which indicate the strength of the implied term.

195. As for the final straw, it is possible for a final straw to constitute a repudiatory breach even if in itself it does not breach trust and confidence, and even if in isolation none of what has gone before has breached trust and confidence.

Approach to the Claimant's Case

196. The claimant's case was set out in the final version of the agreed amended List of Issues. The List of Issues concentrated on five paragraphs in Part 1 plus the final straw which appeared in paragraph 2.

197. Paragraphs 1.1 - 1.4 of the List of Issues overlapped and focussed on events between the incident on 22 February 2017 and the decision on 1 March 2017 to start the disciplinary investigation. I considered that period first by reference to four broad themes, and then the events of December 2017 accounting for paragraph 1.5 and the final straw in paragraph 2.

First Theme: No Reflective Review

198. The first of those four themes was the absence of any face-to-face reflective review.

199. The Medicine Errors Policy at page 1962 required the line manager to carry out a reflective review with the nurse as soon as possible within seven days of the incident using the template found in Appendix 2 to that policy. The claimant maintained that she was given no such meeting.

200. The evidence of Jane Dean in cross examination was that she had discussed the incident four or five times with the claimant, but that the reflective review occurred about lunchtime in the office where the claimant had completed the transfusion training. There were no notes kept of that interaction and that was not in Mrs Dean's witness statement. She told me that she intended to resume the discussion later in the day once the claimant had provided her reflective statement but was unable to do so because the claimant went home upset mid-afternoon.

201. Yvonne McKean said she had also discussed the incident with the claimant but she was not the claimant's line manager.

202. The claimant's evidence was that in her interactions with Mrs Dean and Mrs McKean no-one discussed it with her at all. That was an assertion she made repeatedly in emails and other documents beginning from 14 March at page 177B. She said that no-one, including her line manager, had actually asked her about the incident, and that remained her case in this hearing. Yet it was also part of the claimant's account, for example in her bullying and harassment complaint at page 288, that Mrs McKean asked her to do a reflective witness statement, read her first draft on screen and made comments on it, and intended to return later than evening in her own time it read it again once the claimant had changed it. That was some form of interaction about the incident.

203. Having heard all the evidence I found as a fact that neither Jane Dean nor Yvonne McKean carried out the reflective review meeting in the way envisaged by

the policy. Essentially they left it to the claimant to do her own reflective witness statement on the basis that Mrs McKean would then comment on the draft. When the claimant emailed it at 3.30pm on 28 February (page 120A) she asked Mrs McKean to advise if any additional information was needed. She then went home upset. Mrs McKean did not reply to that email and the claimant did not get that further input.

204. Nor had the claimant been taken through Appendix 2 as a framework for the discussion as the policy envisaged, although she had received a copy of the policy including the appendix with Jane Dean's email of 25 February at page 96.

205. Just after 8.00pm that day Mrs McKean forwarded to Mrs Dean (page 157B) the reflective statement which the claimant had emailed and suggested that there was still an element of involving others in that reflection. Her email said that she would be coming in Thursday afternoon or evening. That was 2 March when the claimant was next due to be in work.

206. That email also contained a comment that Mrs McKean suggested that "we will have to see if she goes off sick now or fronts it out". I accepted Mrs McKean's evidence that "it" was the retraining required after the incident. I also found that the reference to the claimant going off sick was because of two things: firstly, the claimant had raised in a work WhatsApp group a concern about being labelled off sick with psychiatric issues, presumably in line with what she had said in her email to Mrs Dean on 24 February (page 96). Secondly, Mrs McKean knew that the claimant had gone home early upset following events earlier in the day. It was inappropriate to comment in that way but I recognised that it was a comment made between two managers not intended to be seen by the claimant.

207. Despite that comment I was satisfied that Mrs McKean genuinely intended to resume her discussion with the claimant about the reflective statement on 2 March by way of concluding the reflective review. However, Mrs Dean did not wait for that to happen. She forwarded the reflective statement to Mr Wilson at 8.00am on 1 March; he had already done his rapid review by that stage, having emailed it at 9.00am on 28 February to Mrs Dean and to others. Mrs Dean should have made it clear that further discussions with the claimant about her reflective statement had been planned for the following day, and that this was not intended to be the final version of the reflective statement.

208. Perhaps more importantly, it was clear that Mrs Dean and Mr Smith discussed the situation between 8.00am and 9.30am on 1 March. I will return to that below when considering the decision to proceed with the disciplinary investigation.

209. In summary, therefore, I found as a fact that the respondent failed to hold a proper reflective review discussion with the claimant, failed to remind her in the course of that discussion of Appendix 2 to guide her through the compilation of the reflective statement, and failed to recognise in emails that the version the claimant emailed at 3.30pm on 28 February was due to be discussed on 2 March before it was finalised.

