EMPLOYMENT TRIBUNALS

Claimant: Mrs C Moores

Respondent: University Hospital of South Manchester NHS Foundation Trust

HELD AT: Manchester **ON:** 30 and 31 August, and 1 September 2017

BEFORE: Employment Judge Franey (sitting alone)

REPRESENTATION:

Claimant: Mr B Norman, Counsel
Respondent: Ms R Eeley, Counsel

JUDGMENT

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

REASONS

Introduction

1. By a claim form presented on 2 August 2016 the claimant complained that she had been unfairly dismissed by the respondent from her position as a Band 5 registered nurse at the end of March 2016 following a disciplinary hearing arising out of a medication error which had occurred in February 2015. She argued that she had been told at the time that no further action would be taken over that incident, that the decision to dismiss her was too harsh (in part because another nurse involved had not been dismissed) and that the investigation was a "witch hunt" following 15 years of being bullied and having complained about it.

2. By its response form of 13 September 2016 the respondent defended the claim on the basis it was a fair dismissal for gross misconduct. It asserted that the claimant had not been told that no further action would be taken, that the investigation had been delayed because of the claimant's sickness absence, and that earlier allegations of bullying had played no part in the decision.

Issues

3. I clarified with Mr Norman at the start of the hearing that the sole complaint was unfair dismissal. The issues to be determined in relation to liability were as follows:

> **(1) Could the respondent show that the reason or principal reason for dismissal was a reason relating to the claimant's conduct?**
>
> **(2) If so, was the dismissal fair or unfair under section 98(4) Employment Rights Act 1996?**

Evidence

4. I had the benefit of an agreed bundle of documents running to approximately 400 pages. Any reference in these reasons to a page number is a reference to that bundle unless otherwise indicated.

5. The respondent had four witnesses of whom three gave evidence in person. Helen Thompson, the Head of Midwifery/Deputy Director of Nursing who dismissed the claimant, was unable to attend in person for medical reasons. I attached less weight to her signed witness statement than if she had been able to attend in person. The witnesses who gave oral evidence were Susan Langworth, the Matron for the department in which the claimant worked at the relevant time; Kathryn O'Brien, the Human Resources (HR") Business Partner who supported Ms Thompson during the disciplinary hearing; and Silas Nicholls, the Chief Operating Officer/Deputy Chief Executive who chaired the panel which heard the appeal against dismissal.

6. The claimant gave evidence herself but did not call any other witnesses.

Relevant Legal Framework

Unfair Dismissal

7. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

8. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(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 sub-section (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 sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**

> **(4) Where the employer has fulfilled the requirements of sub-section (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".**

9. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

10. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

11. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

12. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

13. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

14. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

15. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

16. The word "equity" in section 98(4) can import considerations of consistency: **The Post Office v Fennell [1981] IRLR 221 (**Court of Appeal). The EAT pointed out in **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352** that evidence of more lenient treatment of other employees in truly parallel situations may support an argument that dismissal fell outside the band of reasonable responses. However, such arguments should be scrutinised with particular care because an employer is entitled to take into account not only the nature of the misconduct but also the surrounding facts and any mitigating personal circumstances affecting the employee concerned: **Paul v East Surrey District Health Authority [1995] IRLR 305** (Court of Appeal).

Relevant Findings of Fact

17. In this section of the reasons I will set out the broad chronology of events necessary to put my decision into context. Any disputes of primary fact of central importance to my decision will be addressed in the discussion and conclusions section below.

The Respondent and Its Policies

18. The respondent is an NHS Trust based at Wythenshawe Hospital in South Manchester. It is a substantial employer with access to specialist HR advice.

19. Its Disciplinary Policy in force in early 2015 appeared at pages 204-228. Examples of gross misconduct appeared at page 216. Examples of gross misconduct included:

> **"(15) Falsification or inappropriate alteration of, or omission from, documents or records relating to patients, staff or other persons.**
>
> **(26) Breaches of professional code of conduct."**

20. The Trust also had a Medicines Management Policy (pages 229-342). It was published on the intranet in August 2014. It addressed the procedures for administration of medicine at pages 318-323.

The Claimant and Her Professional Code

21. The claimant was employed as a Band 5 Registered Nurse in June 2001. On 11 July 2001 she signed her contract of employment (pages 36-41). The contract confirmed in clause 15 that she was subject to the respondent's disciplinary procedure.

22. Clause 19 required her to ensure that she was registered with the appropriate professional council, which in her case was the Nursing and Midwifery Council ("NMC"). The NMC periodically produced a Code setting out standards of conduct, performance and ethics for nurses and midwives. The version from May 2008 appeared at pages 196-203, and a revised version was published at the end of January 2015 effective from 31 March 2015 (pages 357-376). Both versions included obligations to keep accurate records, and the latter expressly required the record to identify any risks or problems which have arisen and the steps taken to deal with them. The 2015 Code also required a nurse to document all mistakes and

take further action (escalate) if appropriate so mistakes could be dealt with quickly (pages 367-368).

23. The job description for the claimant's role appeared at page 42 onwards. She was allocated to a role in the Neonatal Unit. Her line manager was the clinical nurse manager, Rachel Brindley, who reported to Ms Thompson. The job description required the claimant to adhere to the NMC Code of Conduct, and to report clinical and non clinical incidents through the electronic Hospital Incident Reporting System ("HIRS").

Historic Bullying Allegations

24. In September 2006 the claimant made a complaint of bullying and harassment. It was investigated but by a report dated 6 November 2006 (pages 51-60) the nurse manager, Helena Brown, concluded that the allegations were not well-founded.

25. The claimant made a further allegation of bullying in July/August 2012. The allegation was investigated by Helen Thompson and in a report from October 2012 at pages 61-67 she concluded that although the claimant had been genuinely upset, there had been no intent to bully or harass her. Instead there was "a culture of friendly banter" to be addressed. An action plan to that effect was implemented (page 68).

