EMPLOYMENT TRIBUNALS

Claimant: Mrs Julie Higham

Respondent: NM Health Innovation Limited

Heard at: Manchester (by CVP) **On:** 21, 22 & 23 June 2022

Before: Judge Cowx (sitting alone)

REPRESENTATION:

Claimant: Mr Joshua Cainer of Counsel
Respondent: Mr Sonny Jagpal, Consultant

RESERVED LIABILITY JUDGMENT

1. The claimant's claim of unfair dismissal contrary to Section 98 of the Employment Rights Act 1996 ("the ERA 1996") is well founded and succeeds. The claimant was unfairly dismissed.

2. It is not just and equitable for any compensatory award to be made to the claimant pursuant to the principle in *Polkey v AE Dayton Services* [1987] IRLR 503.

3. It is not just and equitable for any basic award to be made to the claimant pursuant to Section 123(6) of the ERA 1996 because her dismissal was entirely caused by her own blameworthy action.

4. The claimant's claim of unauthorised deduction from wages contrary to Section 13 of the ERA 1996 is well founded and succeeds. The respondent is ordered to pay the claimant the sum of £150.08**.**

REASONS

5. This was a final hearing conducted remotely by CVP on 21, 22 and 23 June 2022. The parties did not object to the case being heard remotely.

6. The claimant brought the following claims against the respondent:

a. Unfair Dismissal on the basis that to dismiss her on grounds of conduct was unreasonable and therefore contrary to Sections 94 and 98 of the ERA 1996.

b. Unauthorised deduction from wages contrary to Section 13 of the ERA 1996, in that the respondent's dismissal letter dated 30 June 2021 was not received by the claimant until 2 July 2021 and that she was eligible to be paid up to the latter date.

7. On the morning of the first day of the hearing, Mr Cainer confirmed that the unfair dismissal claim was based on conduct and not motivated by the claimant's terms and conditions as averred in the claimant's claim form.

8. Prior to the hearing the Tribunal was provided with an electronic core bundle containing 81 documents and running to 397 pages. Also served were a supplementary bundle of 10 documents running to 67 pages, an amended Schedule of Loss of 7 pages, a witness statement by the claimant and witness statements by Mrs Tracy Muttucumaru, Mrs Naila Nisar-Butt and Mrs Jacqui Chester for the respondent.

9. The parties agreed the following list of liability issues:

1). Was the claimant dismissed? If so:

(a) What was the date when the claimant's employment contract terminated as a matter of contract law?

(b) What was the Effective Date of Termination (EDT) under Section 97 ERA 1996?

The claimant maintains that the relevant date for both Issues 1(a)-(b) is 2 July 2021 which is when she received the letter informing her of dismissal. The respondent maintains that the relevant date for Issue 1(a) is 30 June 2021 and that the relevant date for Issue 1(b) is 2 July 2021

2). What was the reason for dismissal? Was this a potentially fair reason under Section 98(2) ERA 1996?

The parties agree that the reason for the claimant's dismissal was conduct (Section 92(2)(b) ERA 1996).

3). If the reason for dismissal was the claimant's misconduct, the Tribunal shall apply the test set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379 and ask whether, at the time of the dismissal:

(a) Did the respondent have a genuine belief in the acts of misconduct alleged against the claimant?

(b) If so, did the respondent reach that belief on reasonable grounds?

(c) If so, had the respondent reached that belief after carrying out a reasonable investigation?

4. If the dismissal was for a potentially fair reason, did the respondent follow a fair procedure both by reference to the test set out in Issue 3 and generally?

5. If the dismissal was for a potentially fair reason, in all the circumstances, did the respondent act fairly and did the dismissal fall within the range of reasonable responses?

6. If the Tribunal finds that there was some procedural unfairness in the claimant's dismissal, to what extent does the Tribunal consider that she would have been dismissed in any event (s.123(1) ERA 1996 and *Polkey v Dayton Services Ltd* [1987] ICR 142)?

FACTS

10. I find the following facts.

11. The respondent is a Lancashire based limited company which runs General Practice (GP) surgeries at six sites, including the Croston Medical Centre and the Village Surgery, Lostock Hall.

12. The claimant qualified as a nurse in 1987 and was employed as a Practice Nurse at the Lostock Hall Village Surgery from 2 November 1998. In 2019 the claimant's employment was transferred to the respondent under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), when the Lostock Hall Village Surgery merged with other GP surgeries.

