



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Stillman

Respondent: Mid and South Essex NHS Foundation Trust

Heard at: East London Hearing Centre

On: 4 and 5 November 2021

Before: Employment Judge C Lewis

Representation:

For the Claimant: In person

For the Respondent: Mr A Shellum, Counsel

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

RESERVED JUDGMENT

The claim for unfair dismissal fails and is dismissed.

REASONS

1 By a claim form received on 16 April 2020 following a period of early conciliation from 15 – 16 March 2020 the Claimant brought a complaint of unfair dismissal. The Respondent denied that the Claimant was dismissed unfairly.

2 The Respondent confirmed that following a merger on 1 April 2020 Basildon and Thurrock University Hospital NHS Foundation Trust became Mid and South Essex NHS Foundation Trust and all staff transferred to the latter named Trust and that is the correct Respondent to these proceedings. The Respondent accepts that the Claimant was

dismissed. It relies on a potentially fair reason, namely, misconduct and asserts that the dismissal was fair in all the circumstances; that it adopted a fair and reasonable procedure; and that the investigation and disciplinary hearing were carried out in accordance with the Respondent's disciplinary policy and procedure and workforce investigation policy.

3 The hearing was conducted by Cloud Video Platform. The parties provided the Tribunal with a hearing bundle consisting of over 1000 pages, a bundle of witness statements containing a witness statement from Dawn Patience, Roslyn Blackboro, Rosie Clarke and two witness statements from the Claimant. The Tribunal was also provided with a separate bundle containing disputed documents, although in large part the dispute as to the documents had been resolved by the beginning of the final hearing and it was agreed that the Judge should consider the parts of the documents in that bundle that were specifically referred to in the second witness statement of the Claimant [witness statements bundle at pages 29 – 41].

The Issues

4 At the start of the hearing the Judge outlined the issues which arise in any unfair dismissal claim where the reason relied on by the Respondent is conduct, which is a potentially fair reason under Section 98(2) of the Employment Rights Act 1996 (*BHS v Burchell* [1978] IRLR 379). Mr Shellum had prepared a draft list of issues which covered largely the same ground, it was not disputed that the Respondent had a genuine belief in the Claimant's misconduct.

5 The issues for the Tribunal to decided were as follows:

5.1 Did the Respondent hold the belief in the Claimant's misconduct on reasonable grounds having carried out as much investigation as was reasonable in the circumstances.

5.2 Did the Respondent acted reasonably or unreasonably in all the circumstances (including the size and administrative resources of the Respondent's undertaking) in treating that reason as a sufficient reason for the Claimant's dismissal, Section 98(4) of the Employment Rights Act 1996.

This question is usually summarised as was the decision to dismiss within the range of reasonable responses open to a reasonable employer?

5.3 If the Claimant was unfairly dismissed should there be any deductions to the award either in respect of *Polkey* (to reflect that a fair dismissal would have taken place in any event) or in respect of contributory fault.

5.4 The Judge explained that the range of reasonable responses applied to all aspects of the test of reasonableness including the reasonableness of the investigation.

The Evidence

6 The Respondent called evidence from Roslyn Blackboro who made the decision to dismiss and Dawn Patience who heard the Claimant's appeal against dismissal. The Claimant gave evidence on her own behalf and called Rosie Clarke as a witness. The Claimant had attached her grounds of appeal to her claim form and it was understood that these formed the basis of her criticisms of the fairness, or reasonableness, of the decision and the process by which that was reached.

7 I was helpfully provided with some key documents to read, those being the Claimant's appeal letter (pages 770 – 778), the response to the claim (pages 14 – 32), notes of the meeting with the student midwives from 11/5/2019, a note by Lesly Overy from a meeting on 12 March 2019 [pages 244 – 246], and the suspension letter [pages 229 – 230], the terms of reference for the investigation [page 234 – 237], the investigation report [page 459 – 497], the dismissal letter (the outcome letter from the disciplinary) [page 740 – 748] and the appeal outcome letter [page 982 – 984].

8 The disputed documents included a copy of the statement from a student midwife containing the complaint against the Claimant and another midwife (in which the complaint in relation to another midwife had been redacted) which is said by the Respondent to have prompted them to arrange the meeting in March with other student midwives. The other disputed document was the report of the CQC inspection which was published on 19 November 2020 in respect of the maternity unit and which identified some ongoing issues, this report post dates the dismissal. Mrs Stillman confirmed that she had referred to the relevant pages of that document in her second witness statement and there was no objection from the Respondent's counsel to me reading those pages.

9 At the end of the evidence I was addressed by Mr Shellum and by the Claimant. Unfortunately, at the end of submissions there was insufficient time to deliver an oral judgment and the judgment had to be reserved.

Findings of fact

I made the following findings of fact so far as they are relevant to the issues before me.

Background

10 Following a merger on 1 April 2020 Basildon and Thurrock University Hospitals NHS Foundation Trust became Mid and South Essex NHS Foundation Trust and all staff transferred and I accept that the correct name of the Respondent to this claim is the Mid and South Essex NHS Foundation Trust and that name should be substituted as the name of the Respondent.

11 The Respondent is a NHS Service Foundation Trust which provides acute hospital services for people living in South East Essex. It employed around 14,000 staff in a range of clinical and non-clinical roles.

12 The Claimant's commenced her employment with the Trust on 14 June 2010 as a midwife. She was promoted to a Band 6 in June 2011 and then promoted to a Band 7 Delivery Suite Coordinator in June 2017. Her role as Delivery Suite Coordinator consisted of having overall continuing clinical responsibility for the Delivery Suite and it was expected

that she would demonstrate excellent clinical leadership and professional skills. In this role the Claimant had overall responsibility for five wards with the high risk labour ward being her base. The Trust serves an area with a wide range of social and ethnic diversity.

13 The Claimant suffered a catastrophic back injury whilst attending to a patient in 2013, she was absent from work for some 18 months and required extensive surgery and rehabilitation in her back. For the last two years of her employment the Claimant worked mostly nights to enable her to care for her terminally ill mother during the day. The Claimant accepted that the main duties and responsibilities of her role were as set out in her job description [page 135], and included “being a proactive, clinical lead practitioner and role model in promoting evidence based care and midwifery culture in the clinical practice [at 136 item 2], “education and training to develop, monitor and maintain a positive learning environment for both learners and train staff.” [page 137], and that she was required to comply with the Trust’s equal opportunities policy [page 138].