27 February 2015

26. On 27 February 2015 the claimant was one of three members of nursing staff on the neonatal ward. She was working with her colleague, Ms Sadler, and with a student midwife, Ms Bailey. Ms Sadler was relatively new to the respondent and the claimant had not previously worked with her. It was Ms Bailey's second day working with the claimant and she had only learned from Ms Bailey the previous day that she was Ms Bailey's mentor and supervisor.

27. The claimant was the lead nurse for one of the patients, "Baby X". The nursing notes for Baby X for that day appeared at page 70. The baby was due to have intravenous antibiotics administered around 10.00am. Due to an error antibiotics were administered orally with a feed rather than intravenously. The nursing note made no record of this. The claimant, Ms Sadler and Ms Bailey had all been involved in preparing, checking and administering the medication but none of them reported it on the day to anyone else.

March 2015

28. Ms Bailey subsequently spoke to her educational supervisor about it and as a result it came to the attention of Ms Brindley on 5 March 2016. It was passed to the Matron, Mrs Langworth, to investigate.

29. Standard practice where there has been a medication error was for the Matron to meet with each member of staff involved on a one-to-one basis and for each person to complete a "reflective statement" to establish why the incident has occurred and what actions were needed to reduce the risk of it happening again. That was required for continuing professional development within nursing and

midwifery. The respondent had a pro forma available on the intranet but it was not mandatory to use it.

30. The claimant was unaware that the incident had come to light until she returned from annual leave on 16 March. She was informed of the matter by Ms Brindley that day. Ms Brindley told her that Ms Bailey had said that on the day the claimant had told Ms Bailey to forget the incident. The claimant was offended by the way in which Ms Brindley spoke to her.

31. The same day the claimant had a meeting with Mrs Langworth. She was asked to do a reflective statement. The claimant went on sick leave on 22 March but did her statement the following day (pages 73-80). She explained how the medication had been prepared, checked and administered. She made clear that Ms Sadler had also checked it. Her statement said (page 75) the following:

> **"Later that morning, my student approached me on the corridor and said she had realised the oral [medication] should have been an IV drug not oral. I told her it was for me to sort out, not for her to worry about. When mistakes like this occur the doctor should be informed. However, due to the very busy shift this didn't happen."**

32. Her reflective statement emphasised that there had been an oversight on her part, not any attempt to cover up.

33. Mrs Langworth had meeting with the other people involved and they produced statements. The reflective statement from Ms Sadler of 25 March 2015 appeared at page 80A-80B. It was on the pro forma for reflective statements and Ms Sadler addressed the printed questions about why the error occurred and what needed to be done to prevent it occurring again.

<u>April – May 2015</u>

34. On 6 April 2015 Ms Sadler prepared a further statement (pages 84-86). It said that the student had approached her first about the error but she had told the student to speak to the claimant. The claimant was the senior nurse and she believed that the claimant would have continued the escalation to the shift leader and to doctors.

35. The same day Ms Brindley did a statement which appeared at pages 81-83. It explained how the matter had only come to light on 5 March 2015 instigated by the student nurse. She had not been made aware of it before, and no HIRS report had been done. The missed intravenous antibiotic had not caused any harm to the baby; the course of treatment had been discontinued the following day in any event. Her statement recorded that the claimant had been supervised in practice upon her return from work in mid March before she went on sick leave.

36. Mrs Langworth did not take any further action in relation to her investigation at that time. She wanted to speak to the claimant before proceeding but the claimant was still on sick leave.

37. She was also trying to get a statement from Ms Bailey, having to go through the university. Ms Bailey's statement was eventually made on 27 May 2015 (pages 87-88). It recorded how when she noticed the error she spoke to Ms Sadler who advised her to tell the claimant. Her statement said that the claimant:

> **"Told me to forget about the error, stating that sometimes this drug was given orally anyway."**

38. In this period the claimant prepared a second reflective statement (pages 89-96). It was unclear when this was done or whether Mrs Langworth had seen it before she left the respondent on 1 June 2015. In that second reflective statement the claimant said she had gone through the incident 100 times or more in her mind, that she should have been stronger in insisting that the student left the medication to her, and she said:

> **"I did aim to tell the doctor of this error. But did forget to do so. The shift was very busy."**

39. Her statement emphasised that nothing had been intentional; she knew she was responsible for her student, and that she had been aware that errors or mistakes should be the subject of an entry on the HIRS. She did not feel that she had told the student to forget it ever happened.

40. It was the claimant's case that she had a chance encounter in a corridor with Mrs Langworth during this period and was told that it was all sorted. Mrs Langworth denied having said that to the claimant as it was not her decision. I will return to that issue in my conclusions.

June 2015

41. The claimant had not returned to work when Mrs Langworth left the Trust in early June 2015. The investigation was passed to another Matron, Tracey Jones.

42. The claimant returned to work on 8 June 2015. She was posted to a different area of work. She had agreed with Mrs Langworth that she would work in the Nightingale Suite. The claimant felt that she was bullied and harassed by the sister in charge of the Suite and she went on sick leave again on 22 June 2015. She was not to return to work until 16 November 2015.

July – November 2015

43. The management of the claimant's absence fell to the acting Matron, Sharon Hyde. They had a meeting on 20 July. In a letter of 22 July 2015 at pages 97-99 Ms Hyde recorded that there had been a discussion about the incident on the neonatal unit. There was no reference in that letter or in the notes of the meeting to there being any ongoing investigation into that incident.

44. Tracey Jones was present at a further sickness review meeting on 6 October 2015. The notes of this meeting were not produced but there was no mention in subsequent letter of any pending investigation.

45. However, at a meeting on 13 October 2015 (page 102) the claimant was informed that the investigation had been on hold while she had been off sick and would be progressed now she was returning to work. That was confirmed in the letter of 15 October at page 103A. The letter recorded the claimant's immediate reaction which was to say that she thought the incident had been dealt with by Mrs Langworth and that it was being brought up to prevent her moving forward. The letter said that

Tracey Jones would "recommence the investigation" and that a formal letter would be issued to that effect.

