



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109250/2021

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Held in Glasgow (by CVP) on 7-9 September 2021 and 29 October 2021

Employment Judge B Beyzade

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Miss S Ketterer

**Claimant
Represented by:
Ms. R Wark,
Solicitor**

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Greater Glasgow Health Board

**Respondent
Represented by:
Ms. K Henderson,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

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

REASONS

Introduction

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2. The claimant presented a complaint of unfair dismissal which the respondent denied.

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3. A final hearing was held on 7-9 September 2021. This was a hearing held by CVP video hearing pursuant to Rule 46. The Tribunal was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings. A further hearing date was listed on 29 October 2021 in chambers for deliberations and judgment.

4. The parties prepared and filed a Joint Inventory of Productions in advance of the hearing consisting of 728 pages.
- 5 5. An updated Schedule of Loss was also submitted to the Tribunal by the claimant, albeit the parties agreed that liability issues only would be determined at the hearing on 7-9 September 2021, and if the claimant were successful in her claim a separate remedy hearing will be arranged.
- 10 6. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:
- (i) Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of s98(1) or (2) of the Employment Rights Act 1996 (the ERA)? The respondent states that the claimant was dismissed due to her conduct.
- 15 (ii) Was the claimant's dismissal for that reason fair in all the circumstances, in terms of s98(4) ERA?
- (iii) Was it reasonable for the respondent to believe that the claimant was guilty of gross misconduct against the claimant's contention that no such reason could be ascertained?
- 20 (iv) If so, having regard to the tests set out in *Burchell v British Home Stores*, had the respondent carried out sufficient investigation so that at the time of dismissal they had a genuine belief based on reasonable grounds of the claimant's misconduct.
- 25 (v) Was a fair procedure followed with particular reference to any disciplinary procedures? Did the respondent fail to follow the ACAS Code of practice on Disciplinary procedures?
- (vi) Was dismissal within the band of reasonable responses?

(vii) Should there be a reduction of any compensation in line with the Polkey case?

(viii) Should there be a reduction of any compensation in view of the claimant's contributory conduct?

5 (ix) If the claimant's dismissal was unfair, what compensation should be awarded?

7. The Claimant gave evidence at the hearing on her own behalf. Mr C MacDonald, Head of Adult Services, Ms E Salmon, Professional Nurse Lead,
10 Ms R MacLeod, Head of Adult Services (Sexual Health, Police Custody and Prison Health Care) and Mr J Hobson, former Assistant Director of Finance gave evidence on behalf of the respondent.

8. Both parties were represented by solicitors and made written closing submissions and also provided replies to the other party's submissions.
15 References was made to a number of authorities in the Joint List of Authorities, which the Tribunal found informative.

Findings of fact

9. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine
20 the list of issues -

10. Following the claimant's registration with the NMC on 09 September 2017, she started working for the respondent as a Staff Nurse Band 5 at the Royal Infirmary in Glasgow in an Orthopaedics role on 23 October 2017. The claimant was also employed as a Bank Nurse from 5 March 2018. She started
25 her role as a Primary Care Nurse at HMP Low Moss on 1 April 2019 and she remained in this role until her employment ended on 11 December 2020.

11. Greater Glasgow Health Board, the respondent, is located at JB Russell House, Gartnavel Royal Hospital, 1055 Great Western Road, Glasgow, G12 0XH.
- 5 12. HMP Low Moss has approximately 750 prisoners, all male, over the age of twenty-one. The prisoners are a mix of remand, short stay, and long stay. A prisoner is deemed to be a long stay prisoner if they have a sentence of over 4 years. There were about 25 to 30 NHS staff working at HMP Low Moss.
- 10 13. The provision of health care within prisons is a unique environment. Unlike other health settings, the NHS in prisons operates in an environment owned and managed by Scottish Prison Services (“SPS”). This significantly influences how healthcare is delivered, including service times and when patients can be seen. Safety and security is priority for SPS and gathering of
15 intelligence in relation to any concerns that may compromise this is ongoing at all times. This applies to all prisoners, staff, and visitors to the prison.
14. The claimant would generally see prisoners in the nurses’ room or on the hall. Where patients were seen depended on their clinical needs. Patients requiring
20 dressings, venepuncture, ECG’s, and ear examinations were seen in the treatment room as this was equipped for those sorts of tasks, and they attended on an appointment basis. Those to be seen in the hall were usually following a referral done by the prisoner themselves, for example if they were feeling unwell or had a minor ailment. On some occasions prisoners would be
25 assessed in their cells, for example if they were under the influence of a substance or if they had been in a fight.
15. The nurses’ rooms were within the view of SPS staff side and SPS staff could see these from their desks. The door to the nurses’ rooms had a long glass
30 panel. SPS staff would either be at their desks or stand at the door.
16. Medication would be kept at the Health Centre, which was within the prison but separated from the halls. Medication rounds took place in the nurses’

5 room in the mornings, lunchtime and during evenings. The claimant would pass the medication under the hatch to the prisoner as they will be standing in an adjoining room with an SPS staff member present. Medication rounds were more often than not conducted alone by the claimant, unless controlled drugs were being dispensed which was always witnessed.

