



EMPLOYMENT TRIBUNALS

Claimant: Mr A Olalere

Respondent: Guys & St Thomas NHS Foundation Trust

Heard at: London Central (remotely by CVP)

On: 22 and 23 August 2022

Before: Employment Judge Heath

Representation

Claimant: In person

Respondent: Mr R Dunn (Counsel)

RESERVED JUDGMENT

The claimant's claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant claims unfair dismissal. The respondent says it dismissed the claimant fairly for a reason related to conduct.

The issues

2. At the start of the hearing, I clarified both parties the issues I had to determine with. They were agreed to be as follows:

Unfair dismissal

- a) What was the reason or principal reason for dismissal? The respondent says the reason related to conduct.
- b) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide whether:

- i. the respondent genuinely believed the claimant had committed misconduct.
 - ii. there were reasonable grounds for that belief;
 - iii. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - iv. the respondent otherwise acted in a procedurally fair manner;
 - v. dismissal was within the range of reasonable responses.
 - c) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - d) If so, should the claimant's compensation be reduced? By how much?
 - e) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - f) Did the respondent or the claimant unreasonably fail to comply with it ?
 - g) If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - h) If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
 - i) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
2. The claimant confirmed that he did not pursue a claim for outstanding pay.

Procedure

3. A Notice of Hearing dated 7 April 2022 set this matter down to be heard over two days. Case management orders were enclosed, which included an order for the exchange of witness statements two weeks before the hearing. This order was clear that *"everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement"*.
4. Despite this order, the claimant forwarded an email with the subject line "Witness statements" to the respondent's solicitor on 18 August 2022. The forwarded email was from Ms Adewodu, and was in the nature of a witness statement, with a grievance outcome letter attached to it. I accepted this email and the attachment as Ms Adewodu's witness statement. The claimant did not provide a witness statement of his own,

despite having been asked for it by the respondent on a number of occasions.

5. At the start of the hearing there was some discussion about how the claimant would give his evidence. Mr Dunn indicated that he was pragmatic about the fact that I would be unlikely to strike out the claimant's claim for not having complied with the order to produce a witness statement. He proposed that section 8.2 of the claimant's ET1 should stand as his witness statement and indicated that if the claimant sought to expand his case beyond that, the respondent could be prejudiced. Mr Dunn also pointed out that the claimant would be able to expand on his evidence during cross examination.
6. The claimant confirmed that his ET1 set out what he wished to put before the tribunal. His main concern was that his dismissal was too harsh and disproportionate an outcome for any misconduct found.
7. I allowed the claimant's ET1 to stand as his evidence in chief. I also indicated that he would be allowed to expand on his evidence under questioning, and that he could give further evidence after his cross-examination to clarify any answers he gave (in the nature of re-examination). I considered that this would be the fairest and most just approach having regard to the overriding objective.
8. The respondent relied on the evidence of Ms C Gadd, retired Clinical Services Manager and Mr M White, General Manager. These witnesses provided witness statements and were questioned by the claimant.
9. I was provided with a 635 page bundle. The claimant sent some further documents to the tribunal during the course of the hearing.
10. Mr Dunn provided written submissions which he supplemented with oral submissions. The claimant made oral submissions. There was insufficient time to deliberate and give a decision, and so I reserved my decision.

The facts

Background

11. The respondent is a National Health Service trust. It had merged with the Royal Brompton and Harefield NHS foundation trust in February 2021. The Royal Brompton Hospital employs 2200 staff
12. The claimant was employed by Royal Brompton and Harefield NHS Trust on 25 January 2016 as a Band 4 Paediatric Phlebotomy Supervisor at the Royal Brompton Hospital. His responsibilities included taking blood samples from patients, line managing five employees and working alongside the Phlebotomy Manager.
13. The respondent's disciplinary policy included a non-exhaustive list of examples of behaviour is normally viewed as gross misconduct . They

included: *“Negligence: wilful or deliberate action or failure to act, which would... Endanger the health and safety of patients...; Abuse of the code of conduct and professional standards of practice and behaviour related to the employees occupation; Any act of sufficiently serious nature to endanger the well-being of a patient; Non-compliance with safety, health or fire rules are such non-compliance would pose a serious risk to themselves or others, and where the rules have been known to staff”*.