13. The claimant is an experienced nurse with no history of previous disciplinary warnings or complaints.

14. One of the claimant's duties was to carry out cervical screening smears.

15. Mrs Tracy Muttucumaru is an Advanced Nurse Practitioner and Nurse Manager employed by the respondent. Mrs Muttucumaru job-shared the role of Nurse Manager with her twin sister, Mrs Jacqui Chester, who is also an Advanced Nurse Practitioner. Mrs Muttucumaru and Mrs Chester were the claimant's line managers.

16. Mrs Muttucumaru carried out the disciplinary investigation which concluded with the claimant's dismissal.

17. Mrs Chester heard the claimant's appeal against the dismissal decision and upheld that decision.

18. Mrs Naila Nisar-Butt was the disciplinary hearing decision maker in relation to the claimant and made the decision to dismiss the claimant.

19. On 3 February 2021, patient SB attended the Croston Medical Centre for a smear test. SB was invited to attend by the practice on the basis it was believed she was due for a test. The claimant was tasked with carrying out the test but having taken the smear the claimant became aware that SB should not have had the smear because she had recently undergone a gynaecological procedure. The claimant informed SB that the smear would have to be discarded and that she would have to wait a further 12 weeks before she could have the test done.

20. On 8 February 2021, patient SB sent an email to the respondent, which included a complaint about the claimant. SB alleged that the claimant was unprofessional, asked her if she was due for a smear test, to which SB answered "Yes". As SB was removing her trousers, SB told the claimant "I had a procedure done in November." It was alleged that the claimant took the smear without reading SB's notes. According to SB, it was only after taking the smear that the claimant looked at her notes and realised the smear should not have been taken because the gynaecological procedure may affect smear results.

21. The respondent delegated the investigation of this complaint to Mrs Muttucumaru. The investigation included checking patients' records for smear test appointments. Mrs Chester assisted Mrs Muttucumaru by downloading smear appointment information for a number of patients on the respondent's IT system, "Open Exeter".

22. Mrs Chester spoke to SB on the telephone on 10 February 2021, but not as part of the investigation. The call was a medical triage call, during which SB allegedly made further allegations against the claimant that the smear carried out was very rough and painful, and also that the claimant had told her she had already discarded one other smear earlier that day.

23. Mrs Muttucumaru conducted an initial investigation meeting with the claimant on 12 February 2021, during which the allegations of the unnecessary swabs from SB and possibly others was put to the claimant together with the allegation that the swab procedure was not carried out correctly because no lubrication was used. The claimant was suspended shortly after this meeting.

24. An audit of smear tests carried out by the claimant was conducted by Ms Debbie Whiteside, the local CCG smear mentor.

25. A second investigation meeting with the claimant took place on 22 March 2021 and a third and final investigation meeting took place on 7 May 2021. At the second and third meetings the parameters of the investigation were widened to include allegations that a painful smear had been carried out on a 61 year old patient ("Patient 61"), without the use of lubrication; poor control of patient personal

information by the claimant taking home her smear log and burning it by mistake; failing to complete a smear audit; and putting a false entry on Patient SH's records that a smear had not been taken when it had been taken.

26. During the investigation process, the claimant was aware of the allegations made against her and responded to those allegations, in the form of written and verbal responses. In response to the complaint made by SB and the discarded smear, the claimant volunteered information about one other patient (The Reflective Patient), referred to her by a GP for a swab. The claimant was unable to access the patient's records and only after the procedure did she discover the patient was not due a smear. The claimant discarded the smear as it would be rejected by the laboratory and she informed the patient of this by telephone.

27. Written statements were not taken from any of the patients it was alleged the claimant treated incorrectly. Their evidence was either recorded in patient records, which was not disclosed to the claimant, or presented second-hand to the claimant as hearsay.

28. The claimant was unable to access the respondent's P-Drive to read various policy documents, including those on data protection. However, such policy documents were available to the claimant by other means.

29. On 20 May 2021, Mrs Nisar-Butt wrote to the claimant instructing her to attend a disciplinary hearing on 24 May 2021. That letter included the five misconduct allegations preferred by the respondent and which, it is averred, amounted to gross misconduct capable of leading to dismissal if proved. The claimant did not accept the allegations as put by the respondent although she did accept there were some learning and improvement points for her practice. The respondent found that the proven allegations cumulatively amounted to gross misconduct.