210. However, viewed in isolation those failings did not breach the **Malik** test. The claimant was an experienced nurse familiar with the principles of reflective

statements and had submitted a sample of them only weeks earlier for her GMC revalidation exercise. Mrs Dean and Mrs McKean were operating in a busy clinical environment and there was reasonable cause to assume that the claimant was familiar with the process and also reasonable cause, in my judgment, to get the claimant to do the first draft on her own and then provide input before it was finalised. Further, the claimant had been sent the policy by Mrs Dean in her email of 25 February. That included Appendix 2 which explained how a reflective statement should be done. The claimant was not being left simply to plough her own furrow in this reflection. Mrs McKean read the first draft on screen, made comments on it and intended to resume that process having seen the second draft on 2 March 2017. Although she was not technically the claimant's line manager she was a band above the claimant in her team and the Practice Educator. I was satisfied that the reflective process would have resumed with a face to face discussion had the claimant returned to work on 2 March 2017.

211. Further, I was satisfied that the claimant's view of the way this was handled was jaundiced by the events which led up to it. Before the incident she already had mistrust of Mrs Dean and Mrs McKean due to her perception of events since the ACT was formed in 2016 which later formed part of her complaint of bullying and harassment. Her fear that the incident would be used to get her out of the ACT was fuelled by the restriction imposed on her administering medicines by Mrs Dean on 23 February and her consequent removal from the night shifts for the forthcoming weekend, a matter which she wrongly sought to portray as a suspension. The claimant had also heard from Rachel Coffey on 24 February that there was an investigation but had been given no details or explanation about what this was or its scope. Finally, the claimant had seen on the electronic rosters that she had been marked down as off sick due to anxiety as a consequence of her email of 24 February at 11:57 in which she said that she would be going off sick. Those matters, I concluded, accounted for her feeling that she was denied a fair opportunity to reflect. Objectively, I rejected that. The approach of Mrs Dean and Mrs McKean was not wholly compliant with the policy but the failings were relatively minor, and had the discussion resumed as planned on 2 March the reflective review process would have been adequate.

<u>Second Theme: Changes to Reflective Statement</u>

212. This concerned the way in which changes to the claimant's reflective statement came about on 28 February 2017.

213. In the original claim form and the amended grounds of complaint (paragraph 11.d) the claimant said that she had been bullied into changing her reflective statement and was being prejudiced because she was unwilling to accept that she would not act the same way in the future if a patient appeared at risk. The specific changes which the claimant identified in paragraph 79 of her witness statement and her oral evidence were as follows:

(1) She had to change the suggestion the ambulance was travelling at between 110 and 120mph to say that it was travelling at speed;

(2) She had written originally that it was a safe transfer and had to change that to say "I should have considered if this was an unsafe transfer or whether it required a doctor present".

214. The claimant said that there were lots of other changes she could not recall.

215. In submissions Miss O'Rourke suggested that another change had been the insertion of a paragraph in the middle of page 120C recognising that the third unit of blood had not been prescribed. That was based on paragraph 9 of Mrs McKean's witness statement where she said that the claimant had written that "the correct blood had been given" and she suggested that she give this more thought as that was what the whole incident was about.

216. I could not be sure about this but it was clear to me that at the very latest by 3.30pm on 28 February 2017 the claimant did know that the third bag of blood had not been prescribed. If that is the change that Mrs McKean initiated to the reflective statement, she was right to do so. It was factually accurate.

217. In considering whether Mrs McKean put any undue pressure on the claimant I took account of the supportive text messages sent by Mrs McKean to the claimant on 23 February at pages 92C and 92D. In my view they were genuinely supportive and appropriate.

218. I also took account of page 157B. I did not accept the claimant's submission that the suggestion that they see whether she "goes off sick or fronts it out" bore the significance for which Miss O'Rourke contended. It was an unwise form of words which betrayed some annoyance on the part of Mrs McKean, but it was a consequence of her genuine impression that the claimant was not acknowledging the nature of her part in the incident and a well-founded feeling that the claimant might go off sick. It did not support the claimant's case that Mrs McKean had bullied her.

219. I also took account of the discrepancy in the record of Mrs McKean's interview with Jennifer Bebb. The version she approved at pages 190-192 differed from that appended the Bebb report at pages 372-373; the latter version was more critical of the claimant than the former. Mrs Bebb could not explain this as an HR colleague had custody of the electronic version of the statements. Miss O'Rourke suggested that Mrs McKean had altered the statement after approving it to make it more damning of the claimant, but the converse seemed to me equally plausible: that the first draft was toned down by Mrs McKean when she approved, but in error the first draft was included with the Bebb report. There was no evidence before me that Mrs McKean approved the version at page 372, only that she approved the version at page 190. I was satisfied that the views she expressed in the version at page 190 were genuine representations of her view of the claimant. I did not agree that they give any credence to the allegation of malice which is made against her.