46. On 11 November 2015 Ms Hyde wrote to the claimant to confirm that she would be returning to work in a temporary non clinical role in the safeguarding team whilst the investigation process was undertaken. Her letter appeared at pages 106-107.

47. The claimant returned to work in that role on 16 November 2015.

Formal investigation November 2015 – February 2016

48. By letter of 11 November 2015 the claimant was informed by another Matron, Chris Mckay, that she had been appointed to conduct a formal investigation under the disciplinary procedure into the incident on 27 February 2015. The letter recorded that the claimant had been advised that an investigation would take place. It was suggested that there could have been a breach of three examples of gross misconduct and two examples of misconduct in the Trust's disciplinary policy. The claimant was invited to an investigation meeting.

49. The claimant said in evidence that Chris Mckay telephoned her when the invitation letter was being issued and told her that the outcome would probably be a medication course. Although the letter informed the claimant that there was a risk of dismissal, she did not think that was a serious risk.

50. The investigatory meeting took place on 18 November 2015. The claimant chose not to be accompanied. The notes appeared at pages 110-114. At page 112 the claimant was recorded as saying the following:

> **"I said [to Ms Bailey] don't worry I'll sort it out. But if it's oral instead of IV it's not that serious. But if had been I'd run to doctor and tell them. But in hustle and bustle of day. It's not urgent – not that it doesn't matter. I know my drugs. If remembering I'd have said baby had oral instead of IV. It was a horrendous shift."**

51. The claimant said that she could kick herself and that it was her responsibility due to the circumstances of the day.

52. Chris Mckay carried out further interviews in January 2016. She interviewed Rachel Brindley (pages 115-116), Ms Sadler (page 117) and Ms Bailey (pages 118-119).

Disciplinary Charges February 2016

53. By a letter of 11 February 2016 the claimant was invited by Ms Mckay to attend a disciplinary hearing before Helen Thompson on 22 February 2016. The letter appeared at pages 119A-119B. The allegations were set out as follows:

> **"(1) You failed to ensure medicines were administered correctly to a neonate…and therefore failed to follow the medicines management policy appropriately.**
>
> **(2) You failed to report a medicine error when [you] became aware an error had occurred.**
>
> **(3) You failed to report a medicine error had occurred via the HIRS system.**

> **(4) You failed to adequately supervise a student midwife in the preparation and administration of medicines.**
>
> **(5) You failed to maintain accurate and contemporaneous notes."**

54. The letter went on to say that the maximum sanction that could be applied was dismissal.

55. The claimant was supplied with a copy of the management statement of case which set out the outcome of the Mckay investigation. It appeared at pages 120-136. It recorded the progress of the investigation and analysed the evidence available from patient records and Trust policies. It recommended a disciplinary hearing to consider gross misconduct.

Disciplinary Hearing 15 March 2016

56. The hearing was delayed until 15 March 2016. The notes appeared at pages 137-142. Ms Thompson was supported by Ms O'Brien as HR Business Partner. The claimant was accompanied by a representative, Mr Hodgkiss, from her trade union the Royal College of Nursing ("RCN").

57. The claimant and her representative had the opportunity to question Ms Mckay about her report. The claimant made her point (page 138) that Mrs Langworth had told her at the time that it was sorted informally, and she said that she had seen Mrs Langworth a few weeks earlierand that she had said:

> **"Why don't they let things alone?"**

58. The claimant's case was then presented. The claimant was questioned by Ms Thompson. She referred to the earlier bullying and harassment investigations and felt they were affecting the way she was treated. There was discussion at the disciplinary hearing about how the matter had proceeded. Ms Mckay said that Tracey Jones had decided "to take it down the disciplinary route". There was no evidence that Rachel Brindley had been involved in that decision.

Further Investigations

59. No decision was made on the day. Ms Thompson carried out some further investigations. She looked at the claimant's personal file. She saw that the claimant had a clean disciplinary record.

60. A witness statement was obtained from Mrs Langworth. It appeared at pages 143-144. Mrs Langworth recorded that she had spoken to the staff involved at the time. She said that Ms Sadler knew that she should have escalated the error but felt that the claimant was the senior nurse. Her statement included the following:

> **"Carole too appeared to reflect appropriately but I felt that to continue administering medications would put her under considerable stress and would be a risk to her and to the patients, so we agreed that she would not administer medications during the investigation…"**

61. Her statement said that she had been unable to complete the investigation due to leaving the Trust before the claimant returned to work.

62. She ended by recording her brief meeting with the claimant by chance on 22 February 2016. She related that the claimant said that she thought that Mrs Langworth had sorted the investigation and it was all completed, but Mrs Langworth had told her that it had been a long time but the investigation had not been completed by her.

Dismissal Decision 29 March 2017

63. Ms Thompson set out her decision in a letter of 29 March 2016. She concluded that the claimant had failed to administer medicines properly and therefore failed to follow the medicines management policy. It was also a breach of the NMC Code of Conduct. The failure to report the error to management or via HIRS was also found against the claimant. She concluded the claimant had failed adequately to supervise the student midwife and that she had failed to maintain accurate and contemporaneous notes. All five allegations were found to be breaches of the NMC Code of Conduct.