10 17. The claimant used paper copy Kardex's which contained the prisoner's name, date of birth, location, allergy status and often a photo. However if a prisoner's location changed, the claimant may need to check the location information using the respondent's Vision software. There was a computer in each nurses' room on the halls. Drugs that were dispensed were recorded on Kardex. Vision contained records of treatment given or needed in respect of a patient. Thus, Vision would store details in terms of why the prisoner required medical assistance which necessitated their visit to the Health Centre.

15 18. On 3 October 2019, the claimant was returning to the prison from her evening tea break when a strip of medication in the pocket of her uniform sounded the security alarm. The claimant disclosed the medication to a security officer. The claimant was taken to the office of Ms A Dryburgh, Head of SPS Operations. Ms K Simson, Health Care Manager also joined the meeting. Ms A Dryburgh explained that she had received a number of intelligence reports
20 which she felt suggested that the claimant's position at HMP Low Moss had been compromised. When questioned, the claimant confirmed that she had not felt pressured by any of the prisoners or felt unsafe. She was also asked if she had done anything outside the scope of her work, and she replied that she had only performed her role as a nurse.

25 19. At the end of the meeting the claimant was taken to the Health Centre, and both her bag and locker were searched. Thereafter, the claimant was removed from HMP Low Moss.

20. Mr C MacDonald was told that the intelligence received indicated that the claimant may be engaged in inappropriate relationships with prisoners and

5 may be involved in bringing contraband into the prison, and that she had denied the allegations. He was also told that she was found with medication in her pocket that day after a break, and that she had been removed from HMP Low Moss. Mr C MacDonald told Ms K Simson to obtain clarity about the intelligence gathered, to speak to HR and to contact the claimant.

10 21. Within a few days of being told this information, Mr C MacDonald met the Governor of HMP Low Moss, and he was directed to Ms A Dryburgh who was the intelligence lead, to discuss this matter further. Having met with Ms A Dryburgh he was informed that information had been received from viable sources raising concerns about the claimant's behaviour and interaction with prisoners and that an investigation by SPS was being undertaken. He was also informed that they had not ruled out police charges and following an investigation, a decision will be taken by SPS whether the claimant could return to work at HMP Low Moss.

15 22. He was not given further details about the intelligence gathered. SPS use a variety of means to gather intelligence to maintain the safety and security of the prison.

20 23. On 15 September 2019 Mr C MacDonald, who was at the time in the joint role of Service Manager for Police Custody and Prison Health Care, received a call from Dr C Ogilvie, a Consultant Clinical Psychologist working within HMP Low Moss advising him that Patient A had disclosed, unprompted, during a therapy session that day that he had been having an inappropriate relationship with an NHS nurse called Samantha. She told Mr C MacDonald that the prisoner informed her that the relationship had been going on for several months (until 2 months ago via text messages and phone calls), that Patient A used a contraband mobile telephone to maintain contact with the nurse, that he offered the nurse money towards car repairs, and that she agreed to bring a drugs package into the prison, although it was not confirmed
25 by Patient A whether these events in fact took place. Patient A also alleged

that she was having similar relationships with other prisoners and had been in touch with his sister.

24. Dr C Ogilvy was advised to complete a Datix report, which was duly completed by her on the next day.

5 25. Following her removal from HMP Low Moss, the claimant took sick leave for a period of 4 weeks. Towards the end of October 2019 the claimant advised the respondent that she was fit to return to work.

26. On 25 October 2019 Ms K Simson called the claimant and advised her that she was suspended from duty, on full pay, pending a formal investigation into allegations regarding bringing contraband into the prison and failing to follow the *Safe and Secure Handling of Medicines policy*.

10 27. A letter was sent to the claimant on 29 October 2019 confirming her suspension on full pay with effect from 1 November 2019 pending the outcome of a full investigation. The following allegations were set out in that letter:

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20 *“That you were advised by Ms A. Dryburgh, Head of Operations at HMP Low Moss on the 3rd October 2019, that they had received intelligence that you were involved in behaviour that may be deemed as unprofessional and non-compliant with Scottish Prison Service (SPS) policy in relation to contraband. They are, at this stage, unable to disclose the source of the intelligence.*

Secondly, you failed to adhere to policy in relation to The Safe and Secure Handling of Medicines in NHS GG&C Prison Healthcare.”