220. I also had the benefit of having seen both the claimant and Mrs McKean give oral evidence.

221. Putting all this together I was satisfied that there was no bullying or undue pressure from Yvonne McKean. The changes identified by the claimant were either a question of factual accuracy or intended to help her present a more reflective piece. For a nurse to say that the transfer was safe was unwise when unprescribed blood had been administered and the two-person blood checks had not been done. Mrs McKean was acting out of good intentions in seeking to moderate those passages.

222. For the claimant to allege that this amounted to bullying or undue pressure was evidence of her distorted perception tainted by her belief that Mrs McKean and Mrs Dean were out to get her. I accepted that the claimant was concerned at the lack of a proper sit-down discussion before she did her reflective statement, and I did not doubt that she genuinely felt the process had been deficient, but viewed objectively those concerns were unfounded. In isolation the actions of Mrs McKean in getting the claimant to change her reflective statement did not meet the **Malik** test. There was reasonable cause for Mrs McKean to act as she did.

Third Theme: Restrictions

223. This concerned the restrictions placed upon the claimant from administering medicine. Understandably Miss O'Rourke did not emphasise this in submissions and I can deal with it relatively briefly.

224. The Medicines Error Policy at page 1962 provided for restrictions on administering medication following a medicines error in two circumstances:

(1) Under paragraph 3.2 where the error was serious enough to warrant it; and

(2) Under paragraph 3.3 in less serious cases, such as where there was a near miss or no patient harm, the line manager should take into account the best interests of patient safety and the emotional impact on the practitioner and consider relieving the practitioner of medicines administration.

225. In this case there was plainly reasonable cause to impose that restriction. Unprescribed blood had been administered by a nurse without the required checks being done. There were mitigating circumstances, but they were to be addressed in the IR1 and Rapid Review, and in the practitioner's reflective statement.

226. It was clear that no restriction was imposed on the claimant beyond that. In practice the claimant could not work nights but she was asked to do days. She did attend for training on 28 February. The next rostered day shift was 2 March but she did not attend.

227. As for the length of the restrictions, that was due simply to the fact that the IV fluid training never took place. The training and the lifting of the restrictions could not occur until the claimant returned to work. In isolation this matter did not create any breach of trust and confidence.

Fourth Theme: Disciplinary Investigation

228. The final and most important matter from this period was the initiation of the disciplinary investigation by Mr Smith. The handling of the reflective statement was relevant to this matter even though in isolation that did not amount to a repudiatory breach.

229. I found as a fact that it was a decision that Mr Smith made at some point shortly before 9.30am on 1 March. Mrs Bebb said in oral evidence that she thought she may have been asked to do an investigation on 28 February, but I was satisfied that was a mistake on her part: it was a tentative suggestion and she was plainly unsure of the precise date. I preferred to go by the documents which showed the decision being communicated in an email on 1 March.

230. The claimant's case, broadly, was that there was no reasonable cause for that decision and it was serious enough to destroy trust and confidence. Before considering the claimant's points in support of that proposition I had to make a finding of fact as to Mr Smith's reasons for making it. His evidence required careful consideration.

231. In paragraphs 13 and 14 of his witness statement he identified a number of factors. They included that the claimant had failed to undertake a reasonable request to complete a programme of work and training, that the claimant had failed to demonstrate understanding and insight in the reflection and training process, and that she had been knowingly non-compliant on 22 February 2017 because she knew she had not completed the blood transfusion training by that stage. The reasons also included that the claimant had administered blood when it was neither prescribed nor indicated, and following his use of the Incident Decision Tree (page 2065A) the view that the patient could have suffered transfusion related reaction or death and the claimant had taken an unacceptable risk given that the patient's blood pressure and pulse were within the normal range and there were no signs of active bleeding. He relied on the passage in the Decision Tree which envisaged a referral to discipline. In paragraph 17 of his witness statement he also said that it quickly became apparent that issues would not be resolved in a pragmatic way because of the claimant's behaviour and reluctance to accept a reasonable request.

232. In oral evidence Mr Smith added to what was in his witness statement and in the contemporaneous documents. I asked him why he did not go back to the claimant to correct her misapprehension, as he saw it, that it was just a paperwork error. He said that as a consequence of what were described as "extensive discussions" with Jane Dean and senior HR officers he had been told that the claimant was frustrating the process, it was proving challenging to have conversations with her and she was not engaging with the training, and this led to him forming the view that the claimant was placing obstacles in the way.