64. The letter went on as follows:

> **"You and your representative raised matters that I have also considered in reaching my conclusion. In particular, you had referred to alleged bullying by Unit Manager, Rachel Brindley. You were asked at the hearing how in your view this alleged bullying and harassment had contributed to your actions on that day. You spoke about the interaction you had with Rachel Brindley days after the incident, however did not relay anything to suggest to me that this relationship had any impact upon your actions on that day. I am therefore satisfied that there is no correlation between the two matters.**
>
> **I noted your concerns around the process and whilst I acknowledge these, I am unconvinced by your suggestion that you were informed by Matron Langworth that the matter was closed.**
>
> **In considering the evidence, I conclude that you have breached the following UHSM disciplinary rules which are regarded as gross misconduct within the Trust's disciplinary procedure:**
>
> **(15) Falsification or inappropriate alteration of, or omission from, documents or records relating to patients, staff or other persons.**
>
> **(26) Breaches of professional code of conduct.**
>
> **I therefore inform you of my decision to dismiss you from the Trust. As the above breaches fall within gross misconduct, you are summarily dismissed (with immediate effect)."**

65. The letter ended by notifying the claimant of her right of appeal and that she would be reported to the NMC.

66. The claimant did not receive the letter until 1 April 2016. She continued to attend work between 29 March and 31 March 2016.

Appeal

67. The claimant appealed by a letter sent in early April 2016 (pages 148-158). She addressed the allegations for which she had been dismissed in some detail. She reiterated the circumstances in which the medication error arose. She admitted not

having reported the error but said this had been an oversight not intentional. She said she had reflected on the situation and in future would report any error, omission or incident immediately with no chance of it then being overlooked. She accepted she had not maintained accurate notes. She reiterated that Mrs Langworth had told her that the situation had been dealt with. She said that:

> **"I feel that the hearing should have resulted in a maximum of misconduct, with my attending further training regarding documentation, and personal study and reflection."**

68. Attached to the letter of appeal was a reference from Kathryn Cooper (pages 159-160) confirming how good the claimant's work had been since she moved to the safeguarding team in November 2015.

69. By a letter of 5 May 2016 (pages 162-163) the claimant was invited to an appeal hearing in June. She prepared an additional statement for the appeal which appeared at pages 164-169. It dealt with the history of difficulties with Ms Brindley and instances of bullying of the claimant in the past.

70. The management statement of case for the appeal was prepared by Helen Thompson. It appeared at pages 170-179. The rationale for her decision on each of the allegations appeared at pages 175-177. She had concluded that although the shift had been busy there was appropriate staffing on the day; the claimant had not reported the incident despite several opportunities to do so, and had failed to document the error and had not supervised Ms Bailey properly. She relied on the statement from Mrs Langworth denying that she had told the claimant that the matter had been "sorted". She explained the movement of senior staff which had caused delay in the investigation.

71. The appeal panel was chaired by Mr Nicholls. His panel members were Graham Lomax, Division Director of Operations, and Caron Crumbleholme, the Divisional Head of Nursing. The notes appeared at pages 180-188. The claimant was represented again by Mr Hodgkiss of the RCN.

72. The claimant presented her case first and answered questions. She said she should have had a warning for a drug error. The error would not have hurt the baby. She mentioned the shift being busy and said that during the day the whereabouts of her brother was on her mind. The claimant and her sister were extremely worried about him. He had developed serious mental health problems and would frequently go missing. He had gone missing near the airport that day.

73. There was discussion of the historic bullying matters.

74. Helen Thompson presented the management case and was questioned by the panel and Mr Hodgkiss. Mr Nicholls asked her whether she had considered misconduct as well as gross misconduct. The notes at page 185 recorded her answer as follows:

> **"Yes, it wasn't just one element, there were multiple aspects, for example there was no HIRS, no escalation and nothing was said at handover. There was no attempt to address this after."**

75. She was asked whether she considered training and/or counselling as an alternative but said:

> **"I felt that there was an issue of professional integrity and trust as a registered nurse and that there was an element of blame and a lack of reflection."**

76. She explained that Ms Sadler had been treated differently because of her reflective statement and the difference in responsibility between her and the claimant.

77. The hearing reconvened on 29 June 2016. The notes appeared at page 188. Mr Nicholls conveyed the decision to reject the appeal.

78. The decision of the appeal panel was confirmed by a letter of 29 June 2016 at pages 189-192. The letter included a summary of the discussion. The panel members concluded that dismissal was an appropriate sanction because there had been multiple opportunities to raise the error, and at no point had there been evidence of reflection during the appeal hearing. They found no correlation between the historic bullying and harassment and the investigation of the decision. Grace Sadler was not in the same position as the claimant: she had been the second medication checker on the day and the claimant had been responsible for the care of the baby. The error was escalated to the claimant and Ms Sadler had reflected on what she would do differently. The letter said:

> **"Your reflection was different to this and still has an element of blame on others rather than accepting responsibility."**

79. The letter went on to say that the appeal panel concluded that the move to administrative work had been a suitable alternative to suspension, and that there had been breaches of the professional Code of Conduct which fell within the examples of gross misconduct in the disciplinary procedure. The failure to escalate the error through the appropriate channels despite multiple opportunities to do so was also misconduct.

80. The clean disciplinary record had been taken into account, but the claimant had been dismissed not just for the initial error but for the failure to deal with it properly. The letter said that the concerns held by Helen Thompson about the claimant's integrity as a nurse were justified and the decision to dismiss was appropriate.

<u>NMC Referral</u>

81. A referral to the NMC had been made at the time of dismissal. By a letter which appeared in the bundle at pages 193-195 (wrongly dated 14 June 2016; it must have been sent after 7 July 2016) the NMC confirmed that it would not be investigating the matter. The NMC letter said:

> **"Following a review of the information received on the matter the legal team have concluded that whilst your actions are concerning and indicative of a momentary lapse of attention to detail, they do not fall within the scope of requiring further investigation. The NMC have noted that you admitted the error from the outset, highlighting both insight and remorse. In regards to the failure to report the incident we have noted that there is insufficient evidence to support any dishonesty allegation and no real prospect of obtaining any evidence which would raise concerns you acted dishonestly**

> **in attempting to conceal the incident. The NMC submit that the matter had been adequately dealt with by way of a local investigation and thus does not require further investigation…This case relates to a single error and in isolation this single error is not capable of impairing your fitness to practice. The NMC have noted no information regarding any harm that came to the baby as a result of the minor medication error. You have admitted the error and the NMC have noted that the there have been no other referrals in a sixteen year nursing career."**

Submissions

82. At the conclusion of the evidence each advocate made an oral submission.

Claimant's Submission

83. For the claimant Mr Norman began by pointing out that there was no clarity in the contemporaneous documents as to whether the respondent believed the claimant had been guilty of a deliberate (i.e. dishonest) omission to record or report the medication error, or whether it was believed to have been accidental. The witness statement of Ms Thompson said she thought that the claimant had deliberately not reported it, but he argued that the justifications she relied upon in reaching that conclusion appeared to be misconceived.