Complaints leading to disciplinary investigation

14 On the evening of 7 March 2019 Lesley Overy, the Respondent’s Head of Midwifery, Nursing and Equality, was copied into an email from one of the senior midwifery lecturers at Anglia Ruskin University addressed to one of her matrons raising concerns about the experiences of some of the student midwives who had been on placement at the Basildon Trust University Hospital. The matters raised was summarised as being about derogatory remarks about students and newly qualified staff and offensive remarks about patients. It was also reported that similar concerns had been raised by year 3 student midwives regarding negative experiences and behaviours they had witnessed at the Trust and they were considering seeking alternative employment after their work placements

15 Lesley Overy attended a meeting with junior midwives and their lecturer on 12 March to discuss the concerns raised, she made a note of the allegations that were made [245]. A number of allegations were made against the Claimant specifically and other allegations were made against a group of midwives or senior midwives generally. It was not disputed by the Claimant that at that time Lesley Overy was a good friend of hers and she did not impugn Ms Overy’s motives in recording the outcome of that meeting.

16 At the meeting concerns were raised by student midwives regarding behaviours alleged to have been shown or demonstrated by Mrs Stillman in breach of the Trust values and behaviours including foul language, disrespect for patients, and using expressions that could be construed as discriminatory. (The note of that meeting is at page 244 headed Appendix 2). Student midwives who were unable to attend the meeting raised their concerns by email [Appendix 3], two students, Student 1 and Student 2 singled out the Claimant for criticism, although Student 1 referred to another member of staff as being her main issue; Student 2 also singled out the Claimant in respect of her concerns, describing her as creating an awful atmosphere and being a bully, and reporting that she made derogatory remarks about the patients and the women in their care. The next day Mrs Overy asked the line manager of the ward where the Claimant worked if there had been any previous escalation to her in respect of the students’ experience, without specifying any particular staff member. The ward manager reported that she had previously escalated concerns that included behaviours of the Claimant to a Matron who no longer worked at the Trust

17 The Claimant accepted that it was appropriate for Lesley Overy to meet with the students who were expressing concerns and that it would be a matter of concern for the Trust that complaints had been made and that the student nurses were stating that they would be seeking work elsewhere.

18 The Claimant accepted in evidence that it was not the students who had initiated the investigation, they had simply raised matters in their feedback with their lecturer as they were encouraged to do, the investigation was initiated by Lesley Overy. The Claimant was concerned that in fact a dialogue had already begun with the Anglia Ruskin University that was instigated by someone else, that is someone she described as a new member of staff in January 2019. However, in evidence she accepted that it was Lesley Overy who was the commissioning manager in respect of the investigation into her conduct and she did not contest that as far as Lesley Overy was concerned what prompted her to commission the investigation was the concerns raised by the student midwives at the meeting she attended with them and the concerns raised in the email. It was accepted that the concerns raised included general concerns about the culture in the unit and these behaviours were reported to refer to a team of seven unnamed but more senior members of staff. The Claimant also accepted in evidence that she was specifically singled out and named by the student midwives and that the more serious allegations were those raised against her, including discriminatory comments. She accepted in cross-examination that the person singled out as the worst perpetrator in the students' eyes was herself. The file notes prepared by Lesley Overy [page 245] indicates the Claimant's initials against a number of the specific complaints made by the students. Seven separate complaints were identified as having been made specifically in respect of the Claimant's conduct.

19 Prior to these complaints being received the Claimant had been invited by Sarah Dunn, Band 8 Matron, to an informal meeting on 8 February 2019 about her behaviour. The Claimant accepted that as a Matron Sarah Dunn was senior to her and was also fairly new at the time of the meeting. Sarah Dunn informed the Claimant that she had been approached by staff who had raised concerns about the Claimant's behaviour. The Claimant described Sarah Dunn as "compiling a dossier" about her and suggested that it was in fact Sarah Dunn who had an agenda and who had initiated the investigation into her conduct. However, the Claimant accepted, and I am satisfied that the investigation report and the investigation into her conduct that led to the disciplinary proceedings was initiated by Lesley Overy as a result of the complaints received in the meeting on 12 March 2019 and in the emails from the students. The Claimant accepted that at that point in time she was a very close and good friend of Lesley Overy and that Lesley Overy had no grudge or axe to grind against her.

20 The Claimant accepted that the allegations against her was serious: they included alleged racial remarks, comments about overweight patients, and allegations that she was a bully. The Claimant accepted that if the allegations were true the alleged conduct would be a breach of the Trust's policies and behaviours and if proven would amount to breaches of the NMC Code and would also have an impact on patient care and potentially damage the reputation of the Trust.

21 Ms Overy contacted her HR Business Partner for guidance on how to manage the situation and was advised to commission an investigation into the allegations, which she proceeded to do straight away. It was also agreed with the HR Business Partner that it would be in the best interests of the staff member and the rest of the team for the Claimant

to be suspended during the investigation; the Claimant was notified of the suspension and the pending investigation.

Suspension

22 The Claimant was called to a meeting on 14 March 2019 with Jane Carter, Women's Health Matron, which she attended with her work colleague; she was informed of her immediate suspension to allow an investigation into allegations that had been brought against her. The allegations were outlined in that meeting and then set out in the letter dated 18 March 2019 confirming her suspension from duty, which the Claimant said she did not receive until 25 March 2019. The letter set out seven allegations that were being investigated. Jane Carter advised the Claimant that she was not at liberty to inform the Claimant at that stage who had made the complaints. She was also advised that the allegations would be investigated in accordance with the workforce investigation policy and procedure and she was provided with a copy of the policy. The Claimant was informed that she would be required to attend a formal investigatory meeting at which she could be accompanied by her trade union representative or a workplace colleague and that for the duration of the investigation she would be excluded from the workplace and duties but would be continued to be paid; she was told that the suspension would be reviewed regularly and on a fortnightly basis and continued suspension would be communicated in writing.