30. The allegations are summarised as follows:

a. Failing to follow the correct process when taking cervical smears in regard to two patients: Patient SB and the Reflective Patient.

b. Failing to follow the expected practice of using lubrication when carrying out examinations, causing discomfort and pain.

c. Failing to follow smear audit policy by not completing smear audits from April 2020 to March 2021.

d. Poor control of confidential information or patient identifiable information, which was taken home and burned "…*in breach of practice and NMC IG and data protection policies and GDPT training*."

e. Incorrectly updated or falsified patient records by recording that a smear was not performed when it was but was then discarded.

31. The disciplinary meeting was postponed and took place on 16 June 2021. Mrs Nisar-Butt wrote to the claimant on 30 June 2021 informing her that she had found

all five allegations to be proved, that her conduct was found to amount to gross misconduct and a gross breach of trust, resulting in the respondent company losing all faith in the claimant's integrity in her role of Practice Nurse. Mrs Nisar-Butt informed the claimant that she was dismissed with immediate effect.

32. In regard to Allegation 1, Mrs Nisar-Butt found that the claimant failed to review patient SB's care records and as a result, failed to spot the letter which explained that SB had undergone a gynaecological procedure in November and failed to ask the relevant pre-treatment questions which would have prompted the patient to divulge information about the procedure.
33. In response to Patient SB and Allegation 1, the claimant asserted that she did read the patient's records before beginning the smear but did not see the letter referring to the gynaecological procedure. She said it was an error and when reflecting on the incident, said she would take greater care in future.

34. In regard to the unnamed Reflective Patient, the claimant was asked to carry out a smear on the patient and was unable to access the computer system to check that she had been correctly invited to the surgery for a smear. The claimant trusted the word of the patient rather than delaying or deferring her appointment and later learned the patient's smear test was not due.

35. In regard to Allegation 2, the respondent found that the claimant had seriously failed in her duty, in that she did not following the correct cervical smear procedure by failing to use a gel lubricant. In reaching this conclusion, Mrs Nisar-Butt rejected the evidence of Mr Mark Terry, an experienced cytology trainer, involved in the training of those involved in cervical smear testing. Mr Terry's opinion was that gel lubricants are to be avoided because it is possible they may interfere with the cellularity of cervical samples. The respondent rejected Mr Terry's opinion because he was not a practising clinician and because the respondent felt greater weight should be given to local CCG guidance.

36. In regard to Allegation 3, Mrs Nisar-Butt found that the claimant had failed to complete a smear audit for April 2020 to March 2021. However, did produce a smear audit for the period 1 October 2019 to 30 September 2020. A copy of this document appears at page 148 of the core bundle. It shows that the purpose of audit is to monitor the effectiveness of the cervical screener in the national screening programme. It also shows that the audit formed part of the claimant's revalidation evidence which formed part of her revalidation folder which was due in October of each year. The claimant's next audit was not due until 30 September 2021.

37. The claimant said in evidence that she had not begun to prepare an audit for the period 1 October 2020 onwards because she had mistakenly burned her written smear log which contained the necessary data. However, it was possible to find the necessary data to make up the audit by searching patient records if necessary. This would be a time consuming exercise, but Ms Whiteside used that method in producing an audit of the claimant's smears for the respondent.

38. In regard to Allegation 4, Mrs Nisar-Butt found that the claimant was in breach of policy and practice by taking her smear log home with her and burning it, thereby exercising poor control over confidential information. Although the information was

limited to dates and NHS numbers, the information was confidential and sensitive as it could have led those with access to NHS systems to identification patients who had undergone smear tests. The respondent considered this to be a data breach, however, it did not go on to assess the seriousness of that breach, for example by assessing the culpability of the claimant and the harm or potential harm caused by the loss of the data. In mitigation, the claimant said that because she regularly worked at different sites, she was required to have the log with her, but accepted that she should not have burned the log and that it was done in error when she was destroying other unwanted material at home.

39. In regard to Allegation 5, Mrs Nisar-Butt rejected the claimant's version of events, which is that she did not take a smear from Patient SH, only a swab, which is a different procedure. The claimant insisted that she was accurate in marking up the patient's record "Smear not Performed", because she had not taken a smear. However, SH said she knew from experience the difference between a smear and a swab, the two procedures being described by Mrs Muttucumaru. Mrs Nisar-Butt preferred the evidence of SH over the claimant and found that the entry in the patient's record was incorrect.