233. I noted that I did not have any evidence from Jane Dean about this precise point. She had already given her evidence by the time this emerged in Mr Smith's oral evidence and neither side applied for her to be recalled. However, she did say in her evidence to the hearing that she would have discussed the reflective witness

statement with Mr Smith on the morning of 1 March. She did not have any specific recall of that discussion.

234. Mr Smith was cross examined by Miss O'Rourke on the basis that this view of the claimant could not properly have been conveyed to him by Jane Dean by 9.30am on 1 March. When challenged on this Mr Smith said that Mrs Dean had passed on her concern about the content of the reflective statement. He had not seen it for himself but his recollection was that Mrs Dean told him the claimant was saying that in the same situation she would do the same thing. Having read the reflective witness statement Mr Smith acknowledged that any such statement was missing, but he maintained that this was the impression he had gained from Mrs Dean in that discussion.

235. In considering this I took into account that when asked by Mrs Pemberton during the appeal to explain why the referral had been made he did not reply in writing but spoke to her. According to Jane Pemberton's witness statement (paragraph 13) he told that the reason for the escalation was that the claimant had not properly reflected on her practice area.

236. This was an important passage of evidence from Mr Smith and it formed a central part of Miss O'Rourke's assault on his credibility and that of Jane Dean. His witness statement had not set out these matters when explaining why the disciplinary investigation had been instituted. Although that decision only became the overwhelming focus of the claimant's case during this hearing, it had been identified from the outset as one of the eight constituent parts of the breach of the implied term in the claim and it had never fallen away. It had been addressed in the witness statement but not in this detail. That was a surprise.

237. Further, as Miss O'Rourke emphasised, at face value a number of the components of this evidence did not appear to withstand scrutiny.

238. Firstly, the reflective witness statement from the claimant did not say that she would do the same again. It said just the contrary in the closing passage on page 120C. It concluded by saying that she would do all the relevant checks and in the same situation would decline to do the transfer at all.

239. Secondly, the claimant had not failed to engage with the training. She came in on 28 February and received training from Christine Barnes. At the time this decision was made she was due back in on 2 March and would receive the IV fluid training then or shortly thereafter.

240. Thirdly, Mr Smith was not able to identify any refusal to accept a reasonable request from a manager. The claimant came in for the training on 28 February as instructed. She had gone home early upset that day, but there was no indication that she would not be back and complete the rest of her training.

241. Putting those matters together, Miss O'Rourke submitted there were only two possible conclusions for this Tribunal: firstly, that Mr Smith was lying about the reasons for the decision and what he was told on 1 March as part of a cover up, or secondly that he was telling the truth but Jane Dean maliciously misled him on 1

March. Miss O'Rourke made clear that it was the first of those interpretations which was the claimant's primary case.

242. However, despite Miss O'Rourke's forceful submissions I declined to resolve that matter in either of the ways she suggested. The Tribunal has to take into account the reality of the working environment as well as the nature of the judicial process. Mr Smith was giving evidence in October 2019 about a single decision he made on the morning of 1 March 2017 which was not contemporaneously documented save for a brief email. Having seen him give evidence I concluded Mr Smith was being honest in his recollection and not deliberately seeking to mislead the Tribunal. However, I was satisfied that he was mistaken about the extent of what Jane Dean told him that morning because his recollection had been affected by what he subsequently came to know about the case.

243. I found as a fact that Mrs Dean did convey to Mr Smith on the morning of 1 March 2017 that the claimant had been difficult to engage with, that her reflective statement was not adequate and that she did not think the claimant appreciated the full seriousness of the incident. That impression of the claimant was drawn from Mrs Dean's interactions with her, including the following:

(1) The email from the claimant of 24 February at page 94 said that the matter was about her failure to complete a form, and that the claimant would be off sick until her ability to perform her role properly had been reinstated;

(2) The claimant reiterated in her email of 25 February at page 103 that she never denied not signing for the blood and yet now insisted she was not off sick but had been suspended, and importantly she said in the final paragraph of that email that her error was not the improper administration but the failure to complete documentation;

(3) Mrs Dean had seen the reflective statement and Mrs McLean's concerns as expressed at page 157B.