23 The Claimant was informed that Tracy Braddock was her named point of contact during her suspension and was informed that she was not permitted to contact anyone from Basildon Hospital Maternity Service or enter the unit without prior agreement from the investigating officer or Tracey Braddock. The Claimant was informed of the availability of the independent employee assistance programme for support during the process and told that a referral to Occupation Health had been completed at her request. Finally, she was reminded that strict confidentiality in relation to the matters under investigation needed to be maintained at all times and she should not discuss the matter with any other members of staff. She was informed that failure to maintain the confidentiality may result in formal action being taken.

24 The Claimant was informed by Jane Carter on 29 March 2019 (page 232) that there had been some challenges in appointing the investigating officer (IO) due to annual leave arrangements and that there would be a review of the suspension on 15 April 2019. She was told that the Trust were hoping to be able to confirm the appointment of the IO no later than 5 April 2019. The Claimant accepted in evidence that Jane Carter provided her with regular updates of the progress of the investigation.

25 On 12 April 2019 Elaine Martin, Matron for medicine, wrote to the Claimant to confirm that she had been appointed as the investigation officer [page 238 – 239]. The Claimant accepted that Ms Martin set out the allegations in full in seven numbered points. Ms Martin enclosed the terms of reference for the investigation and confirmed that the commissioning manager for the investigation was Lesley Overy. She anticipated that the investigation would take approximately six weeks to complete and then the Claimant would be invited to an investigation interview where she would have an opportunity to explain her version of events. She reminded the Claimant of the support of the employee assistant programme and concluded her letter with the following sentence "in the meantime, should you have any information that might be of assistance to the investigation or you wished to discuss anything relating to this investigation, please do not hesitate to contact me."

Elaine Martin investigation report

26 Elaine Martin produced her report on 26 September 2019 [458]. The report set out in detail its terms of reference, methodology, findings, additional findings, investigation conclusion and 42 appendices, including the notes of each investigation meeting with the 19 witnesses. Once the investigation report was completed it was sent to Ms Blackboro who had been appointed to chair the disciplinary hearing.

27 In Section 5 of the Report [page 464] it was noted that the students had requested to remain anonymous due to concerns that they would experience prejudicial behaviour from staff: this was agreed, it was noted that the Trust's Workforce Investigation policy states that requests for anonymity will be considered in exceptional circumstances. The Respondents considered that the circumstances were exceptional due to the very junior nature of the students and newly qualified midwives who were at the start of their careers and bringing complaints against a much more senior midwife who was in a position of influence over the team, and their concerns as to the detrimental impact on their training and further career prospects as well as in respect of the treatment they would receive. The Report's methodology sets out the steps taken to identify other witnesses, including line management staff and other relevant witnesses and states that in order to investigate whether or not the Claimant's close colleagues on the night shifts had witnessed similar behaviour those who had worked on night shifts when students and the Claimant were present were identified. In evidence before me this was explained and I was taken to a table [503] showing the result of the investigation into who might have been, or was, present on the nights that the Claimant worked with the respective student midwives. The Claimant raised some criticisms of the investigation in this regard stating that it had failed to identify the witness who came forward to give evidence at this Tribunal, namely Rosie Clarke, and she suggested there may have been other witnesses, that the attendance on night shifts was often subject to change at the last minute, the student midwives were not paid as they attended as part of their training and therefore did not need to record the shift for the purposes of the payroll, and that the off duty rota which was produced was subject to frequent manuscript amendments. The Respondent confirmed that the manuscript amended versions of the rota were retained for payroll purposes and other records including use as a register and that these were the documents that were used to compile the table at page 503. Mr Shellum accepted that if the particular members of staff or student midwives had not signed in on that occasion then they would not show up on those records.

28 The student midwives were interviewed at the Anglia Ruskin University on 14 May 2019 there was no evidence that the midwives had conferred or that they had been invited to a joint meeting. Midwives 3 and 4 were interviewed on 7 June 2019. The next set of interviews were with the line management staff. The Claimant did not contest that the Respondent took steps to interview a range of potential witnesses from different areas and different grades, those included a Band 7 Midwife and MCA and a newly qualified as well as doctors and consultants who may have been on duty.

29 The Claimant criticised the questionnaires used as the basis for the interviews, she considered that they contained leading questions and did not encourage the witness to give their own free account but instead asked them to confirm the contents of the allegations. It was suggested on the Respondent's behalf that this was a new way of putting the Claimant's allegation and in fact at her appeal (see page 777) her complaint had been that leading questions had been used in the hearing. I accept that when the Claimant referred to leading

questions she was also making a reference to the questionnaires. The Claimant was taken through the questionnaires in evidence. She accepted that there was one set of questions for the students and another set for the non-students and in principle she agreed that it was right to ask all the witnesses the same questions. Initially the Claimant said that she did not agree that the witnesses in an investigation should be asked questions about the allegations that were under investigation, she suggested that they should be asked broadly topical questions so that they could feel comfortable to use their own words. However, on being taken to the documents setting out the questions and interviews, for instance page 247, page 252, page 312 (a non-student midwife), page 319, page 248 and 255 the Claimant accepted that the questions asked were appropriate, that it was appropriate that the allegations were set out and that the witnesses were asked if they had witnessed anything similar. The Claimant also accepted that the allegations set out by Student Midwife 1 and 2 [pages 248 and 255] on analysis appear to be in respect of two separate occasions if their evidence was correct. The Claimant disputed that it would not ever be the case that two student midwives would be on the same shift, whilst ideally that would not be the case sometimes there were swaps or sometimes more student midwives were on a shift, particularly when they were in year 3 and had to complete their attendance at 40 births, towards the end of the course they would come in whenever they could if they had not reached that number. It was suggested that document 503 showed that Student Midwives 1 and 2 were not on the night shift at the same time as each other. The Claimant simply suggested that it could be inaccurate due to swaps.