14. The respondent also had a set of Core Behaviours expected of staff, which included: *“To act with honesty and integrity at all times; Focus on the patient and internal and external customer at all times; Being aware of the impact of their own behaviour on others”*.
15. In February 2020 Ms Angus became the Phlebotomy Manager. The relationship between the claimant and her was not good. The claimant took out a grievance against her very early on, which led to a workplace mediation in June 2020.
16. The phlebotomy team was responsible for taking blood samples from all inpatients (adults and children) and in the inpatient department the rota system was organised which set out where team members would work. The manager was responsible for staffing and ensuring that the work was done. The supervisor, that is to say the claimant, completed the rota. It was apparent that there were numerous problems within the team with lines of communication and responsibility.
17. On 24 September 2020 the claimant was issued with a Notice of Improvement by Ms Angus. This notice set out how he had failed to comply with the respondent’s policies and procedures relating to the labelling of patient samples. The claimant had pre-printed labels for patients prior to collecting samples from them. The Notice set out that he was to undergo a full reassessment of all phlebotomy core competencies, and that he would be monitored for the next four months until 31 January 2021. He was warned that failure to maintain the required standard of performance may result in him being taken through a “formal capability process and review in accordance with the [Respondent’s] Disciplinary Policy and Procedures”. I accept the claimant’s evidence that a reassessment was subsequently undertaken which did not find poor practice.

Investigation

18. During the summer of 2021 Ms Angus encountered numerous difficulties with the claimant’s work. There is not a great deal of evidence of this, but it appears that Ms Angus had attempted to manage some concerns on an informal basis without improvement. Additionally specific incidents were raised by other Trust staff which led to further investigations which revealed other conduct issues. Ms Angus escalated her concerns to HR in early September 2021. An independent review panel commissioned an investigation into seven allegations. Ms Lauren Berry (Associate Director Rehab and Therapies – Patient Services) was assigned as the investigator.

19. The seven allegations were as follows:-

- a) Allegation 1: On several occasions the claimant used pre-printed labels in breach of the trust policy on labelling specimens.
- b) Allegation 2: the claimant shared his staff login to access the trust systems on more than two occasions, in breach of IT policy.
- c) Allegation 3: On 6 June 2021 the claimant entered the Aerosol Generated Procedure (“AGP”) areas, in breach of infection control standards operating procedure.
- d) Allegation 4: The claimant failed to adhere to correct reporting requirements in the absence policy.
- e) Allegation 5: Following a patient complaint that he forgot to remove a tourniquet from the patient’s arm as he took a personal telephone call.
- f) Allegation 6: The claimant failed to report an error in processing a drawn sample in a timely manner causing delay in analysis and treatment for a patient.
- g) Allegation 7: The claimant raised his voice in front of the patient when discussing sickness absence with his manager.

20. Ms Berry interviewed six witnesses, including the claimant, over a two-week period in October and November 2021. Each interview was held over Microsoft Teams and a transcript was created of each interview, which was agreed with each interviewee. Ms Berry only considered evidence over the previous year. The witnesses were Ms Angus, her line manager and three members of the Phlebotomy Team.

21. On 17 December 2021 Ms Berry submitted a completed Investigation Report. The report was 28 pages long with 25 appendices. The report set out the terms of reference, background information, methodology, a summary of the evidence, Ms Berry’s findings and her conclusions and recommendations. The appendices included transcripts of each investigation meeting with the witnesses and the documentary evidence relied on.

22. In relation to allegation 1, Ms Berry found the case for a disciplinary partially upheld. In respect of all the other allegations, she found the allegations upheld. Despite the use of the word “upheld” it is clear from the report that Ms Berry was finding that the allegations should go forward to be heard by a disciplinary panel.

Disciplinary hearing

23. Ms Gadd, who was then Clinical Services Manager at Harefield Hospital, was asked by Mr Widdowson, the Head of Employee Relations, to hear the disciplinary case against the claimant. In her role Ms Gadd’s

responsibilities included patient and staff safety, operational issues related to patients and staff, and ensuring that local policies, procedures and guidelines were upheld.