40. A further ground given by the respondent for suspecting the claimant had falsified SH's record was the fact there were three separate time stamped entries for SH's appointment: the first at 11:30, the second at 11:55 and the third at 12:30, suggesting to the respondent that the record had been amended after the 20-minute appointment, which was the duration of such appointments according to Mrs Muttucumaru.

41. On 23 July 2021, Mr Brian Hann, Business Operations Manager at the respondent company, wrote to the claimant informing her that her appeal hearing would be heard by Janice Threlfall, a Nurse Practitioner independent of the respondent. That hearing did not go ahead and was rearranged for 13 August 2021. The appeal on 13 August 2021 was heard by Mrs Chester.

THE LAW

42. The relevant law is to be found in the ERA 1996 at:

Section 13

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

> (a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> (b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*

Section 94

(1) *An employee has the right not to be unfairly dismissed by his employer.*

Section 98

(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a) *the reason (or, if more than one, the principal reason) for the dismissal, and*

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) *A reason falls within this subsection if it—*

(a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

(b) *relates to the conduct of the employee,*

(c) *is that the employee was redundant, or*

(d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

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

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

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

41. Counsel also referred me to a number of authorities which included *British Home Stores Ltd v Burchell* [1978] IRLR 379.

APPLYING THE FACTS TO THE LAW

Unfair Dismissal

42. The test to be applied in conduct cases such as this is the *Burchell* test, which is in four parts. Firstly, did the employer have a genuine belief in the misconduct alleged? Secondly, did the employer reach that belief on reasonable grounds? Thirdly, was that reasonable belief formed following a reasonable investigation? Fourthly, did the dismissal of the claimant fall within the range of reasonable responses open to the employer in light of the proven misconduct?

43. The respondent had reasonable grounds which formed a genuine belief that the claimant carried out a cervical smear on Patient SB when she should not have done because a gynaecological procedure some months prior meant the due date for her smear had to be delayed. The reasonable grounds were provided by Patient SB who emailed the respondent complaining amongst other things that her smear had to be discarded and that the claimant had not checked her records before starting the procedure. A check of SB's records showed that she was indeed not due for a smear which gave the respondent the genuine belief the claimant had done something wrong.

44. This first allegation caused the respondent to quite properly begin a preliminary investigation into that allegation. That investigation uncovered evidence of other potential misconduct or performance issues, which formed the basis of Allegations 2 to 5.

45. The respondent is a relatively small business which runs GP practices. It cannot be expected to conduct an investigation to the same standard as a much larger organisation with its own experienced investigators or with the resources to employ independent investigation consultants. Notwithstanding that, the investigation that was carried out was fair and reasonable in all the circumstances. It was proportionate in terms of its scope. The main lines of enquiry were followed. Although first hand accounts were not taken from those patients the claimant was alleged to have interacted with incorrectly (save for SB's email), their evidence was produced in the form of hearsay which was then put to the claimant. The respondent also relied upon patient records, an audit of the claimant's smear tests, policy documents and other documents showing that the claimant had undergone update training on the taking of smears and data protection.

46. Having conducted a reasonable investigation, did the respondent have a genuine belief that the claimant was guilty of the five heads of misconduct averred, based on reasonable grounds?

47. Allegation 1. It is submitted on the claimant's behalf that the respondent unreasonably ignored the claimant's consistent evidence that she did check SB's records before beginning the smear. I find that the respondent did not act unreasonably in this regard. The claimant's evidence on this point was internally consistent, that is to say, she repeated the assertion she checked SB's records, but provided no evidence to support that assertion. It was not unreasonable for the respondent to prefer SB's evidence over the claimant's. SB's evidence is clearly set

out in her complaint email of 8 February 2021, which is that the claimant did not look at her records until after the smear was taken. SB made that assertion because that is what she claimed she observed. SB's account is also a plausible reason why the claimant did not see the gynaecological letter and it was not unreasonable therefore for Mrs Nisar-Butt to conclude that the reason it was not seen by the claimant was because she did not check the patient's record at all.