30 The Claimant accepted that the date for her own interview was changed at the request of herself and her RCN rep due to her own commitments and the RCN reps annual leave; the interview was eventually arranged for 6 August 2019, which was a mutually convenient date and that she was happy with that [384]. Notes of that meeting are at page 397. The Claimant accepted she was given the opportunity to respond to specific allegations and given the names of the members of staff who made the allegation [page 400 and page 403] apart from those that had been anonymised. Although the Claimant alleged in her appeal that she had been put under sustained pressure at that interview she accepted in her evidence that the record of that meeting did not illustrate any sustained pressure, or pressure of any sort, that her responses demonstrated that she could clearly recall the incident and she gave her own account in respect of the allegation of a racially discriminatory comment about “black African women” which was that she was making reference to her back and not black African women.

31 The Claimant had received the letter setting out the allegations well in advance of the meeting on 6 August 2019. Despite that the letter informing her that she should contact Elaine Martin with any relevant information, other than providing information about the comment being made in the presence of Sister Folake the Claimant did not contact Elaine Martin with any other information either before, during,, or after the investigation meeting. The Claimant was critical of the fact that she was not provided with dates for any of the incidents however she accepted that she had been able to provide a detailed account of what took place; describing the patient/mother, where the student was, what was said, and that Sister Folake was present. Mr Shellum suggested that therefore clearly she should have been able to identify any other potential witnesses but she did not provide the details of Rosie Clarke at that time. The Claimant provided testimonial from Rosie Clarke, [page 550] which does not say anything about the incident. The Claimant accepted that after the disciplinary hearing she went back to Rosie Clarke and asked her to sign her testimonial and that she did so in September 2019 [page 754] but nothing was added and she made no reference to being present on the night of one of the incidents.

32 The Claimant provided a number testimonials from colleagues who worked alongside her. The first time she made reference to these was at the meeting with Elaine Martin on 8 August 2019, up until then the Respondent was not aware that the Claimant had been in contact with her colleagues and was seeking testimonials from them. The Claimant told Mrs Martin that she had asked for testimonials from her BAME colleagues to confirm that she did not discriminate and provided these to her [page 540, for an instance] these were in general terms and did not address any of the specific incidents. One of the testimonials was from Mercy Mutuku who had left the Trust 18 months before any of the incidents that formed part of the allegations had occurred.

33 The Claimant was taken through the allegations at the hearing. She denied making comments about black African women being difficult to deal with when in pain in labour, saying that she had made a reference to her bad back. She accepted that she had made comments about overweight women, [page 402] but denied using the term bloater. She denied saying that someone was a “whale on a bed”. She accepted that if the mothers concerned were obese that she would use the word “fat” to describe them. The Claimant contested that some of the incidents raised by fellow staff e.g. allegation 3 from Ms Yallet were very old she did not remember calling a patient a nightmare but if she had said it then it would have been some six years plus previously when she last worked for Ms Yallet. In respect of Dr Kalburgi alleging she had made a comment about wanting to put a pillow over a patient’s face, page 403. She explained that it was probably the type of joke she would make and she accepted that it was in poor taste.

34 In evidence the Claimant accepted that at the time of the interview she was not representing herself in a very good light and she could see that it came across that she did not appear to care, that she was making the student midwives feel bullied or intimidated or uncomfortable. She explained that since that time she had undergone some counselling and she believed she would conduct herself differently now. She accepted that in respect of allegation 2, [page 241] where a student midwife said that she did not like it when the Claimant was in charge that her response had been that a student midwife “should not be supported by me. I am nothing to them. I am not involved with them”. She explained that this was her clumsily trying to get across that she was not directly involved in their training, she was a manager for the unit and they were working with a mentor who was showing them how to help women give birth and that she should not be on their radar. She agreed that it was part of her job description to be a role model and develop a positive learning environment. She accepted in respect of allegation 5 that her response to students feeling that they could not speak up was that they “had nothing to speak up about” and that she could not think of an incident where a student should need to challenge her and she accepted that that response showed a lack of contrition at that time.

35 The Claimant criticised the Respondent for introducing additional matters into the investigation. One of those issues was that the Claimant had been speaking to her colleagues during her suspension, including going to a retirement party without permission, then subsequently attending a wedding, she accepted she had obtained testimonials from colleagues knowing that she was suspended. The Claimant disputed that the terms of the suspension set out in her suspension letter were in line with the Respondent’s policy, she considered they went beyond the policy and were therefore not binding on her.

36 After the investigatory meeting the Claimant was sent a copy of the notes [page 428]. She did not take any issue with the them at the time. She was reminded of the terms of her

suspension and responded by saying she would be attending the wedding and did so in full knowledge that she would thereby be in breach of the terms of her suspension.

Disciplinary hearing

37 On 28 October 2019 Ms Blackboro wrote to Mrs Stillman inviting her to disciplinary hearing on 13 November 2019 [page 504 – 506] and enclosed the investigation report. It was noted by Ms Blackboro that the Claimant had been given regular updates on the basis of her suspension and reasons for the delays in the investigation (pages 229 – 230, 232, 242, 243, 296, 322, 435 and 450). The Claimant was informed that the disciplinary hearing may result in a disciplinary sanction which might include dismissal and she set out the seven numbered allegations. Ms Blackboro also explained that the hearing would be conducted under the Trust disciplinary policy and procedure (in the bundle at page 110 – 115); that the Claimant was entitled to be accompanied at the meeting by her trade union representative or work colleague and that she could call witnesses and provide their names and details along with any supporting document at least five days prior to the hearing. Ms Blackboro also set out that a number of witnesses would be called at that hearing and that the student midwives and newly qualified midwife would be provided with arrangements to ensure their anonymity; that Mrs Stillman's representative would be present while those witnesses were giving evidence and would be able to ask them questions on Mrs Stillman's behalf; and that this was a decision in accordance with the Trust workforce investigation policy and procedure. Ms Blackboro explained that the decision to anonymise the evidence of the student and newly qualified midwives was taken in recognition of their vulnerable position, being the most junior people involved, that they were just starting out in their careers and that they could and might feel that their careers would be somehow jeopardised by giving evidence against someone so much more senior and that it was important they felt safe and able to speak out. Ms Blackboro set out her view that any hardship to the Claimant was mitigated by the arrangements in place for her representative to be present during the evidence. No objection was raised at that time by the Claimant or her representative. The Claimant told me that she had not known that she could have objected, she accepted however that she was represented throughout by an experienced representative from her union, the Royal College of Nurses.