24. The disciplinary hearing was due to take place on 20 January 2022. Prior to the hearing the claimant and Ms Gadd were provided with the Investigation Report together with the evidence it attached. The claimant emailed Mr Widdowson on 17 January 2022 attaching some further evidence of his own. Mr Widdowson acknowledged the email, pointed out that there was some duplication in the evidence but told the claimant he could present his own new evidence to the panel during the hearing.
25. On 19 January 2022, the day before the disciplinary hearing, the claimant emailed Mr Widdowson asking him to contact seven witnesses. Mr Widdowson responded "*The hearing is tomorrow. As discussed, all relevant information and witnesses to be called needed to be advised two days prior to the hearing. It is for you to arrange for witnesses to be present at the meeting and you need to be clear as to which part of the case they can provide supporting evidence. I have discussed this with Carol Gadd, panel chair who has agreed that you may call witnesses for tomorrow's hearing on the proviso that names are provided by 5 PM today, the reason for them being called and for which allegation of clearly defined*".
26. The claimant responded to this email saying that he had only sent the names of three witnesses, and that "*I know it would be very difficult to get any reliable witnesses because of power to influence the outcome of this case and secondly, the general fear of consequences that may result from saying the truth.... I spoke to my witnesses and informed them they are likely to be invited to the meeting tomorrow, one or two are not all that willing to come forward*". Mr Widdowson responded "*You need to invite them and let [Ms Gadd] know by 5pm who they are and the reason for calling*".
27. The disciplinary hearing took place on 20 January 2022. It was chaired by Ms Gadd who was supported by Mr Widdowson. The management case was presented by Ms Berry and a note taker was also present. The claimant attended without accompaniment or witnesses, and he confirmed that he had received the evidence and was happy to proceed without accompaniment.
28. The meeting was recorded, and a full transcript of the hearing was in the bundle. Ms Gadd confirmed that everyone had been supplied the Investigation Report and she outlined the procedure that the hearing would follow. During the hearing Ms Berry read out from her report to present the management case. The claimant was given the opportunity to question her, and then given an opportunity to put forward his representations on each allegation.
29. **Allegation 1:** - Ms Berry outlined that this allegation had only been partly upheld as there was little supporting evidence to indicate what the

claimant had done with respect to labelling following the improvement notice.

30. The claimant's case was that he had prepared pre-printed labels in case of blood sample was requested by a doctor or specialist nurse. He suggested it was common practice to use pre-printed labels, notwithstanding his recent Improvement Notice).
31. **Allegation 2:** - Ms Berry outlined that the claimant had shared his login details during the training of new staff, and had done so on several occasions. He had demonstrated a lack of understanding of the implications arising for staff members and patients from this practice.
32. The claimant gave evidence to the disciplinary hearing that he had undertaken the inductions for new starters and the team at times when these colleagues had not been provided with an ID badge. He said that he allowed colleagues to bleed patients and had recorded these and printed samples from his own IT account. He said that Ms Angus had challenged him about this and said that it was a disciplinary issue.
33. The claimant referred to the fact that this issue had been escalated to the head of Department, Dr Donovan, who on 10 March 2021 had emailed Ms Angus to say *"I can't find anywhere that categorically states what he did was wrong or in breach of any policy – he assured me he didn't give her his password, and was supervising the whole time."* Ms Angus had replied *"My concern is that [the claimant] allowed the staff member to use his login, although he may not have disclosed his password, the staff member bleed patients under his name so if there were to be an error of any kind who would be held responsible"* (sic).
34. At the disciplinary hearing the claimant confirmed that he was aware that new starters should not immediately be undertaking practical work. Ms Gadd raised her concern that the policy only permits for new starters to observe in the early stages, and that the new colleague carrying out work in the absence of having an ID would mean they could not be easily identified by other staff or patients. She was also concerned about the fact that work was being recorded as been having been done by the claimant when it had in fact been carried out by another.
35. Ms Berry, in response, referred to a further occasion where the claimant had instructed a different staff member to log in to her own account to print labels when she was not the person who would be taking blood from the patient.
36. **Allegation 3:** - Ms Berry outlined that the claimant had entered an AGP area on four separate occasions, and had been challenged on each occasion. Within the evidence pack was an email from the lead paediatric respiratory physiologist setting out that a procedure known as spirometry, an AGP, was performed in a particular area. She outlined that the professionals perform the procedure in full PPE and have to leave the room for one hour after the test before anyone else is allowed

to enter the room. She set out that a clear sign was put on the door stating that an AGP has occurred and the times when the room is out of action. She said that on four occasions the same member of entered the room before the one-hour time had elapsed. She commented "*This is obviously not safe either for him or patients he then goes on to see. On each occasion he has been reminded that this should not happen and the reasons why. On each occasion he has stated that he didn't see the sign. I am not sure how to make it any more clear but just wanted to make you aware in case you wanted to talk to your own team. I am happy to fill out a DATIX form if you wanted to go down that route*".