84. Further, the claimant had 16 years of unblemished service and should have been given the benefit of any doubt. There had been no attempt to seek evidence from colleagues about her integrity generally. The NMC concluded there was no dishonesty.

85. Accordingly he submitted there was no genuine belief (or alternatively no reasonable grounds for such a belief) that the claimant had been dishonest, and without that the respondent could not reasonably have regarded her as guilty of gross misconduct based on this one incident. He relied on the wording of example 15 of the gross misconduct examples in the disciplinary policy. He also submitted that example 26 which related to breaches of the NMC Code could not itself amount to gross misconduct without dishonesty. Little weight if any should be attached to the claimant's acceptance in cross examination that what she did fell within the gross misconduct part of the policy.

86. In support of his proposition that dismissal fell outside the band of reasonable responses he relied on a number of different matters. These included the respondent's misunderstanding that when the claimant said the ward was busy she was providing mitigating context, not seeking to avoid blame. The same was true of the information about her concerns about her brother. I was invited to accept that Mrs Langworth had told the claimant that "it was sorted", not in support of an argument that the respondent could not then fairly pursue a formal investigation but to show that the only reasonable view of this incident was that it was just not serious enough to be gross misconduct. That lack of seriousness was evident in addition from the fact the claimant was allowed to continue working in the neonatal unit for a day and a half after the matter came to light, and there had never been any real consideration of whether she should be suspended. There was no formality about the handover from Mrs Langworth to Tracey Jones, and Ms Jones did nothing between June and October in relation to the investigation even though the claimant

was at work for two weeks in June. That all showed that in truth it was not a serious matter.

87. The view that it was gross misconduct was also impossible to reconcile with the fact that no action was taken against Ms Sadler. There were some very slight differences between her situation and that of the claimant but not enough to explain the great disparity in treatment. He also relied on the Mckay comment about the likely outcome, and the flawed view taken by the respondent of the claimant's lack of reflection. The respondent failed to take account of the fact that the claimant had been put on the defensive by the way in which her manager, Rachel Brindley, had confronted her about the issue. She was entitled to point out the fault of others without being taken to deny her own responsibility.

88. He submitted that the view that there was a risk in future was outside the band of reasonable responses. The NMC view was relevant to that as was the lengthy unblemished service of the claimant. A warning would have been a reasonable sanction and would have been entirely sufficient and it was unreasonable to go beyond that. He submitted the respondent had failed to look properly at alternatives to dismissal.

Respondent's Submission

89. For the respondent Ms Eeley had helpfully prepared a written skeleton argument which ran to 20 paragraphs over 11 pages. It was accompanied by copies of the authorities relating to consistency of treatment (see above). I read the skeleton argument before oral submissions. Reference should be made to it as appropriate.

90. Ms Eeley submitted that there was no requirement as a matter of law or under the respondent's policies that the omission to record or report the matter had to be deliberate or dishonest in order for there to be gross misconduct. She relied on the grammar and punctuation of example 15 and the broad way in which example 26 of the gross misconduct examples was framed. She invited me to accept the evidence of Ms Thompson in her witness statement that she had considered the claimant acted deliberately, but even if I was against her on that she submitted that there were still reasonable grounds for the conclusion that there was gross misconduct. Views to the contrary which the claimant alleged had been expressed by Mrs Langworth and Ms Mckay, which were not conceded, were irrelevant as they were not the decision makers. The band of reasonable responses could encompass different views of the seriousness of what the claimant did.

91. The claimant's long unblemished record was relevant but was only one of a number of factors to be taken into account. It was reasonable to conclude that it counted against her because she must have known it was a matter which should have been recorded and reported and that made her failure to take that step even more serious. The fact she had such long experience meant that the respondent could not be confident she would act differently in future, particularly because she displayed no real insight but sought to deflect blame to others.

92. The view of the NMC after the appeal as to the seriousness of the breach of their Code should not be given any weight as they did not have considerations which

the respondent had, and had not seen the claimant in the disciplinary and appeal hearings.

93. Overall Ms Eeley submitted that dismissal was well within the band of reasonable responses. The factors were identified in paragraphs 9 and 10 of her written skeleton argument. The lack of insight and what Mr Nicholls described as the "cavalier attitude" of the claimant were relevant. The position taken on the mitigating factors such as the shift being busy and concerns about her brother was within the band of reasonable responses. There were rational distinctions between the claimant's position and that of Ms Sadler. The respondent should not be criticised for taking the course of action which avoided having to suspend the claimant. The actions taken in relation to her redeployment were consistent with a genuine concern about a risk to patient safety. The claimant's acceptance in cross examination that her conduct could fall within the gross misconduct section of the policy should be given some weight: if there had been a good reason why that was wrong she would have volunteered it.

Discussion and Conclusions – Reason for Dismissal

94. The first issue to determine was the reason for dismissal which is a set of facts or beliefs in the mind of the decision maker which causes her to dismiss the claimant.

95. In this case I was satisfied that the reason related to conduct, the conduct in question being that in relation to the medication error in February 2015 and the subsequent failure to record or report it. Mr Norman ultimately did not pursue an argument to the contrary.

96. However, there was a dispute between the parties as to whether Ms Thompson and on appeal Mr Nicholls thought the claimant had deliberately failed to record it, or whether they thought the failure was an accidental omission. That was an important dispute because a reasonably formed view that there had been a deliberate failure to record/report the error would be more likely to result in a fair dismissal than if the employer thought it had been accidental.