48. It is submitted on the claimant's behalf that the respondent did not attribute any blame to patient SB for failing to disclose the gynaecological procedure which, it is submitted, was a mitigating factor not taken into account by the respondent. It was not unreasonable for Mrs Nisar-Butt, as the fact finder, to reject the suggestion that SB was partly to blame. SB's evidence was that she told the claimant she had undergone a procedure the previous November and one would reasonably expect a Nurse Practitioner, experienced in taking smears, to ask further questions about that procedure. It was not unreasonable of Mrs Nisar-Butt to find that the claimant did not ask the relevant questions which would have identified the procedure that acted as a bar to the smear.

49. The respondent could reasonably view that the claimant was lax in the way she carried out the smear procedure with SB. The respondent reasonably concluded that she did not carry out the required pre-screening checks which would have identified that SB was barred from having a smear taken at that time.

50. In regard to the Reflective Patient and Allegation 1, the respondent reasonably concluded the claimant should not have carried out the smear without checking the patient's records, but the claimant did not give the claimant credit for her unchallenged mitigation, which was that she could not access the computer system at that time and because the claimant did not want to cause the patient inconvenience by further delay or deferral to a later date.

51. The respondent did not acknowledge that other employees or the respondent's system of work were also at fault, in that someone else was responsible for inviting patients to attend the surgery for smear tests and did not identify that SB and the Reflective Patient were not due to have smears taken. But for that error, the claimant would not have gone on to make the errors she made.

52. In regard to Allegation 1, the first three stages of the Burchell test are answered in the affirmative. The allegation was reasonably investigated, and there were reasonable grounds to provide a genuine belief that the claimant had done something wrong. The respondent's witnesses were unanimous that each allegation, when considered separately, was so serious and led to such a breakdown of trust and confidence, that each merited dismissal by itself. I have therefore considered whether dismissing the claimant was within the range of reasonable responses to Allegation 1. I am careful not to substitute my own view as to what the appropriate outcome should have been, and I rely on the evidence that was before the respondent at the time when considering the reasonableness of its response.

53. When viewed in isolation, the mistakes made by the claimant, which is what they were rather than intentional wrongdoing, were not so serious that they could be labelled gross misconduct and worthy of dismissal without notice. In regard to

Patient SB and the Reflective Patient, the claimant's performance fell below the standard expected of an experienced Nurse Practitioner. Although she refused to admit the full extent of her mistake in not reviewing SB's records, instead limiting her admissions to overlooking the gynaecological letter, in all the circumstances known to the respondent, dismissal was not a response that falls within the band of reasonable response.

54. The respondent's discipline policy makes clear that sub-standard performance may lead to dismissal but goes on to say that most cases of poor performance may be dealt with by informal advice, coaching and counselling. Where there is no improvement, or the matter is a serious one, an employee be invited to a disciplinary meeting. The policy gives a list of possible outcomes from a disciplinary meeting, starting with an Oral Warning, then Written Warning, Final Written Warning, and then Dismissal.

55. The respondent's policy also give a list of "offences" which are considered to amount to gross misconduct. Although the list is not exhaustive, I do not agree with Mr Jagpal that the conduct founding Allegation 1 equates to serious negligence which caused or might have caused unacceptable loss, damage or injury. Whilst the procedure carried out by the claimant may have been uncomfortable and perhaps painful, it was not suggested what the claimant caused or might have caused injury. The extent of her mistake was carrying out a necessary medical procedure at the wrong time. As a consequence, the patients would have to go through the procedure at a later date. I do not minimise the fact both women would have had to go through the unpleasant procedure a second time in order for a usable smear to be taken, but the respondent's suggestion that the claimant's conduct amounted to an assault (more correctly a battery) is unfounded given the touching could not be said to be unlawful or that the claimant possessed the necessary *mens rea* for a battery.

56. On the evidence before the respondent, a reasonable response would have been one of the alternative outcomes provided in its own discipline policy, together with advice, coaching or counselling. To settle on dismissal, without any consideration for remediation in the alternative, was an extreme and disproportionate response to the mistakes made by the claimant, especially given her clean disciplinary and performance record over the preceding 24 years.

57. Allegation 2. It was not reasonable for the respondent to dismiss Mr Terry's opinion simply because he was not a practising clinician and because his opinion was inconsistent with that of the local CCG smear mentor. No apparent consideration was given to Mr Terry's knowledge, skills and experience, which was evidently that of a specialist who understood the adverse effects gel lubricants may have on cellular samples. It was not reasonable to reject his evidence simply because local expertise was preferred.