37. The sign itself was in the evidence pack (and also the bundle before me) and was A4 size in large font.
38. The claimant told the disciplinary hearing that he accepted he entered the AGP area on four occasions, and had left when he was instructed to do so. He said that the rooms have been used for a variety of reasons during the pandemic and that he had not seen the signs. He accepted that the AGP process increased the risk of transmitting Covid.
39. **Allegation 4:** - Ms Perry referred to a number of Whatsapp messages from team members to the claimant, which she said showed that little inquiry had been made by the claimant into the nature and duration of the absences. Reference was made to a WhatsApp message in which a team member referred to the claimant having seen him in the Westfield shopping centre when he was off sick. The claimant's response was a laughing emoji. He did not report to Ms Angus.
40. The claimant said that he expected the team to call him to report their absence. He said he would text Ms Angus reporting his own lateness or absence.
41. **Allegation 5:** - Ms Berry told the hearing that a consultant radiologist had discovered a patient with a tourniquet left tight on their arm, and the patient had said that the claimant had left them to answer a phone call. The consultant had completed a DATIX report (the respondent's incident reporting system, which could be for any type of incident, major or minor). The patient suffered bruising as a result.
42. The claimant confirmed he had left the patient to take a call from his wife. His daughter had gone missing the previous day and he felt he needed to take the call.
43. It is not clear whether the claimant referred to this at the disciplinary hearing, but at the hearing before me he referred to an email he received from Ms Mortimer, Quality & Safety Lead, who had completed the DATIX report. This email, dated 3 November 2021 included "*It is normal practice for the head of the Department/service to investigate incidents, it is just about finding out the facts and learning from these to ensure that they do not happen again*".

44. Mr White said that the DATIX reports were used to report all incidents, minor or major. I accept this, and do not accept the claimant's suggestion that Ms Mortimer might have been indicating that this issue was about learning lessons rather than a disciplinary issue.
45. **Allegation 6:** - Ms Berry outlined to the hearing that a sample had gone missing. This was not a serious concern of itself, but management were very concerned that there was a delay in reporting the matter.
46. The claimant said that a sample had been found 2-3 days after it had been taken, and that he had immediately taken the sample to the lab.
47. **Allegation 7:** - Ms Berry outlined to the hearing the circumstances in which the claimant had raised his voice to Ms Angus in front of patients.
48. The claimant gave context to the issue, which concerned staff absence and the need to change the staff rota to arrange cover. The claimant explained that he had been upset and had raised his voice.
49. During the course of the hearing the claimant largely appeared to agree with the management case against him. The claimant's case was largely about providing rationales for doing what he did. Ms Gadd found these rationales contradictory and confusing and this brought his credibility into question for her.
50. Both management and the claimant given the opportunity to sum up at the end of the case. Ms Gadd adjourned the hearing to make a decision.

Ms Gadd's decision to dismiss

51. Ms Gadd communicated the outcome of the disciplinary hearing in a letter dated 31 January 2022.
52. She set out the allegations and outlined the procedure but had been adopted. She then communicated her findings on each of the allegations:
- a) **Allegation 1:** - Ms Gadd noted the claimant had already been subject to an improvement notice, and considered that he needed management support to ensure he followed the relevant protocols. The allegation was not upheld.
 - b) **Allegation 2:** - Ms Gadd found the claimant did share his login details when he trained new staff. She considered this was unacceptable as the claimant's name would be associated with bloods taken by a colleague. Although she recognised the pressure to on-board new starters quickly, she considered this to be a serious breach of the relevant guidance. The allegation was upheld.
 - c) **Allegation 3:** - Ms Gadd referred to the claimant's claim that he had not seen the notice on the door. She mentioned that the sign

was highly visible. She set out the risks of infection transmission inherent in disregarding the notice. Whilst noting the claimant's claim that the room could be used for different procedures, she was not satisfied that he had learnt from the advice given him, and that this was the fourth known occasion. She upheld this allegation.