38 The Claimant confirmed she had full access to the investigatory notes and details of what was said by each witness in advance, including the allegation of discriminatory language used in allegation 1 and that she was aware that she would have an opportunity to call any relevant witnesses. The Claimant was provided with the pack that was before the disciplinary panel. She had that pack for a considerable time before the hearing and had an opportunity to go through it with her representative and identify any areas of dispute, including in respect of what the witnesses had said in their interviews.

39 The Claimant commented that in practice it proved rather more difficult than she had anticipated to deal with the anonymous witnesses at the hearing. She had not understood that she would be in a completely separate building and although she had written out questions for her representative to ask in advance and her representative was reminded that she could take a break and ask to speak to the Claimant on the phone and seek further instructions at any time, her rep did not do that. However the Claimant accepted that this was not a criticism of the Respondent.

40 The Claimant accepted that she was aware of all the issues that had arisen in the investigation and that these were set out in the report at pages 492-493. The additional findings were identified at item 7 under the headings “clinical practice and development” and “informal management”, 7.1 and 7.2 and set out there in detail over those two pages and that the additional findings about her non-compliance with the terms of her suspension was set out at page 497.

41 The Claimant was critical of the Respondent’s decision to refuse her request to call her former line manager Madeline Reece, although her request to include a number of testimonials and to call other witnesses were granted. The Respondent’s explanation for refusing the Claimant’s request was that Ms Reece had only returned to the Trust in February 2019, she did not address any of the allegations in her statement, and that she stated that she was a close personal friend of the Claimant. The Claimant accepted she did not raise any objection to being told that Madeline Reece could not be a witness and nor did her representative. The Claimant also accepted that 15 February 2019 was the only potential shift where Madeline Reece was present with any of the student midwives who had made complaints. The Claimant obtained more than 20 testimonials including one from Dr Mistry and produced those as unsigned statements, the Claimant considered those should balance the testimony of 11 witnesses. The Claimant accepted that the statement she provided did not address the specific allegations and they were character witnesses rather than witnesses of fact.

Rearranging the hearing

42 When Nicola Reece saw the number of witnesses and the detailed evidence to be considered she came to the view that it would take more than one day to complete. She suggested that the hearing be continued on the following Monday but this date was not convenient for the Claimant and her representative. Attempts were made to find dates in November/December but the Claimant’s RCN rep was not available and the meeting was rearranged for January 2020.

43 In advance of the meeting in January 2020 the Claimant submitted some print outs of text messages between herself and Lesley Overy. Ms Blackboro’s initial response was that the text messages should only be considered if they were shared with the other parties to the disciplinary. The Claimant’s RCN representative challenged that position, [page 591] and Ms Blackboro changed her mind [page 590], confirming on 30 January she that she would consider the late documents. The Claimant accepted that this showed that her representative was aware that she could challenge decisions relating to the conduct of the disciplinary and did so where she considered it right to do so.

44 The Claimant accepted in evidence that she was given every opportunity before the hearing to provide evidence to the panel, including the testimonials obtained in breach of her suspension. She confirmed that her representative had the opportunity to cross-examine the named individuals in her presence and also had the opportunity to cross-examine the anonymous student and newly qualified midwives in her absence. The Claimant accepted that her representative could have asked those student midwives for the names of anyone else who was present and who may have witnessed the events but did not do so. The transcript of the hearing was in the bundle. The Claimant was taken to specific allegations and the evidence given to the panel in respect to those allegations. For instance, in respect of student midwife 2’s account she accepted that was a pretty clear

recollection of the events and that page 646 showed that her representative had an opportunity to cross-examine the witness and did put the Claimant's account, which was the word that she used was "back" and not "black".

45 The Claimant accepted that before the Respondent presented its case she was given an opportunity to ask any questions of the investigating team and that there was no occasion when she or her representative asked for an adjournment and was refused one. Ms Blackboro had outlined the procedural matters at the start of the hearing and she and her representative had confirmed they were happy with how it was proposed to proceed. The Claimant accepted that she was given an opportunity to summarise her case at the end of the hearing but stated that there is a difference between being able to summarise your case and your case actually being listened to.

46 The outcome of the disciplinary hearing was conveyed to the Claimant on 28 January 2020 by letter. Ms Blackboro set out her findings and the basis for those findings in detail, [pages 741 – 747]. She set out her recommendation to the Director of Nursing as a result of those findings, namely that the sanction that had been agreed upon by the panel was dismissal for gross misconduct in respect of allegations 1 and 7 and misconduct in respect of allegation 2; allegation 3 was only partially upheld, allegation 4 was not upheld, nor was allegation 5 or 6; the additional allegations that the Claimant had breached the terms of her suspension and committed misconduct in her clinical practice were both upheld.

47 In her evidence Ms Blackboro told me that the panel had considered whether to impose a lesser penalty. She was aware that the normal sanction for gross misconduct would be summary dismissal but considered all the sanctions in turn to assess what would have been most appropriate. She concluded that it would not be feasible for the Claimant to remain employed in the Trust in the light of her findings. In particular it was clear to her from the evidence that the Claimant had on numerous occasions used discriminatory language in front of students and made unacceptable comments about patients including overweight women. She found that the witnesses making the allegations against the Claimant were clear, concise and confident with what they had heard, this was in contrast to the Claimant's evidence which relied on her stating that witnesses had misheard her or that other colleagues shared the same behaviours as her, without producing evidence of which colleagues, where and when.

48 Ms Blackboro also believed that the Claimant had shown no real remorse for her actions, which were a clear breach of the Trust values, and she was not reassured that the Claimant would change her attitude and behaviour if she were to be permitted to carry on working. Ms Blackboro explained that in previous disciplinary panels she had experienced employees showing genuine contrition when faced with disciplinary allegations and this contrasted with the Claimant's approach. Ms Blackboro acknowledged that towards the end of the hearing the Claimant had apologised for all the allegations and acknowledged that following some counselling some of her behaviours were not appropriate. However, Ms Blackboro's view was that the Claimant did not demonstrate that she would change her actions or behaviours and she was not satisfied that the Claimant could continue in her employment. Ms Blackboro took into account that the Trust had a zero tolerance policy towards bullying, discrimination and racism, she also was aware that the Claimant was a Registered Midwife and that a number of her findings amounted to breaches of the NMC Code of Conduct. Ms Blackboro reached the conclusion that dismissal was the appropriate

and reasonable sanction in this case, she discussed the decision with the panel which included HR personnel before reaching that conclusion.