58. For her appeal hearing, the claimant produced further specialist evidence from cytologists in other parts of the country, which Mrs Chester similarly dismissed for the sole reason she believed the local guidance of Ms Whiteside had to be given precedence. The respondent acted unreasonably in dismissing the additional cytology evidence without proper consideration.

59. In choosing not to use gel lubricants, instead preferring to use water of natural secretions, the claimant was acting in accordance with advice and guidance from respected professional sources, which contradicted the approach the respondent averred was the correct approach. Because there was a respected body of opinion which supported the way in which the claimant carried out smear tests, the respondent did not have reasonable grounds to form a genuine belief that the claimant had committed gross misconduct in the way she took smears.

60. The respondent was entitled to challenge the way in which the claimant carried out the smears without lubrication and it was entitled to insist that she adopted the local practice advocated by Ms Whiteside, but the decision to dismiss the claimant without any opportunity to conform to the preferred methodology, was a response outwith the band of reasonable responses.

61. Allegation 3. On the evidence before the respondent, there was no basis upon which it could find that the claimant's smear audits were missing. She produced her audit for the period 1 October 2019 to 30 September 2020 and the audit for the following period was not due until 30 September 2021. Mrs Nisar-Butt's letter of 30 June 2021 informing the claimant she was dismissed, did not include a finding for Allegation 3. She dealt with Allegations 3 and 4 under the same heading but made reference to the burning of the smear log only. Notwithstanding the absence of a finding for Allegation 3, the inference taken from the letter as a whole suggests Mrs Nisar-Butt found it to be proved. Such a finding was not a reasonable response by the respondent because the claimant had produced her audit for part of the period in question and the audit for the remainder was not due until she submitted her revalidation paperwork at the end of September or early October 2021.

62. Allegation 4. The claimant did not dispute the fact she was wrong to burn the smear log and that her actions amounted to a data breach for which she apologised. In mitigation she claimed that she was unaware of certain data protection policies, and much was made of the fact she did not have access to the respondent's P Drive where she would have found various policy documents, including those on data protection. I give little weight to that argument on the basis the claimant had many years of experience as a Nurse Practitioner. She would therefore have understood the importance of protecting patient data and had previously undergone data protection training. By itself, the respondent formed the view this allegation was worthy of dismissal, but such a view was unreasonable in the circumstances.

63. The respondent did not provide any cogent evidence that it carried out any assessment of seriousness of the data breach which was required by its own policy and by data protection rules generally. The loss of personal data, in the form of patients' NHS numbers, did amount to a breach, but in order to decide the seriousness of the claimant's misconduct it was necessary to determine the seriousness of the data breach. In evidence, Mrs Nisar-Butt said that she did not carry out any form of assessment of the level of seriousness of the data breach. There was no evidence before the Tribunal that the respondent reported the breach to the ICO or informed patients of the breach as it was required to do if there was any risk of harm following the loss of the data. I therefore conclude that the respondent did not consider the breach to be of a particularly serious kind and this is

consistent with the nature of the material in question, which was NHS numbers only, that did not fall into unauthorised hands because they were destroyed. No harm was caused or could have been caused by their destruction because the same data was preserved on the respondent's IT systems.

64. Whilst admitting her error, the claimant had significant mitigation for her mistake. It was unrealistic to criticise her for removing the patient data from the surgery when she was an itinerant employee, required to work at different locations and it was reasonable therefore to take items such as her smear log with her and to have it in her work bag at home. It was the claimant's responsibility to safeguard the log and her error was to burn the log by mistake, but it was accepted by the respondent to be a genuine mistake and no harm was caused. In all the circumstances, dismissal for this incident, when viewed in isolation, was not within the band of reasonable responses open to the respondent.

65. Allegation 5. The facts of this allegation were in dispute. The respondent's assertion was that the claimant falsified Patient SH's records by stating that a smear had not been taken when it had been but was then discarded by the claimant. The claimant's defence was that the record was accurate in that she did not take a smear, only a swab, and that SH mistakenly believed the swab was a smear.