- d) **Allegation 4:** - Ms Gadd found that the claimant had attempted to sideline his manager in the reporting of team absences. She found this disrespectful, causing confusion within the team and putting the Trust in a vulnerable position as absences were not properly reported. She did not accept the claimant's account of how he dealt with seeing a colleague in a shopping centre, finding this disrespectful to his manager and in breach of the respondent's sickness absence policy. She upheld the allegation.
- e) **Allegation 5:** - Ms Gadd accepted the claimant had personal difficulties, but set out that his primary concern at work had to be for patient safety. The claimant should have made colleagues aware or taken time out if he had difficulties which were distracting him. The patient made a complaint. She upheld this allegation.
- f) **Allegation 6:** - Ms Gadd was concerned that the claimant had attempted to present a sample of blood testing a few days late. She accepted that occasionally samples go missing, but the concern here was that once the sample was located the claimant assumed that it could still be processed some days later. She was also concerned that the test results may have been critical to the treatment of a patient. She upheld this allegation.
- g) **Allegation 7:** - Ms Gadd noted the claimant saying that he had a naturally loud voice, and that he was unhappy with his manager. However, she found he initiated an argument with her which was overheard by patients and staff. Ms Gadd considered this inappropriate and unprofessional. She upheld the allegation.

53. Ms Gadd went on to note underlying difficulties within the claimant's team and his poor working relationship with his manager. However, she considered on the evidence that he had "*antagonised the situation by establishing a WhatsApp group which [the claimant was] aware she has not part of*".

54. Ms Gadd was concerned that the claimant did not appear to learn from his mistakes and took no notice of important protocols and carry out his work. She considered this was compounded by his negligence towards patient care and that he did not uphold the respondent's core behaviours for its staff.

55. Ms Gadd concluded "*Therefore, based on the evidence available, the investigation carried out, and your lack of awareness and learning, it is*

with regret I have decided to dismiss you with notice for misconduct that compromises patient safety. I deem any sanction less than dismissal would be insufficient in the interests of the Trust, its staff, and patients”.

56. Ms Gadd determined that the claimant would be paid his notice, but would not be required to attend for work. She set out that his employment would be terminated from 28 February is on 22. She gave him a right of appeal against a decision.
57. Ms Gadd formed the belief, on looking at the totality of the evidence, that the claimant did not listen to his colleagues, repeatedly acted in his own self-interest disregarding processes and procedures which were designed to protect the workforce and patients. She found his failure to report team absences to his manager demonstrated a lack of respect towards her. She considered that his disregard of processes unnecessarily compromised patient care and safety. She believed that the cumulative nature of the allegations demonstrated an intentional disregard of processes and procedures that had been established to protect workforce and patient safety. She concluded that he was aware of the existence of policies and procedures but either did not take them seriously or did not take reasonable efforts to familiarise himself with them. She considered his behaviour inappropriate, unprofessional and not compatible with the behaviours expected of someone in the caring professions, particularly someone in a supervisory role. She concluded that the claimant's actions destroyed the trust placed in him as an employee. She considered he could no longer be trusted to act appropriately in his interactions with patients and colleagues.

The claimant's appeal

58. On 3 February 2022 the claimant appealed by way of email to Mr Davies, Director of Workforce. He stated that the decision to dismiss was not within a band of reasonable responses. He said that the allegations for his dismissal was Misconduct, and not Gross Misconduct and that the decision to dismiss was excessive and disproportionate. He set out that he had offered his profound apology for any inconvenience's actions caused. He said that it was not his intention to sideline his manager and cause confusion team that he was really sorry for his actions as alleged in the management case. He said that he should have acted in a more professional manner and accepted responsibility for his actions. He said that he did not appear remorseful during the hearing as he was stressed and nervous. He said he had learnt his lessons and accepted that he should have acted more professionally. He said that he was willing to undergo mediation, training and support to improve his working relationship with his manager. He mentioned his seven unblemished years working with the respondent. He said that he loved his job and his patients and considered himself a good ambassador for the trust who has made a significant contribution to the Department. He was willing to accept a lesser sanction.