244. Miss O'Rourke was right to emphasise that Mrs Dean did not reply to the claimant explaining that it was not just about paperwork and that the third unit of blood had not been prescribed. The claimant should have been told that, as Lynne Mannion acknowledged in her email at page 92E. But even assuming in the claimant's favour that it was only made clear to her on 28 February by Yvonne McKean that the third unit had not been prescribed, the view espoused by the claimant that it was only a failure to complete documentation could reasonably be seen by Mrs Dean as lacking insight. The claimant had not seen a prescription when she administered the third unit of blood and was therefore relying on an assumption that the prescription existed. In her bullying and harassment complaint of 8 May at page 281 the claimant said that Nurse Ormerod had told her the purpose of her going on the transfer was to administer blood. However, in cross examination, having seen what Nurse Ormerod said when interviewed at page 385, the claimant said that Nurse Ormerod had told her the reason was to continue the administration of blood - which the claimant assumed meant administer the third bag if needed. The claimant had not checked her understanding with the nurse.

245. Overall I was satisfied that it was reasonable for Jane Dean to have formed the view that the claimant lacked insight in failing to recognise that her administration of the third unit of blood had been based on an assumption without sight of the prescription or the purple form, and had been done at a time when the clinical haemodynamic indicators did not warrant it. It was also reasonable for her to convey this impression to Mr Smith on the morning of 1 March 2017, even though his recollection of what she said has become distorted by the passage of time.

246. It followed, therefore, that when Mr Smith made his decision the picture before him was composed of the following:

(1) He had the email from Mr Wilson at page 114 and the attached Rapid Review. The email identified very significant gaps in practice in breach of Trust policies, including the fact the blood had not been prescribed and the two-person checks had not been done;

(2) He had the result of his application of the Incident Decision Tree;

(3) He had the claimant's email of 24 February at pages 94 and 95 which had been sent to him as well as to Mrs Dean;

(4) He had the benefit of his discussions with senior HR advisers as to the appropriate course of action;

(5) He had the benefit of his discussion with Mrs Dean on the morning of 1 March leading him to the belief the claimant had been difficult to engage with and lacked insight into the serious nature of the incident.

247. I found as a fact that Mr Smith's decision to institute the disciplinary investigation was because of this combination of considerations not because of any one reason.

248. Having made that finding of fact I had to apply the **Malik** test to identify whether that was a decision for which there was no reasonable and proper cause, and if so whether it was calculated or likely to destroy or seriously damage trust and confidence when viewed objectively.

249. Miss O'Rourke in her submissions identified 20 instances of conduct supporting her contention that this decision should meet that test, and I concentrated on what I considered to be the six main points emerging from those individual matters.

250. The first point was that the disciplinary investigation should not have begun until the process of reflection and training was complete. I noted that there was no express prohibition on the two matters running concurrently in the Medicine Errors Policy. Paragraph 3.2 referred to a situation where disciplinary action was being considered. The procedure set out in Appendix 1 did not expressly mention the disciplinary policy even in the most serious cases. That supported the view they were separate. Nor did the disciplinary policy itself contain any requirement for the reflective review to be completed first. The Incident Decision Tree was to be used as

soon as possible after an incident (page 2065E) and envisaged that there may be a referral for disciplinary action. In my judgment there was reasonable cause for Mr Smith to take the view that the two matters could run concurrently even though there was some overlap and both procedures sought to improve conduct in future.

251. I agreed that it would have been preferable had Mr Smith been told that the reflective process was not complete and that the claimant was due in on 2 March for further discussions about the reflective statement. He should also have been told that the training was not yet complete. I concluded that Mrs Dean conveyed her view that the reflective statement was not adequate to Mr Smith without telling him that this was the position. However, that did not, in my judgment, vitiate his decision to proceed. I accepted Mr Smith's oral evidence that the purpose of the disciplinary investigation was to move to a different process to identify what happened. There was reasonable cause for doing so even before the reflective process or the retraining was complete. The two matters could run concurrently.

252. The second point was that the claimant had been deprived of full information to enable her to engage properly in the reflective process. It is correct that the claimant did not see the Datix/IR1 form or the Rapid Review. The extent of the managerial concerns about the incident were not fully apparent to her. She was left to do her reflective statement from scratch in the first instance.

253. Nevertheless I concluded there was reasonable cause for giving the claimant the opportunity to do a reflective statement without first briefing her on how management saw matters. It is part of required professional behaviours for a Registered Nurse to be able to reflect on an incident for herself and to identify shortcomings and learning points. The claimant had received the Management of Errors policy with Appendix 2. She was an experienced nurse. It was reasonable to expect her to do the first draft of the reflective statement for herself. Mrs McKean offered feedback on that first draft and was planning to do the same on the revised version had the two of them met again on 2 March.

254. The third point was the contrast between assurances given to the claimant about how the matter would be dealt with and the decision to escalate it to a disciplinary investigation. Miss O'Rourke submitted that this amounted to a breach of a promise or a breach of a legitimate expectation created in the claimant's mind.