66. The respondent rejected the claimant's version of events, preferring that of SH. Mr Cainer contended that the respondent acted unreasonably in so preferring the account of SH. I find it was not unreasonable for the respondent, in the form of Mrs Nisar-Butt as the discipline hearing deciding body and Mrs Chester as the appeal body, because as the factfinders they were entitled to assess the evidence of both the claimant and SH and apply their own judgment when attributing weight to that evidence. As a women who had undergone smear tests in the past, SH said that she knew the difference between the smear procedure and the swab procedure. Mrs Muttucumaru assisted the Tribunal by describing those quite different procedures, emphasising the former is likely to be more uncomfortable for a patient. SH did not need to be a clinician to know the difference between a smear and a swab when it was being performed on her.

67. It was the respondent's case that the claimant had edited SH's record at 11:55 and 12:30 because the IT system labelled the activity as "editing". Mrs Chester accepted that by simply entering the patient's record the system will mark such an entry as editing when in reality no editing or amendment may have been done. The claimant asserted that she was at a disadvantage because she was not provided with copies of the relevant entries in SH's record for the smear/swab consultation. The claimant should have been shown the entries so that she could comment on them, but I do not find that this failure made the disciplinary process as a whole unfair. The claimant was able to deny amending the record even though she could not furnish any additional explanation for going back into the patient's records.

68. Even in the absence of an explanation from the claimant, the fact she went back into the patient's records was a ground for reasonable suspicion. The respondent pursued this line of investigation because SB, another patient who had undergone a premature smear test, told Mrs Chester that the claimant had told her she had already discarded one other smear earlier that same day. Mrs

Muttucumaru's investigation revealed SH had a smear and a swab taken on 3 February 2021 by the claimant, and in a telephone conversation SH told Mrs Muttucumaru that the claimant telephoned her later that same day and told her the smear would have to be discarded.

69. SB's evidence that the claimant told her she had already discarded one sample that day, SH's evidence that she had a smear taken on that day and was later informed by the claimant it had been discarded, together with the three separate occasions when the claimant entered SH's record for the same consultation, was all reasonably capable of satisfying the respondent's decision makers, on the balance of probability, that the claimant had indeed falsified SH's patient record.

70. There was no evidential basis for finding Allegations 2 and 3 proved for the aforementioned reasons. When assessed jointly and severally, Allegations 1 and 4 were not sufficiently serious to justify summary dismissal. The evidence before the respondent was that the claimant's performance was sub-standard in not properly checking patient records or not at all. According to the respondent's own disciplinary policy, sub-standard performance would normally not lead to summary dismissal without first affording the claimant an opportunity to remediate her mistakes. The data breach was not assessed by the respondent as a particularly serious breach which suggests an outcome short of dismissal was appropriate.

71. However, the respondent was reasonably entitled to decide that proven Allegation 5 was so serious by itself that summary dismissal was the appropriate outcome. I concur that intentionally altering a patient's record to cover up a mistake, which I find the claimant did, was such a serious example of misconduct that it amounts to gross misconduct and dismissal was within the band of reasonable responses. Such misconduct, when viewed individually or collectively with Allegations 1 and 4, provided the respondent with legitimate grounds for concluding it had lost trust and confidence in the claimant to such a degree that her employment had to be terminated.

72. I find for the above reasons that the respondent did fairly dismiss the claimant for the reason set out at subsection 98(2)(b) of the ERA, namely conduct.

73. I have considered the claimant's assertion that her dismissal was procedurally unfair. The investigation into the claimant's conduct was reasonable for the reasons set out at paragraph 45 above. It was contended that Mrs Chester actively participated in the investigation and should therefore not have acted as the appeal body. I do not agree that she investigated the allegations she later had to consider as the appeal body. She did speak to SB and recorded what she had to say about the smear being uncomfortable and what the claimant told her about throwing away another smear on the same day hers was also discarded. However, Mrs Chester spoke to SB not as part of the investigation but for an unrelated clinical reason. Mrs Chester was unaware of SB's complaint at that time.

74. Mrs Chester did assist her sister, Mrs Muttucumaru, by providing her information on a number of patients requested by Mrs Muttucumaru. Providing such information did not equate to investigating the matter. For illustration by comparison, it could not be said that Mrs Chester had acted as an investigator if she had provided

the same information to the police. I find that the disciplinary procedure did conform to the ACAS Code of Practice on Disciplinary and Grievance Procedures, save for the exception below.