59. Mr White, General Manager for Harefield Hospital, was assigned to hear the claimant's appeal. On 16 February 2022 he sent a letter to the claimant inviting him to a disciplinary appeal hearing to take place via Microsoft Teams on 28 February 2022. This was later rescheduled to 10 March 2022. The appeal was not a re-hearing of the evidence, but a review to determine whether the decision to dismiss was fair and reasonable in the circumstances.
60. Despite having been asked to provide any evidence in support of his appeal five days before the hearing, on 9 March 2022 the claimant emailed a letter confirming he had had eye surgery to HR. Mr White nonetheless accepted this as evidence.
61. At the appeal hearing on 10 March 2022 Mr White was supported by Ms Issa, HR Case Manager. Ms Gadd attended as disciplinary chair and was supported by Mr Widdowson. The claimant attended and unaccompanied. He indicated although he had been assisted by the trade union, and that at one stage he was hoping to be accompanied by a friend, he was happy to proceed on his own.
62. The claimant was given the opportunity to present his appeal first. He accepted that he had made mistakes and apologised for his behaviour. He considered, however, that the decision to dismiss have been too harsh.
63. The claimant went through each allegation in turn. In respect of allegation three, the claimant told Mr White that following the incident it had been identified that he had visual impairment and had been told that he was not able to see a distance of 2 m or less. He was asked whether he was able to see when taking patients bloods, requiring him to see small veins, or reading request forms, and he responded that he could see because he would look closely. Ms Gadd responded to the submissions made by the claimant. Ms Gadd summed up and the claimant replied.
64. At the end of the hearing the claimant informed Mr White that there was documentary evidence he had been unable to obtain because he did not have access to his email account. Mr White agreed for the claimant to present this documentary evidence at a later stage. The claimant subsequently forwarded documents to Mr White after the hearing, which Mr White considered.
65. Mr White sent the claimant an appeal outcome letter on 4 April 2022. He set out the procedure that had been adopted. He went through each allegation and did not uphold any of the grounds of appeal. Mr White indicated that there were no further factors that would indicate a change in the original decision following the disciplinary hearing on 20 January 2022. He recognised the remorse the claimant expressed, but set out that the seriousness of the allegations left the Trust with no alternative options following the claimant's negligent actions. The original decision to dismiss was upheld.

66. Mr White considered that the number of the allegations in isolation were “more akin to general misconduct”. However, he considered that allegation 5 (the tourniquet) and allegation 3 (entering AGP areas) were sufficiently serious in themselves each to amount to gross misconduct.

a) In respect of allegation 5, Mr White considered that taking blood was a key and integral responsibility for the claimant, and that his actions had resulted in the bruising of a vulnerable patient who subsequently made a complaint. He described the claimant’s decision to leave a patient unattended with the tourniquet still on their arm to take a phone call as a “reckless one [which] demonstrated a lack of care towards the patient”. It would have taken a matter of minutes to have completed taking the blood.

b) In respect of allegation 3, Mr White pointed out that during the pandemic it became ingrained for staff to check and review the function rooms before entering. He observed that the claimant had been repeatedly challenged about entering these areas in breach of the AGP procedures. Mr White was concerned that the claimant was unable to see a large notice on the door but could see sufficiently to carry out intricate phlebotomy work on very small veins on patients. Mr White considered that the claimant’s actions place patients at unnecessary and unacceptable risk.

67. Mr White was concerned that the claimant’s behaviour had been challenged in relation to clinical issues and that he had made no attempt to rectify his behaviour or to learn from his mistakes. He considered that this presented a risk that the types of behaviour demonstrated by the claimant could be repeated. The environment the respondent operates is one in which they aim to deliver the highest standards of care to patients. Mr White considered that it was vital that the respondent could trust its employees to act appropriately.

Ms Adewodu

68. The claimant did not raise the issue during his disciplinary or appeal process, but in his ET1 alleged that in March 2021 a new member of staff was instructed by Ms Angus to monitor the claimant and inform her of any bad practice by the claimant. This individual was Ms Adewodu.

69. Ms Adewodu, in the email I treated as her witness statement, set out that on her third day at work Ms Angus asked her to report all of the claimant’s mistakes back to her. She said Ms Angus told her “Your job will be finished before it got started if I cannot spy on [the claimant]”. She said Ms Angus later asked her how things went with the claimant, and questioned her about login details. She also gave evidence of a bullying and harassment grievance she “*Won... against her on two different occasions*” which led her to resign.