255. The claimant was given some reassurance earlier on. In a text at page 92C Mrs McKean said, "I don't want you to be worried about it". In a text from Mrs Dean (page 2320) she was told that they would look into how to manage it as quickly as possible and the claimant should try not to worry because it was a process that managers had no choice but to follow. Further, Mr Smith in his email of 24 February (page 93) expressed the view that this matter would be dealt with within the team and said it was not normal for him to be involved in clinical incidents like this "at this stage".

256. However, those last words in my judgment were significant. These were all messages sent to the claimant in the immediate aftermath of the incident. I was satisfied that Mrs Dean and Mrs McKean (as line manager and Practice Educator respectively) were simply being supportive of the claimant. Mr Smith was also

entitled to respond as he did at that stage, and I rejected the contention that his was a dismissive or inappropriate reply. What changed for Mr Smith was receipt of the Rapid Review and Mr Wilson's covering email at page 114, which identified significant gaps in practice in breach of Trust policies. I rejected the contention that supportive comments given by text in the immediate aftermath, or in an email from a senior manager explaining that he would have no involvement "at this stage", can restrict that manager from subsequently taking a different view once the picture became clearer. As Mr Smith said in his evidence a number of times, it was a dynamic situation and new information arrived on his desk.

257. The fourth point was that the claimant was not involved in the Rapid Review and had been given no opportunity to provide any input before Mr Wilson formed his conclusions expressed at page 114. By its nature the Rapid Review was based on the documents. The incident reporting policy at page 2046 in clause 6.6 made it clear that its purpose was to decide the level of investigation needed. It was a precursor to an investigation. In my judgment there was reasonable cause for the Trust to take the view that the claimant could provide her input in any subsequent investigation, if indeed an investigation was to be required at all.

258. The fifth point was that the claimant was the only one facing a disciplinary investigation. I accepted that ordinarily managers would deal with medicine administration errors without a disciplinary investigation. Mrs Bebb explained in her oral evidence how she addressed such issues in the Emergency Department when she moved there after this incident. Mr Smith also said in his witness statement (paragraph 17) that he had hoped to deal with matters in a pragmatic way. Tracy Pinner's witness statement (paragraph 5) said that disciplinary action could have been avoided. Jane Pemberton at the appeal stage was keen to understand how it had got to discipline and caused further enquiries of the claimant and Mr Smith to be made on that very point, but her concerns were answered and her conclusion expressed in her appeal outcome letter in the final paragraph on page 1186 where she said:

> **"Your view remains that your actions were correct on the night in question and that in the same circumstances you would not act differently. This lack of reflection on your part and your unwillingness to accept that your actions were not appropriate when experts in this field had explained why give me cause for concern."**

259. By way of an aside, that is consistent with the claimant's case in her original claim form that changes to the reflective statement were forced upon her because she was unwilling to accept she would not act in the same way again. Although the reflective statement as emailed on the afternoon of 28 February 2017 suggested that the claimant would act differently in future, I was satisfied that it did not reflect the claimant's real view. That obviously came across to Jane Pemberton at the appeal hearing.

260. Although others were at fault in this incident and did not face disciplinary investigation, I had no evidence as to the extent of their reflection on those matters. It was entirely possible that they reflected on the incident and their participation in it in a way that their managers viewed as satisfactory. It is also right to say that the claimant did accept in oral evidence that her errors were the most serious of those

made on the night. I concluded that this point did not support her case that the disciplinary investigation was malicious and unwarranted.

261. Nor did the absence of any evidence that other people had been disciplined for different incidents in the past where medicine errors had been made. Without knowing the facts of those other cases I could not conclude that they were materially similar in a way that undermined the Trust's case as to this decision.

262. The sixth and final point was that the claimant had not been taken through the policies to explain the breaches. The claimant was an experienced nurse, fully trained and experienced in blood transfusions. She maintained her training was up-to-date. She had carried out many patient transfers and had received the practical side of the training although not the second part of the training. In my judgment there was reasonable cause to expect so experienced a nurse to do her reflective statement without being reminded of the relevant policies in advance.

263. None of the other points made by Miss O'Rourke took the claimant's case any further.

264. It is convenient here to deal with one further point: a dispute about whether the claimant had admitted to "a moment of madness", as Mrs Dean said in paragraph 16 of her witness statement, or had said to Mrs McKean that "it was silly", as Mrs McKean said in paragraph 22 of her statement. The claimant denied having made either comment. Neither of those comments was documented nor mentioned by Mrs Dean or Mrs McKean prior to their statements. In one sense those comments did not accord with the Trust's picture of a nurse declining to accept how serious the situation was. Having heard the evidence on both sides I found on the balance of probabilities that these were casual remarks made by the claimant, but genuinely forgotten by her. They were not significant because the reflective statement superseded any such comments. I rejected Miss O'Rourke's contention that they had been invented by Mrs Dean and Mrs McKean, but nor did I attach any significance to them. They did not provide any additional justification for the decision to move to a disciplinary investigation, not least because Mr Smith was unaware of them.