49 Ms Blackboro told the Tribunal that had she only made findings in respect of allegation 1 or allegation 7 and/or 1 and 7 the outcome would still have been summary dismissal on the basis of gross misconduct, this was due to the severity of the findings. Had she only made findings in respect of allegation 2, the outcome would have been dismissal with notice on the basis of misconduct, due to the severity of the allegations and the findings. Due to the seriousness of the findings the recommendations included a referral to the NMC in respect of allegation 1. The Claimant was informed of her right of appeal in the outcome letter [748].

The appeal

50 The Claimant appealed on 9 February 2020. The Claimant set out her grounds of appeal in a covering letter and attached 9 appendices, [page 771 – 778] the letter was attached to the Claimant's claim form and forms the basis of her application to the Employment Tribunal.

51 In her appeal the Claimant continued to dispute the accuracy of the allegations (in terms which were consistent with Ms Blackboro's assessment of a lack of contrition or remorse in respect of a number of aspects of her conduct); she stated that there had not been sufficient account taken of her difficult personal circumstances; she raised procedural concerns and disputed that the guidance in the Trust's Workforce Investigation and Procedure policy was applied correctly; she took issue with the application of the phrase "on the balance of probability", for instance she made reference to the fact that there were two witnesses who described her as having made discriminatory remarks or hitting a wall when 16 denied ever seeing or hearing such a thing and that 2 out of 18 did not constitute 51 percent i.e. enough to trigger the balance of probability. The Claimant did not pursue this line of argument before the Tribunal and Mr Shellum invited her to accept that she had misdescribed the balance of probability and its effect and she accepted that she had misunderstood it.

52 In cross examination the Claimant effectively withdrew a number of the other criticisms of the Respondent set out in her grounds of appeal, conceding that her criticisms were misplaced, for instance, her complaint that the witnesses had been asked leading questions, her criticism of the length of her suspension and the investigation and her contention that she had not been kept informed of the reasons for the delays.

53 The Claimant also appealed on the ground of severity of sanction and disparity of treatment. The Claimant alleged disparity of treatment between herself and her colleagues, seven of whom were invited to a meeting in May 2019 which had been a reflective session to address the concerns raised by the student. The Claimant suggested that there was a huge disparity in treatment for what appeared to be the same behaviours and therefore the same level of misconduct. However in evidence she accepted that there much more serious in her case, specifically allegations 1 and 7, and that she had specifically and repeatedly been named by a number of student midwives whereas the same was not true of her colleagues.

54 An appeal hearing took place on 20 April 2020. Ms Blackboro presented the management case, the management case starts at page 799 of the bundle and is dated 10 March 2020. Ms Blackboro referred to the fact that a large proportion of testimonials submitted as part of the Claimant's mitigation were unsigned but she did not say that she discounted them in their entirety. The Claimant submitted a number of signed versions of those statements in her appeal.

55 Ms Blackboro outlined the regular suspension letter updates that was sent to the Claimant on 18 March, 29 March, 15 April, 7 May, 30 May, 26 June, 20 August and 20 September 2019. In respect of communication it was acknowledged that the supporting midwife originally assigned to the Claimant left the Trust during the investigation and that a further midwife was assigned to support her Ms Blackboro recorded that there was no specific mention of support during the hearing and so it was not possible for her to comment further. Ms Blackboro set out her reasons for the decision to summarily dismiss [at page 811].

56 In respect of the extended time of the investigation in her evidence to the Tribunal the Claimant accepted that there was a lot of evidence to deal with both in the number of witnesses and the number of documents and that it was right for the Respondent to ensure that it thoroughly investigated the matters, including making sure they had a statement from Dr Mistry. The Claimant had been critical of the Respondent's actions in waiting for a statement from Dr Mistry, including sending her numerous emails. However when it was put to her that the evidence was potentially relevant she accepted the point. She also accepted that the investigation was made more complicated by the fact that it covered a number of bands (seniority) and a large number of witnesses.

57 The Claimant acknowledged that the delay in hearing her appeal was because it was difficult to find a mutually agreeable date and that she was able to submit evidence before the appeal hearing. The Claimant accepted that the essence of her appeal was the severity of the sanction and disparity of treatment.

58 The appeal was heard by Mrs Dawn Patience who was the Director of Nursing she had been employed by the Trust since December 1983 when she started as a student nurse. She commenced her role as Director of Nursing approximately three or four years before the date of this hearing. In that role she was responsible for nursing and midwifery professional standards and governance arrangements within the organisation. She had over ten years' experience dealing with disciplinary investigations and hearings and had been involved with chairing appeal hearings since she started in her role as Director of Nursing.

59 Mrs Patience was appointed to conduct the appeal hearing because there were additional concerns raised about elements of the Claimant's clinical practice and a referral had been made to the NMC. It was therefore considered appropriate to have someone of her level to hear the appeal. She had had no prior involvement with the case.

60 The Claimant was accompanied by her trade union representative Ms Narey. Ms Patience was supported by Mr DeAlyn and Anne-Lise Curtis an Employment Relations Adviser, Ms Gray was there as a notetaker. Mrs Patience role was not to rehear the case it was to consider the grounds of appeal, any new evidence and determine whether the action taken to dismiss the Claimant was consistent and reasonable taking account of the

available evidence. She had referred herself to the disciplinary policy and procedure before conducting the appeal hearing. The hearing was held via videolink due to the Covid19 pandemic. In the event no criticism was raised in these proceedings by the Claimant as to the mode of the hearing.

61 Mrs Patience evidence to the Tribunal was largely unchallenged. She set out her findings and conclusions at paragraphs 21 – 25 of her witness statement and I accept her evidence.