70. I note from the grievance outcome attached to Ms Adewodu’s email that allegation that Ms Angus made an inappropriate comment in the first

week joining was “partially upheld”. The letter does not set out what this comment was. The outcome of an allegation relating to Ms Angus threatening that Ms Adewodu’s job would finish before it started was “No evidence”. An allegation of receiving a letter twice (the second time being when Ms Adewodu was off sick) to discuss Ms Angus’s allegation of insubordination was upheld. None of the other allegations was upheld. The conclusion was that “*the overall claim of Harassment and Bullying is not upheld*”.

The law

71. Under section 98(1) ERA 1996 it is for the employer to show the reason for the claimant’s dismissal, and that this is a potentially fair reason under section 98(2) ERA 1996. In this context, a reason for dismissal is “*a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee*” (*Abernethy v Mott, Hay & Anderson* [1974] ICR 323).

72. Potentially fair reasons include a reason relating to conduct (section 98(2)(b))

73. The approach to fairness of dismissal is governed by section 98(4) ERA, which provides: -

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

74. The EAT set out the approach to what is now section 98(4) ERA in *Iceland Frozen Foods v Jones* [1983] ICR 17.

(1) the starting point should always be the words of [s.98(4)] themselves;

(2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer’s conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer’s conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

75. Where the reason for the dismissal is misconduct, the approach to fairness is the test in *British Home Stores v Burchell* [1980] ICR 3

“First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”

76. It is important to focus on the wording of section 98(4) ERA, which does not set out a perversity test. It is for the tribunal to decide how serious the claimant's conduct was on the information available to the employer.

77. In *Mbubaegbu v Homerton University Hospital* UKEAT/0218/17 the EAT held that

“It is quite possible for a series of accident demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between an employer and employee. That may be so even if the employer is unable to point to any particular act and identify that alone is amounting to gross misconduct. There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely on a series of acts, none of which would, by themselves, justify summary dismissal”.

78. In considering a dismissal that is disciplinary in nature, the tribunal will have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures.

79. Under the principal in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 where there is a failure to adopt a fair procedure at the time of dismissal, dismissal would not be rendered fair just because the procedural unfairness did not affect the end result. Compensation can be reduced to

reflect the chance of dismissal taking place had a fair procedure been adopted.

80. Section 123(6) ERA provides that the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable where it finds that the dismissal was to an extent caused or contributed to by any action of the employee. This involves a finding that there was conduct “deserving of blame” by the employee *Sanha v Facilicom Cleaning Services Ltd* UKEAT/0250/18.

Conclusions

Reason for dismissal

81. It is not easy to say whether the claimant disputes the reason for dismissal. On the one hand during the disciplinary and appeal process he largely appeared to accept that his actions amounted to misconduct. However, in his claim form he refers to “*seven fictitious allegations which [Ms Angus] had carefully built up against me*”.
82. My findings are that Ms Gadd and Mr White, on examining the evidence before them, considered that the claimant had committed numerous acts of misconduct. Ms Gadd dismissed the claimant for reasons relating to conduct, and Mr White found that a reasonable decision.

Genuine belief on reasonable grounds

83. As set out above, the claimant accepted, to a large degree, what had been alleged against him. His appeal was, more or less, on the basis that dismissal was too harsh a sanction.
84. Ms Gadd was faced with largely undisputed evidence that the claimant had:
- a) Shared his log-in in breach of policy and procedures;
 - b) Entered AGP areas in breach of procedures;
 - c) Failed to follow correct reporting requirement set out in the absence management policy;
 - d) Left a patient with a tourniquet on their arm to take a phone call;
 - e) Failed to report the error in processing a drawn blood sample in a timely manner; and
 - f) Raised his voice in front of staff and patients.

85. This evidence was in the form of a thoroughly prepared investigation report which contained transcripts of meetings with numerous witnesses, policies and procedures, Datix reports, correspondence, WhatsApp messages, photos and other evidence.

86. Ms Gadd was clear in her evidence that she accepted the management case against the claimant. Indeed, she points out that the claimant largely accepted the case against him, but focused on apportioning blame to his manager or existing practices. Ms Gadd expressly sets out her belief that the claimant had committed the misconduct as alleged. I accept her evidence on this.
87. Given that the evidence was largely unchallenged, but also given the fact that it was cogent and coherent I accept that there were reasonable grounds upon which Ms Gadd sustained her belief.