75. What was procedurally unreasonable, was appointing Mrs Chester to be the person deciding the claimant's appeal. Mrs Chester could not, on an objective view, be considered impartial, which is a requirement of the ACAS Code of Practice on disciplinary procedure.

76. Mrs Muttucumaru and Mrs Chester are twin sisters who live together. Mrs Muttucumaru investigated the allegations. It was her findings that led to the decision to take disciplinary action against the claimant. I find it is more likely than not that Mrs Muttucumaru's status within such a relatively small organisation and her considerable experience must have been a significant factor in the respondent's decision to bring disciplinary proceedings. Inevitably in such a small organisation, true independence between investigator and decision maker was likely to be absent. Therefore, the fairminded and informed observer must conclude there was a real possibility that Mrs Chester would be biased in favour of her twin sister's findings.

77. The respondent understood the need to have an independent person conducting the appeal when it first identified Janice Threlfall for the task. It must then have recognised that Mrs Chester was not an appropriate and fair choice of appeal body. For this reason, the appeal stage of the process was procedurally unreasonable, and the dismissal was procedurally unfair.

78. Although the dismissal was procedurally unfair, I am satisfied the outcome would have been the same if Janice Threlfall or some other independent person had heard the appeal. Mr Cainer suggested that one of the GPs in the practice could have heard the appeal. I sure that that a GP, or any other person independent of the preceding stages of the disciplinary proceedings, would have reached the same decision as Mrs Chester: that falsifying SH's record of the smear test was gross misconduct, and that dismissal was the appropriate outcome.

79. It was argued on the claimant's behalf that her long and unblemished record was not taken into account and that if it was, dismissal would not have followed. The respondent's evidence was that the claimant's good character and length of service was taken into account but that her conduct was so serious that it did not alter the respondent's decision to dismiss. In the circumstances, and given the gravity of the misconduct, the respondent's decision that mitigation made no material difference to outcome was a reasonable one.

80. The decision to dismiss the claimant by reason of conduct was substantively fair, but technically unfair on a point of procedure in that the appeal should have been heard by someone other than Mrs Chester. Notwithstanding the procedural unfairness, the claimant would still have been dismissed for the substantive conduct reason.

81. I therefore uphold the claimant's claim of ordinary unfair dismissal on the procedural basis only and dismiss the claim that it was substantively unfair because I

find the reason for the dismissal was her conduct as an employee in accordance with Section 98(2)(b) of the ERA 1996.

82. It is not just and equitable for any compensatory award to be made to the claimant pursuant to the principle in *Polkey v AE Dayton Services* [1987] IRLR 503 because I find that the claimant would have been dismissed for altering a patient's records to cover up her mistake and therefore a 100% reduction in the compensatory award is appropriate and I order the same.

83. It is not just and equitable for any basic award to be made to the claimant pursuant to Section 123(6) of the ERA 1996 because her dismissal was entirely caused by her own blameworthy action, namely altering the patient's records and I order a 100% reduction in the basic award because of the claimant's contributary fault.

84. Deduction from Wages. The claimant claims that her dismissal was not complete until 2 July 2021, which is the day when she received the respondent's dismissal letter dated 30 June 2021. Mr Cainer relied upon the judgment of Lloyd LJ in the case of *Gisda Cyf v Barratt* [2009] EWCA Civ 648, [2009] ICR 1408 which supports the principle advanced by the claimant. At the hearing, Mr Jagpal did not challenge Mr Cainer's submission that the dismissal was not effected until the letter arrived on 2 July 2021. In the absence of contrary argument and authority, I agree with Mr Cainer that Lloyd LJ's test is the correct test and that the claimant was not dismissed until 2 July 2021.

85. The claimant's claim of unauthorised deduction from wages contrary to Section 13 of the ERA 1996 is well founded and succeeds. The claimant is entitled to the one day's pay of £150.08 net as claimed, on the basis she was a part-time employee and would only have worked on one day in the period 1 and 2 July 2021.

86. The respondent is ordered to pay the claimant the sum of £150.08**.** This figure has been calculated using gross monthly pay and the respondent is to deduct from that amount the required sum payable to HM Revenue and Customs for Income Tax and National Insurance.

Judge C J Cowx
12 July 2022

REASONS SENT TO THE PARTIES ON
14 July 2022

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2411505/2021**

Name of case: **Mrs J Higham** v **NM Health Innovation Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 14 July 2022

"the calculation day" is: 15 July 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.