97. In relation to Ms Thompson I did not have the benefit of oral evidence, but I did have a clear statement in paragraph 51 of her witness statement that she concluded that the claimant had deliberately failed to report the medication error. That was not tested in cross examination. Mrs O'Brien's witness statement confirmed that the reasoning given in Ms Thompson's statement was accurate but she did not offer any direct evidence of a specific discussion with Ms Thompson about this at the time the decision was taken.

98. In contrast the contemporaneous documents did not contain any clear statement to that effect. The possibility the claimant had deliberately decided not to record or report the error was not mentioned or put to her at the disciplinary hearing. The dismissal letter did not contain a clear statement that that was the conclusion; it simply said that the allegation of a failure to report it was found proven. The management statement of case for the appeal added nothing to this, save at page 177A where it asserted that the facts demonstrated there was no intention to report it. That is not quite the same as saying that there was an intention not to report it.

99. In the appeal hearing Ms Thompson spoke about questioning the claimant's integrity and trust, but again fell short of a clear statement that she concluded the claimant had deliberately concealed the error. In the appeal outcome letter Mr Nicholls and his colleagues recorded that Ms Thompson had concerns about integrity and that those concerns were justified, but again that was less than unequivocal.

100. As for Mr Nicholls, his witness statement at paragraph 26 said that he felt on balance it was a deliberate decision not to record it, but no such clear statement was made in his outcome letter. In cross examination Mr Nicholls candidly said he could not say for definite it was deliberate but he felt it was highly unusual, and said it was hard to tell if it was deliberate but in the round he was very worried by it.

101. Putting those matters together I concluded that at the time of dismissal and the appeal there was no finding that the claimant deliberately sought to conceal her error by not reporting it. The witness statements making that assertion were a development of or a gloss on the view taken at the time. At the time, I concluded, it was accepted that it was not a deliberate failure to record, even though that was a finding made by a slim margin on the balance of probabilities. The reason for dismissal did not encompass a belief that the claimant deliberately concealed the medication error.

Discussion and Conclusions – Fairness – Burchell Test

102. I turned to the question of fairness under section 98(4) and the various elements of the **Burchell** test (including procedural fairness).

Genuine Belief

103. The first question was whether there was a genuine belief that the claimant was guilty of misconduct as described. I was satisfied there was a genuine belief to that effect in the mind of Ms Thompson at dismissal and Mr Nicholls and his panel at the appeal stage.

Reasonable Investigation

104. The only criticism made by Mr Norman in relation to the investigation was that the respondent should have sought the character evidence which the claimant subsequently obtained (pages 380-384), especially given the claimant's length of service. In my judgment it was within the band of reasonable responses not to take that step. Firstly, it was open to the claimant to put forward that evidence at the disciplinary or appeal stage if she wanted to. Secondly, character evidence of that kind can reasonably be viewed as carrying little weight where it is a single incident which is the focus of the enquiry. I was satisfied that the respondent overall carried out such investigation into the matter as was reasonable.

Reasonably Fair Procedure

105. There were some points made by the claimant which might have had a procedural aspect, but Mr Norman was clear that he was not challenging the overall fairness of disciplinary procedure. His case was that matters such as comments made by Mrs Langworth about it being “sorted”, the comment made by Ms Mckay on

the telephone about the likely outcome of the disciplinary, and the delays in the investigation went to the question of whether the respondent could reasonably characterise this as gross misconduct, and those points will be addressed in that context below.

106. Overall, the procedure followed was reasonably fair. By the time of the disciplinary hearing the claimant knew the case against her and had been given the opportunity to respond; she was aware how serious the allegations were and that dismissal was a possible outcome; the points she raised were considered and she was given a reasoned decision. At the appeal stage she had the same opportunity to have her say and her points were taken into account by Mr Nicholls' panel, which carried out some further investigations before explaining its decision.

Reasonable Grounds

107. Plainly there were reasonable grounds for the conclusion that the claimant was guilty of misconduct. The claimant admitted in the course of the disciplinary and appeal proceedings that there was a medication error made, she had failed to record it and she failed to report it.

Discussion and Conclusions – Fairness – Sanction

108. That left the real issue between the parties in this case: whether the decision to dismiss the claimant was one which fell within the band of reasonable responses. The claimant's position was that a warning and further training would have been reasonable, but not dismissal, not least because this was the first disciplinary offence in approximately 16 years of unblemished service.

Self-Direction

109. Section 98(4) of the Employment Rights Act 1996 requires a Tribunal to consider whether in all the circumstances, including the size and administrative resources of the respondent, the respondent acted reasonably or unreasonably in treating its reason for dismissal as a sufficient reason for dismissing the claimant, and that must be approached in accordance with equity and the substantial merits of the case.

110. There are two points to be emphasised deriving from case law, neither of which was in dispute in this case.

111. Firstly, in a dismissal for a first offence which is characterised as gross misconduct there are two decisions which need to be scrutinised. Was it reasonable to characterise it as gross misconduct? If so, was it reasonable to dismiss instead of imposing a lesser disciplinary punishment? It is not automatically the case that every instance of gross misconduct must result in dismissal: **Britobabapulle.**

112. Secondly, a Tribunal must be particularly alive in these cases to the danger of being carried away by sympathy for a claimant and substituting its own view for the proper test of the band of reasonable responses. A warning to that effect was given by the Court of Appeal in **London Ambulance Service NHS Trust v Small [2009] IRLR 563** at paragraph 43. The question for the Tribunal is not what it would have

done but whether what the employer did was reasonable within all the circumstances.

Gross Misconduct?

113. The first question was whether it was within the band of reasonable responses to term this as gross misconduct at all. The reason for dismissal was the combined effect of the medication error, the failure to supervise the student properly, and the unintentional failure to record the error or report it. The last element was the most significant. The importance of accurate recording in patient records and the reporting of errors of this kind is, in the view of the respondent, an extremely high one. That view was not disputed by the claimant and was, of course, supported by the NMC Code of Conduct.