62 In respect of the contention that there had been disparity of treatment compared to the other midwives in the team Mrs Patience considered that none of the witnesses had described the other midwives in the same terms as the complaints raised against the Claimant. There was no new evidence presented at the appeal in respect of this. She had considered the evidence that was in the pack for the disciplinary hearing. The only new matter was the reflective meeting that had taken place, she did not consider that this was suggestive that there was as serious complaint raised in respect of those midwives. The CQC report that was published in November 2020 and was not something that Ms Patience had at the time of the appeal nor was it anything in the report which she would have taken as suggesting evidence of a culture as referred to by the Claimant.

63 Mrs Patience told the Tribunal that having listened to everything that was put forward by the Claimant and on her behalf and considered it carefully, she did not feel by the end of the appeal and the discussions that she would change the outcome. Mr DeAlyn was with her when she wrote up the outcome that the decision was hers. That the main thrust of the appeal was around the sanction and having heard the appeal she was ensuring the sanction was appropriate given the allegations and the Trust's policies and procedures. Mrs Patience came to the conclusion that the sanction was appropriate: she would not have needed all of the allegations to have been proven to decide on summary dismissal. Allegation 1 she considered on its own to be gross misconduct as, in her view, was allegation 2. Either of those allegations on its own would have warranted a summary dismissal in her view, however given the overall decision she did not consider she needed to interfere with it noting that Ms Blackboro had reached the conclusion that an appropriate sanction for allegation 2 alone would have been dismissal on notice.

Evidence of Ms Rosie Clarke

64 Ms Rosie Clarke gave evidence to the Tribunal in which confirmed that she had witnessed an incident where the Claimant was working with a student midwife on the ward when she heard the Claimant say to Sister Folake directly "I am not going to look after her" referring to a patient "because of my back" and that this was said in her presence. She confirmed that Sister Folake is black, the comment was directed to Sister Folake and not to the student midwife and that was the one time that Ms Clarke heard the Claimant say something of this nature about a patient. She did not hear her say anything else or any other comment about this woman being black or any other black patient. She also confirmed that she had signed a statement before the Claimant's appeal when she did not mention being a witness to the incident and that she had not been asked to comment on the incident before the disciplinary hearing.

The Law and submissions

65 Mr Shellum helpfully set out the relevant law in his oral submissions. Section 94 of the Employment Rights Act provides the right not to be unfairly dismissed to those who have two years qualifying service. Section 98(2) sets out a number of potentially fair reasons for dismissal and Section 98(4) of the test as to whether dismissal is fair or unfair in all the circumstances which is judged against the test of a range of reasonable responses open to a reasonable employer. That is not a standard of perfection, the test is one of reasonableness throughout. It is not for the Employment Tribunal to substitute its own view for that of the employer. The test of a range of responses of a reasonable employer applies equally to the decision to dismiss. Mr Shellum referred to the well-known case of *Iceland Frozen Foods v Jones* and summarised the test set out in *BHS v Burchell*. He reminded me that it was not in dispute in this case that the Respondent had a genuine belief in the reason i.e. in the misconduct alleged, so the issue is whether the Respondent had reasonable grounds for that belief following such investigation as was reasonable. He noted the more serious the allegation the more intense the enquiry that is required [see for instance, A v B [2003] IRLR 405 in which it was also held that the potential effect on the employee and their career of the allegation being upheld was relevant to the intensity of the enquiry required] but again the range of reasonable responses applies to the procedure as well as to the outcome (*Sainsbury Supermarket Plc v Hitt* [2003] IRLR 23).

66 Mr Shellum submitted that the investigation carried out was within the range of reasonable responses, even if the Claimant could point to some areas that could have been conducted better if a counsel of perfection were required. He submitted that on all the evidence this was a reasonable and a significant investigation as befits allegations of this serious nature.

67 Mr Shellum addressed each of the criticisms raised by the Claimant in turn as he had done in his careful and measured cross-examination. He acknowledged the Claimant's candour in her evidence to the Tribunal in which she had agreed with a very large number of the points that he had put to her. He submitted that the contention that the witnesses were asked leading questions was not borne out, the allegations were put to witnesses and they were asked whether they had seen it or not, and it is right that the witnesses are asked about the allegations they are being asked to give evidence about.

68 In respect of Ms Rosie Clarke's evidence he submitted that neither the Claimant nor Sister Folake had mentioned Ms Clarke being present at the incident, she simply had not been identified as a witness at the time; this was despite the Claimant giving an account which illustrated that she recalled the incident in detail, she could remember Sister Folake being present, the student midwife being on a break, she confirmed that it was an unusual event, she described it as the only time in ten years she had declined to provide care to a patient, yet the Claimant had not identified Ms Clarke as being present and he submitted the Respondent could not be criticised for not interviewing her. Ms Clarke had provided a testimonial which made no reference to the incident; after the dismissal and before the appeal she provided a signed statement having spoken to the Claimant (who was no longer prevented from contacting her about the nature of the allegations because she was no longer on suspension) and she still do not identify herself as a witness to the incident. Even if she had been identified as a witness it could only possibly be in relation to the allegation made by Student Midwife 2 (at page 503) and did not relate to incident 1 described by Student Midwife 1. Ms Clarke's account was not consistent with that of the student midwife who gave clear evidence the comment was made just to her alone in the office when no one else was there, (page 255) which would suggest she must be describing a different

incident, even if it was the same night it is highly likely that they related to two separate remarks made even if it was on the same occasion.

Conclusions

69 I reminded myself that my role in this claim which is one for unfair dismissal was not to substitute my own view for that of the Respondent. The Respondent's genuine belief in the misconduct was not in dispute. I had to decide whether the belief in the misconduct was based on reasonable grounds following such investigation as was reasonable in the circumstances, and whether the decision to dismiss was fair or unfair within the meaning of Section 98(4) of the Employment Rights Act 1996 misconduct being a potentially fair reason under Section 98(2). The question therefore is whether in the circumstances including the size and administrative resources of the employers undertaking the employer acted reasonably or unreasonably in treating that reason as sufficient reason to dismiss the employee and that question is to be determined in accordance with equity and the substantial merits of the case.