265. Overall, despite the incomplete nature of the reflective review and the fact the claimant had not been given full information before it, in my judgment there was reasonable and proper cause for initiating the disciplinary investigation. It did not breach trust and confidence when viewed objectively.

266. I acknowledged that it may well have been equally reasonable for the respondent to have proceeded as the claimant suggested, i.e. by giving her the Datix/IR1 form and explaining the concerns in detail, getting her input into the Rapid Review, having a reflective review meeting and taking her through Appendix 2 and helping her put together her reflective statement, and ensuring that that reflective statement and process was complete and retraining had been done before then deciding whether to proceed. However, that was not the test I had to apply.

267. For those reasons I concluded that Mr Smith's decision on 1 March 2017 to commence a disciplinary investigation was a decision for which there was reasonable and proper cause. The **Malik** test was not met.

268. Further, even if it had been an unreasonable decision, in my judgment it would not have been serious enough when viewed objectively to be calculated or likely to destroy or seriously damage trust and confidence. It was not something which showed any intention to abandon and altogether not to perform the contract of employment; it was not something with which an employee could not be expected to put up. There may be situations in which the commencement of a disciplinary investigation - as opposed to disciplinary charges or a sanction - can amount to a breach of the implied term but this was not one of those cases. Underlying the claimant's case was a perception about the significance of a disciplinary investigation which was not objectively justified. I did not accept Mr Cordrey's suggestion that it was an advantage to be put into a disciplinary investigation: for an experienced medical professional with an unblemished record it was plainly most unwelcome. However, nor was it a foregone conclusion that it would end with disciplinary charges and a sanction. I accepted Mrs Bebb's evidence in cross examination that her investigation did not mean that disciplinary charges would inevitably follow. She would have assessed that after sitting down with the claimant for what she termed "a reasonable adult discussion" in which, she said, the claimant would hopefully have shown some insight into the risk.

269. Regrettably that discussion never took place. I noted that in her email sent at 2.00pm on 1 March 2017 (which the claimant reproduced at page 290) the claimant said she welcomed the full investigation, but, unbeknownst to her, two hours earlier her husband had emailed the Chief Executive (page 109) describing the investigation as a "witch-hunt due to a totally vindictive and illegal agenda". Unfortunately, the latter view held sway over the former in the months that followed. By insisting on providing written input rather than a face to face discussion with Mrs Bebb, the claimant deprived herself of the very thing she was complaining had not happened: someone asking her about the incident in detail. I accepted that the claimant wanted to go through the incident with Mr Smith in the meeting on 4 May 2017 but was prevented from doing so, but there was reasonable cause for Mr Smith to do that. The disciplinary investigation was already under way and his letter of 24 March 2017 (page 189A) had made clear that the purpose of that meeting was to discuss resolution and a return to work.

<u>December 2017</u>

270. Despite the absence of any repudiatory breach of contract in March 2017 I considered the three matters identified in the List of Issues as a "final straw". The case law shows that a final straw can result in a repudiatory breach even if what goes before does not, although that was not Miss O'Rourke's primary case.

271. The first matter was the letter from Mr Walton-Pollard of 20 December 2017 at pages 1452-1453. That letter informed the claimant that her three allegations of bullying and harassment had been rejected. It gave very brief reasons: just a

sentence about each allegation. It said the claimant was not entitled to a copy of Tracy Thompson's investigation report.

272. In my judgment that letter can be criticised. The policy (page 2025 paragraph 3.1) said that an appeal can be made against the outcome of an investigation, but the letter said that the appeal could only be against the process, not the outcome. That was technically incorrect. Further, it would have been preferable had the reasons been explained in more detail since the claimant was not going to be given a copy of the investigation report. I accepted also that the claimant was already concerned by this stage that the 11 or so witnesses that she identified to Tracy Thompson had not been interviewed. However, her concern about the limited nature of the investigation could be pursued on appeal even given the terms of the letter itself. In any event, I rejected Miss O'Rourke's contention that the HR advice to Miss Thompson not to interview those witnesses added anything to the decision to move to disciplinary investigation on 1 March 2017. They were witnesses to the 2016 part of the complaint, and that matter was investigated by Miss Thompson by considering records of promotion decisions. Their relevance to the allegation about the commencement of the disciplinary investigation was limited.