114. However, a number of different points were raised by Mr Norman which he submitted took the respondent outside the band of reasonable responses in characterising this as gross misconduct. I will address each one in turn.

115. Employment law: There is no requirement in employment law generally for there to be dishonesty or intent in order for there to be gross misconduct. The fact that it can be found where there has been gross negligence is evident from paragraph 24 of the ACAS Code of Practice, and from paragraphs 108 – 112 of **Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09**.

116. Respondent's Policies: The examples of gross misconduct appeared on pages 216 and 217. The preamble in clauses 1.2 and 2.2 referred to consideration of all the circumstances. Some of the other examples of gross misconduct in that list expressly covered gross negligence, such as examples 1 and 20. I was satisfied that it was within the band of reasonable responses to treat examples 15 and 26 as potentially encompassing omissions or breaches of the Code of Conduct which were not deliberate.

117. No Suspension: The claimant was not suspended but instead worked on the neonatal ward for a few days after the matter came to light before being redeployed into other roles. The incident was not expressly labelled as potentially gross misconduct when it first came to light. However, it was clear that from a very early stage the claimant was either under supervised practice, as Ms Brindley put it in her witness statement at page 82, or (according to Mrs Langworth at page 143) was under restrictions which she agreed to about not administering medication. The respondent's policy at page 212 clause 8.3 made it clear that alternatives to suspension should be considered, and once the claimant returned from her sick leave in early June she was moved at her own request to a different role in which again she was not required to administer medication.

118. In any event in my judgment the view taken of the situation at the outset of the investigation is not determinative of the view that can be taken later once the matter has been fully investigated and once the claimant has attended an investigatory interview, a disciplinary and an appeal hearing. I rejected the contention that the failure to suspend her undermined the case that this could reasonably be seen as gross misconduct.

119. Delay: The delay in the progress of the investigation was plainly unsatisfactory. The claimant was not told that Mrs Langworth was carrying out an investigation which might later be viewed as part of a formal disciplinary investigation, and indeed Mrs Langworth was unclear in her evidence to this hearing whether she was at the formal stage or not. By the time the claimant returned to work in early June she thought the matter was concluded because no one had told her any differently.

120. In fact Mrs Langworth left the Trust on 1 June only a few days after Ms Bailey's statement of 27 May 2015 (pages 87 and 88). The file was passed to Matron Tracey Jones, and I inferred that she did not have time to deal with it before the claimant went off sick again on 22 June. The matter was not mentioned to the claimant at the sickness meeting in July nor, despite the presence of Tracey Jones, at the sickness meeting on 6 October or in the letter which ensued after that meeting. It was only mentioned on 13 October by Ms Jones as confirmed in the letter of 15 October at pages 103A-C. That came as news to the claimant and she made her understanding clear as recorded in the letter. It did mean, however, that with the investigation ongoing she needed to be moved to a non clinical role in safeguarding.

121. The investigation was then pursued by Chris Mckay. The claimant was interviewed in November. There were further interviews early in January and an investigation report and disciplinary charges brought in early February 2016.

122. It is unsatisfactory that the claimant was not aware of the position. It was a failure of communication by the respondent. Mr Norman did not argue, however, that that delay or failure in communication created any substantive unfairness. He was right to do so, in my judgment, because (as everyone recognised) the evidence was effectively preserved at the time. However, I also rejected the claimant's argument that the delay and unsatisfactory nature of this part of the investigation showed it could not reasonably be viewed as gross misconduct. I was satisfied that those shortcomings were explained by other factors: the delay in getting a statement from the student nurse; the claimant's sickness absence between March and early June; the departure of Mrs Langworth and the handover to Ms Jones; and the claimant's further sickness absence between late June and mid November 2015. This point overall did not help the claimant establish that it was outside the band of reasonable responses to regard it as gross misconduct.

123. Langworth Comment: The claimant alleged that Mrs Langworth told her it was all "sorted" when they met in the corridor at some point between March and the end of May 2015. Mrs Langworth denied having told the claimant the investigation was "sorted". It is clear the claimant believed she had been told that. She said it at once on 13 October when told by Tracey Jones that the investigation was pending (page 103). She also said it again to Mrs Langworth when they met by chance in February 2016 as Mrs Langworth's statement at page 144 recorded. However, page 138 recorded what the claimant said in the disciplinary hearing as:

> **"She said she'd sorted it that I could go to Nightingale."**

124. I found that Mrs Langworth did use the words "it's sorted" but that was about the move to Nightingale on return to work. The claimant genuinely and reasonably, but mistakenly, thought that meant the whole investigation was concluded. I am

satisfied Mrs Langworth did not intend to say that or to give that impression; it was not her place to do so particularly when it is extremely likely that she was still waiting for a statement from the student nurse at the time of that chance encounter. This was not a formal communication to the claimant that the investigation was at an end. It was not inconsistent with the later view that there was gross misconduct.

125. McKay Comment: I accepted the claimant's factual evidence on this point. Chris Mckay was not called as a witness. I found as a fact Chris Mckay did say to the claimant on the telephone in November 2015 that she would probably be asked to attend a medication course at the conclusion of the disciplinary proceedings. That may have been her view of the likely outcome. However, that was ultimately a decision for Ms Thompson to make at the disciplinary hearing. There was room for a difference of opinion. Indeed, Ms Mckay subsequently compiled the management statement of case at page 136 where she said that the allegations the claimant was facing could amount to gross misconduct. This point did not assist the claimant.

126. Nurse Sadler: There was a significant disparity in treatment between Ms Sadler and the claimant. I was satisfied that there were differences in their respective positions which reasonably gave rise to that difference in treatment. The claimant was the more senior of the two nurses and had considerably longer service with the Trust. She was the mentor and supervisor of the student nurse. The baby in question was a baby for whom the claimant had direct responsibility. Ms Sadler told the student nurse to report the incident when it became apparent there had been a medication error, and although her own actions fell short of what was expected she was in a different position from the claimant who took no action at all once the error was brought to her attention. It was, therefore, rational and within the band of reasonable responses to regard them in a different light, and to take a significantly different view of their respective culpability.