Reasonable investigation and procedure

88. The claimant made no specific challenge to the procedure adopted by the respondent. Nonetheless, I examine it having regard to the *ACAS Code of Practice on Disciplinary and Grievance Procedures 2015*.
89. The matters which formed the basis for the disciplinary action took place during the course of the summer and early autumn of 2021. This was against a backdrop of a difficult line management relationship between the claimant and Ms Angus, and previous management action in relation to pre-printing of labels. An investigation was commissioned in September 2021, and Ms Berry investigated during the course of October and November 2021. She prepared a report by 17 December 2021. An investigation was therefore carried out without any delay to establish the facts of the case.
90. The claimant was notified of the case against him in detail by providing him with Ms Berry's report and the attached evidence. He was therefore satisfactorily informed of the case he was to meet.
91. The claimant was given the opportunity to be accompanied at the disciplinary hearing chaired by Ms Gadd. This was held without unreasonable delay, and the claimant was given sufficient time to prepare his case. Ms Berry went through the evidence, and the claimant was given a reasonable opportunity to challenge it. He was given the opportunity to call witnesses, but he only notified HR of his desire to call witnesses the day before the hearing. He confirmed that the hearing that he was prepared to go ahead.
92. After the disciplinary hearing the claimant was provided with a written outcome and given the opportunity to appeal. He appealed and his grounds of appeal were considered at an appeal hearing. An outcome is provided.
93. The process overall complied with the ACAS Code and I was not taken to any alleged breach of the respondents own procedures. I find that the investigation and the process, as a whole, fell within the band of the reasonable responses open to a reasonable employer.

Reasonable sanction

94. This was the area the claimant focused on during his appeal, and to a large degree during the hearing.
95. I remind myself that my function is to assess whether the decision to dismiss fell within the band of reasonable responses. While I am not to substitute my opinion for that of the employer, it is part of my function to look at the seriousness of the alleged misconduct in order to decide whether dismissal for it falls within a band of reasonable responses.
96. Some of the allegations would not of themselves have amounted to gross misconduct or justified dismissal for those acts alone. However, I accept Mr White's evidence that allegation 3 and allegation 5 by themselves could amount to gross misconduct. These were "*Any act of sufficiently serious nature to endanger the well-being of a patient; Non-compliance with safety, health or fire rules are such non-compliance would pose a serious risk to themselves or others, and where the rules have been known to staff*".
97. The claimant made the point, in respect of allegation 2, that the head of department, Dr Donovan, did not appear to view the claimant's actions seriously. In this instance Dr Donovan did not take a serious view, but Ms Angus, Ms Gadd and Mr White did. The band of reasonable responses test acknowledges that different employers might act differently in the face of the same circumstance, and each reaction might be reasonable. Similarly there may be different points of view within an organisation. The other point to make was that this was one of six proven allegations.
98. The claimant suggested Ms Mortimer's email dated 3 November 2021 suggested that DATIX reports were about lessons learned rather than disciplinary matters. I do not accept this. The DATIX report itself refers to the patient complaining, several bruises been evident on his arm and the tourniquet being tight around the patient's arm.
99. I accept Ms Gadd's evidence that this was a case where there was a cumulation of misconduct. Ms Gadd took the view that the totality of the evidence suggested the claimant repeatedly disregarded the respondent's processes and procedures to act in his own self-interest. I accept her evidence that these procedures are important in protecting both workforce and patients. I also accept Ms Gadd's evidence that the totality of evidence suggested a lack of respect for the claimant's manager. I also accept the respondent's evidence that allegations 3 and 6 had the potential to compromise patient safety. I accept the respondent's evidence that circumstances behind allegation 4 actually did compromise patient safety and led to a minor injury of the patient.
100. Putting this together I find that the respondent's conclusion that the cumulative misconduct it found was sufficient to destroy the relationship of trust and confidence between the parties was one that was open to a reasonable employer. The decision fell within the band of reasonable responses in all the circumstances of this case. Or, to put it

in the terms of section 98(4) ERA, the respondent did not act unreasonably in treating the misconduct it found as a sufficient reason for dismissing the claimant.

Overall conclusion

101. I do not find that the claimant was unfairly dismissed. In the circumstances I do not need to consider the question of *Polkey* or contributory fault. I would point out that had I done so I would have undoubtedly found a large element of fault which would have reduced compensation substantially.

Employment Judge **Heath**

9 September 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12 09 2022

FOR EMPLOYMENT TRIBUNALS