273. The refusal to provide a copy of the investigation report could reasonably be seen by managers as consistent with the policy which emphasises confidentiality and gives no express right for the complainant to see it. In isolation I concluded this letter was not a breach of trust and confidence and nor did it constitute a breach when added to what had gone before.

274. The second matter was Mr Wilson's sickness absence management letter of 21 December 2017 (pages 1456 – 1459). That was a detailed letter which took stock of the meeting on 18 December. It provided clarity about the option for the Clinical Flow role as a means of getting the claimant back to work. It reiterated the offers of OH and EAP support. It recorded that OH were contacting the claimant's GP for more information. It also informed the claimant of the possibility that dismissal would be considered if absence continued. In my judgment that letter was beyond reproach as a record of the current position. It could neither constitute nor contribute to a breach of trust and confidence.

275. The third matter was the lack of response to the claimant's "without prejudice" ultimatum of 22 December 2017 (pages 1460-1461). It was understandable that Miss O'Rourke did not place any great emphasis on this in submissions. It was an accurate reflection of how the claimant saw matters, but objectively what it sought it was unrealistic. The failure to reply by the deadline of 4.00pm on New Year's Eve was not a breach of trust and confidence, and nor could it contribute to one.

276. Finally, I considered paragraph 1.5 of the List of Issues. Taking into account my conclusions on the position in December 2017, I was satisfied that the allegation that by its conduct the respondent caused the claimant to anticipate further unwarranted mistreatment or indicated a settled intention to undermine her by requiring her to accept a deskbound role or demotion was simply not made out on the evidence. The disciplinary matter was at an end. The claimant had the option of pursuing her confidentiality grievance and her bullying and harassment complaint

further. Managers were trying to get her back to work in alternative roles. Viewed objectively, the problem was her perception, not their actions.

277. More broadly, this case arose in my judgment not because of any failings on the part of the respondent but because of the claimant's perspective. I had no doubt that the claimant acted on the night in what she considered to be the best interests of the patient, and I had no doubt that her factual account of events was essentially truthful, but her suspicion of the motives of her managers and her refusal to acknowledge the full extent of her contribution to an incident where a serious risk to patient safety arose combined to create a hostile and suspicious mindset. That mindset persisted until this hearing, and was most recently manifested in the unfounded attack on the integrity of Mr Smith, Mrs Dean and Mrs McKean which she instructed her representatives to make.

278. Had the claimant stuck with the approach evident from her email of 2.00pm on 1 March 2017, in which she welcomed the investigation, and had she cooperated with it fully by sitting down with Mrs Bebb to go through the detail, the position might have been very different. Instead the claimant embarked on a course of conduct which exacerbated an already difficult situation. This course of conduct included saying she was going off sick and supplying fit notes, yet periodically asserting she was not sick. It included pursuing a grievance about breach of confidentiality which was wholly unwarranted, given that she and her husband shared an email address and he had already involved himself in the matter by his email to the Chief Executive on 1 March 2017. It included seeking to label the decision to start a disciplinary investigation as an act of bullying and harassment. It included making unrealistic demands for resolution in “without prejudice” communications. It was this mindset and these actions which drove the claimant into a position where at the end of December 2017 she had painted herself into a corner, and had to resign.

279. Of course, the forensic scrutiny inherent in a ten day Employment Tribunal hearing has exposed some deficiencies in the approach of managers to policies, to documenting decisions and to the nature of communications. That was hardly a surprise in a busy clinical environment where this was just one of a number of matters to be addressed every day. To seek to elevate those deficiencies into malicious ill intent and to attack the integrity of the managers concerned was, in my judgment, wholly unwarranted.

280. In conclusion, there was no fundamental breach of contract by the Trust, and therefore no dismissal. The questions of affirmation or waiver did not arise, and nor did any question of remedy.

Costs

281. After delivery of oral judgment with reasons Mr Cordrey indicated that the Trust intended to make an application for costs. It will be resisted by the claimant.

282. We agreed that the following Case Management Orders will apply:

(a) Within 14 days of the date upon which this Judgment and Reasons is sent to the parties the respondent will provide to the claimant and to the Tribunal its written application for costs, setting out the amount claimed and how it has been calculated, and the basis for the application;

(b) Within 28 days of receipt of that application the claimant will provide her response to it, setting out the basis on which the application is resisted. If the claimant wishes the Tribunal to take into account her ability to pay, the response must be accompanied by a statement setting out the claimant's financial position together with supporting documentation.

283. By agreement the costs hearing was listed before me for **Thursday 16 January 2020** at **10.00am** with a time estimate of one day. The hearing will take place at **Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA**.

Employment Judge Franey

23 October 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 October 2019

FOR THE TRIBUNAL OFFICE