127. Busy Shift: The claimant's argument that the shift had been "horrendous" was considered but Ms Brindley's evidence at page 115 was that the staffing levels were within guidelines. In any event, even if the shift was a particularly busy one in which there had been simply no time to make any formal record or report, the claimant had a number of opportunities to do that both after the shift and in the days that followed. The respondent's treatment of this argument was within the band of reasonable responses.

128. Claimant's Brother: The claimant said in the appeal hearing, as recorded at page 183, that although this was on her mind it did not affect her ability to do the job. The respondent was entitled to take the view that if it had affected her ability to do her job properly she would have called in sick or sought special leave, as indeed had been the case in the past. It was reasonable to find gross misconduct despite this factor.

129. Wording of Allegations: The formulation of the allegations did change. The invitation to the investigatory meeting issued by Chris Mckay on 11 November 2015 at page 108 apparently classified the failure to report as potential misconduct rather than gross misconduct. However, that lack of clarity was resolved in the charge letter which made it clear that the claimant was at risk of dismissal for these matters, and also in the management statement of case at page 134 which made clear that omissions from patient records were regarded as potentially gross misconduct. Any

lack of clarity at the start of the formal investigation did not prevent Ms Thompson or Mr Nicholls' panel taking a different view by the end of it.

130. Claimant's Admissions: Ms Eeley reminded me of the claimant's admissions in cross examination in my hearing that her actions could be viewed as falling within the examples of gross misconduct. I declined to attach any weight to this. Although she acknowledged as a matter of wording that the examples could be read as covering her actions, the clear thrust of her case was that it had not been gross misconduct and that the dismissal was unfair.

131. NMC View: The conclusion reached by the NMC after the appeal was said by Mr Norman to be relevant to the question of whether the respondent's view was a reasonable one. The view of the NMC was that the breach did not warrant further investigation, but the NMC has a role different from that of the respondent. It has no direct responsibility for patient safety in the same way as the respondent and its managers. It formed its view on the papers alone without having seen the claimant at the disciplinary and appeal hearings. In any event the respondent was, in my judgment, entitled to take a different view from the NMC of how serious breaches of the NMC Code should be viewed; both views can be within the band of reasonable responses.

132. Historic Bullying: I was satisfied that the allegations relating to the bullying in the past and the way in which Ms Brindley was alleged to have treated the claimant in March 2015 could reasonably be viewed as not relevant to the characterisation of the events in question.

133. Overall, therefore, I was satisfied that none of these points took the respondent outside the band of reasonable responses. Even taking all those matters together and looking at their cumulative effect it was still within the band of reasonable responses to characterise the claimant's omission to record or report the medication error as falling within the definition of gross misconduct, both in relation to the omission to record matters (example 15) and by way of breaches of the NMC Code of Conduct (example 26). Even though that omission was inadvertent, the respondent was entitled to think that it was grossly negligent (although that phrase was not used) for the claimant to have omitted to record and report a medication error when she was fully aware of the importance of accurate records and the need to report such errors as soon as practicable, and had had a number of opportunities to do so before the matter came to light through other channels.

Reasonable to Dismiss?

134. Having reasonably concluded that there had been gross misconduct, was the respondent within the band of reasonable responses in deciding to dismiss the claimant rather than impose a lesser disciplinary punishment such as a warning and recommend some form of retraining?

135. It was here that the claimant's length of service and unblemished disciplinary record become relevant again. I was satisfied the respondent took both of those matters into account. It was ultimately reasonable to see those matters as cutting both ways. The view that these made the claimant's failure to record and report the medication error even more concerning was a reasonable one. It could not be

attributed to a gap in her knowledge or experience. The claimant knew what to do after an error of this kind and why it was important to do it. It was reasonable to conclude that it was even more concerning than it would have been at the outset of her nursing career.

136. The respondent's witnesses also relied on what they characterised as a lack of appropriate reflection or remorse by the claimant. In my judgment it was within the band of reasonable responses to see a qualitative difference between the reflection of Ms Sadler and that of the claimant. The claimant did accept responsibility and made that clear a number of times, but she also sought to deflect blame onto others, such as Ms Bailey (appeal document at page 151), and Ms Sadler (appeal document page 158). It was also reasonable to conclude that she was seeking to do the same in mentioning how busy the shift had been, her worries about her brother and the historic bullying matters. There were also the comments made in the investigation interview on 18 November 2015 recorded at page 112 about how the medication error was not that serious.

137. There was some force in Mr Norman's argument that the respondent was wrong to see these as deflecting blame rather than the claimant accepting blame but wanting it to be seen in its proper context. But ultimately it seemed to me that both views of what the claimant was doing were reasonable views. It would have been entirely reasonable for the respondent to have taken the view which Mr Norman advanced, but in my judgment it was also reasonable and within the band to consider that the claimant was not as reflective or as accepting of her responsibilities as she should have been. I was satisfied that the note in the appeal hearing at page 186 where Ms Thompson said that there had been sufficient reflection was a point where she was talking about Ms Sadler rather than about the claimant, as is is evident from what she went on to say over the page.

138. Accordingly it was reasonable for Ms Thompson and, on appeal, Mr Nicholls' panel to consider that this was not a case where training or re-education would remove the risk of repetition. There was a reasonable concern that if the same set of circumstances arose again, namely a very busy shift and personal concerns affecting the mind of the claimant, the claimant might do the same over a medication error that she viewed as not serious. The decision to dismiss the claimant rather than take some other form of action fell within the band of reasonable responses. The unfair dismissal complaint failed and was dismissed.

Employment Judge Franey

11 September 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 September 2017

FOR THE TRIBUNAL OFFICE