70 I am satisfied from the content of the investigation report that the investigation carried out by the Respondent was careful and thorough. The Respondent interviewed 19 witnesses, the notes taken of each interview were signed and provided to the Claimant prior to the disciplinary hearing as were all the other materials. I am satisfied that in respect of the selection of witnesses the Respondent applied its mind to obtaining a cross section of accounts from staff at different levels of seniority and took pains to identify those staff who worked on the shifts with the Claimant and the relevant student midwives who had made complaints, (see pages 464 – 465).

71 The Claimant was given every opportunity to suggest witnesses to the investigating officer, this was referred to the letter from Elaine Martin's informing the Claimant of her suspension, (page 238 – 239). The Claimant declined to provide any names of witnesses not withstanding her knowledge of the allegations prior to the disciplinary hearing. I am satisfied that neither Sister Folake nor the Claimant named Rosie Clarke as a potential witness to the incident of the alleged racially discriminatory comment.

72 The Claimant was accompanied by her trade union representative throughout the disciplinary and at the appeal. The Respondent went to considerable lengths to ensure that the Claimant's representative could attend the hearing, changing the dates to her convenience. I am satisfied that the findings were thorough and supported by the evidence. I accept that the thoroughness of the investigation and the detailed findings demonstrated the Respondent took its obligations to the Claimant seriously.

73 The Claimant conceded, rightly, in cross-examination that it was a lengthy investigation for good reason. The delay point was not pursued. The Claimant was clearly told of the nature of her suspension and the conditions attached; she did not criticise the fact that she was suspended, she accepted that the allegations was sufficiently serious and if proven would have an impact on the reputation of the Trust. The Claimant was kept informed as to the progress and delays in the investigation. The additional matters that were raised consisted of a breach of the suspension and the failure to adhere to required standards of practice both of which came up in the investigation and I am satisfied that it

reasonable (that is, within the band of reasonable responses) that they were included in the disciplinary hearing. The Claimant accepted she was on notice of those well in advance of the disciplinary hearing and had ample time to prepare a response to those allegations hearing and produce any evidence in support in advance if she chose to do so. The Claimant exercised her right to produce evidence by providing over 20 testimonials and calling three witnesses.

74 The Claimant and her representative did not raise any objection or criticism of the anonymisation of the student midwives and newly qualified midwives' names either at the disciplinary hearing or in the appeal and this ground was not really pursued in this hearing. I am satisfied that in the context of the balance the Respondent had to strike was between the concerns of the student and newly qualified midwives who were at that start of their careers making allegations against a senior midwife who was the Delivery Suite Co-ordinator and a group of her colleagues, that the Trust acted appropriately in ensuring that they could come forward without fear of reprisals. I am satisfied that the Respondent ensured appropriate steps were taken to mitigate any prejudice to the Claimant and the balance that was struck was one that was a reasonable one in the circumstances; the Respondent ensured that the Claimant's representative was present whilst those witnesses gave evidence and reminded the Claimant and her representative that they could seek an adjournment at any point if they wished to do so. The Claimant had already been provided with the notes of their statements and accepted she had provided questions in advance; her complaint was that she could not update those instructions in real time in response to the evidence as it came out. However the Claimant accepted that the failure to ask for an adjournment was not a fault at the door of the Respondent and if there was any fault it would lay with her representative and the actions of the Respondent could not be criticised on that regard. In evidence the Claimant accepted that the questions asked of the witnesses were appropriate ones to be asked in an investigation. I am satisfied that the Claimant had the opportunity via her trade union representative to test and probe the evidence and she had the opportunity to go through that evidence in advance of the hearing with her trade union representative.

75 The Claimant was given a full opportunity to give her explanation and any mitigation. The Claimant's unsigned testimonials were considered albeit they were given less weight, however the signed statements were considered at the appeal and further evidence submitted by the Claimant was taken into account.

76 I am satisfied that the Claimant was given every opportunity to put her case and to be heard and the procedure adopted was entirely within the range of reasonable responses.

77 Whilst the Claimant may be able to identify further steps and even a further witness retrospectively, I have to consider whether on the information available to the Respondent at the time they carried out such investigation as was reasonable in the circumstances. I am satisfied that the Respondent carried out a reasonable and thorough investigation into the alleged misconduct before reaching the conclusion that it reached. I accept the Respondent's submissions that it is not a counsel of perfection, that the Respondent carried out a serious, detailed and thorough investigation which was commensurate to the seriousness of the allegations and the potential consequences for the Claimant. I find that it took all steps that a reasonable employer could be expected to take

Severity of sanction

78 I reminded myself it is not for me to substitute my own view for that of the Respondent. Having concluded that the Claimant was guilty of the misconduct alleged in respect of allegations 1 and 7 and also allegation 2, I am satisfied that the decision to dismiss for proven allegations of gross misconduct was within the range of reasonable responses open to the Respondent. In reaching that conclusion I bore in mind the Claimant's submissions in respect of equity and the substantial merits of the case. I am satisfied that the Respondent reasonably believed that the allegations made against the Claimant's colleagues were not as serious as those made against her: specifically allegations 1 and 7, and there was evidence from which the Respondent had concluded that the Claimant created a negative atmosphere, made people feel unwelcome and had reduced a student midwife to tears. Whilst there was also evidence to suggest that the Claimant was well liked by other colleagues the Respondent reasonably believed the evidence from a number of staff demonstrated that she displayed bullying behaviour which amounted to gross misconduct under the Respondent's policies. I am satisfied that the Respondent acted reasonably in distinguishing between the Claimant's conduct and that of her colleagues.

79 I do not find that the Respondent failed to take into account the Claimant's mitigating circumstances. I accept the Respondent's evidence that her mitigation was taken into account: firstly at the disciplinary hearing, where the evidence as to the Claimant's personal circumstances and the testimonials that she provided were given consideration but were found not to outweigh the severity of the misconduct found to have been committed; and secondly, at the appeal where the Claimant's mitigation was also taken into account but the decision was upheld due the severity of the conduct.

80 I am satisfied that the decisions of the Respondent and the procedure that it followed fell within those open to a reasonable employer and that the dismissal was fair within the meaning of section 98(4) of the Employment Rights Act 1996 in all the circumstances.

81 The clam for unfair dismissal fails and is dismissed.

Employment Judge Lewis

14 March 2022