Further detail was provided therein in relation to the second allegation.

25 28. An investigator had been appointed, namely Ms E Salmon, a Professional Nurse Lead within Mental Health Services. Although the initial terms of

reference were dated 31 October 2019, Ms E Salmon had not received these until 12 December 2019.

- 5 29. Mr C MacDonald had asked SPS for regular updates on their investigation, the allegations and whether the claimant would be able to return to work on a weekly or fortnightly basis. He had been due to meet Ms A MacCrimmon, RCN Representative on 23 March 2020 to discuss the case but that meeting had to be cancelled due to government guidance in relation to COVID-19.
- 10 30. On 15 April 2020, a telephone call took place with the claimant, Mr C MacDonald, and Ms A MacCrimmon in attendance. It was confirmed that the claimant was suspended due to three allegations, that these were based on SPS intelligence and a report from a Clinical Psychologist, and that a revised suspension letter would be sent. A risk assessment was also to be conducted in relation to the claimant's return to work.
- 15 31. A Suspension Risk Assessment was completed by Mr G Scott, Professional Nurse Lead on 21 April 2020 who reviewed the suspension of the claimant and concluded that due to the seriousness of the allegations and the potential risks to both patients and nurses the suspension would not be revoked.
- 20 32. On 27 April 2020 revised Terms of Reference were issued to Ms E Salmon, the investigating officer, setting out the three allegations to be investigated.
- 25 33. A letter was sent on 27 April 2020 from Mr C MacDonald confirming that the claimant will continue to be on paid suspension. The letter set out the following revised allegations:
- 30 *"□ Intelligence information received from the Scottish Prison Service on 3rd October 2019 alleges that you behaved in an unprofessional and non-compliant manner in relation to Scottish Prison Service policy, specifically regarding bringing contraband into a prison and an alleged inappropriate relationship with a prisoner. Ongoing communication has taken place*

with the Scottish Prison Service between October 2019 and January 2020 in connection with these allegations.

5 *It is alleged that on 3rd October 2019 you failed to follow the Safe and Secure Handling of Medicines in NHS Greater Glasgow and Clyde Prison Healthcare – namely failure to transport medication to and from a clinical area and leaving the workplace with medication on your person. Information received from the Scottish Prison Service on 3rd October 2019 confirmed that this medication was found on your person when you returned to the workplace.*

10 *Information received from an NHS Consultant Psychologist on 15th October 2019 states that a patient has alleged you engaged in an inappropriate and unprofessional relationship with him, namely using an illegal mobile phone to maintain contact, engaging in a romantic relationship, sharing personal information and exchanging money for bringing contraband into the prison.”*

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34. The letter confirmed that Ms E Salmon will conduct the investigation.

20 35. On 1 May 2020, the claimant contacted Mr C MacDonald to advise that SPS had informed her that they had concluded their investigation and they would keep the case file open in the event that more intelligence were received, or a prisoner made further allegations. Following confirmation of the decision from SPS that the claimant could not return to work at HMP Low Moss, Mr C MacDonald informed Ms A MacCrimmon and the claimant of SPS's decision.

25 36. On 22 May 2020 Ms E Salmon sent a letter to the claimant to advise her that an investigation had been commissioned but there would be a slight delay organising the investigation meeting. This was due to restrictions in relation to COVID-19 and face-to-face meetings taking place.

30 37. There were witness availability issues and witness interviews were undertaken between 23 June 2020 and 11 August 2020.

38. Ms E Salmon sent a letter to the claimant on 16 June 2020 inviting her to attend an investigation meeting on 24 June 2020. An initial investigation interview took place with the claimant on 24 June 2020.

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39. Dr C Ogilvie was interviewed on 23 June 2020. In her interview she explained that she asked Patient A whether the relationship was of a romantic nature, and he said that the nurse had expressed romantic feelings towards him, but he did not feel the same way.

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40. On 1 July 2020, the claimant's suspension was reviewed on a more informal basis and Mr C MacDonald sent an email to the claimant advising her that the suspension could not be lifted due to the potential seriousness of the allegations.

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41. Mr A Lockheart, Charge Nurse provided a statement on 20 July 2020 confirming he had spoken to Dr C Ogilvy regarding the disclosure of a patient on 15 October 2019 and he advised her to complete an intelligence form for SPS colleagues and to speak to Mr C MacDonald.

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42. A letter was sent to the claimant dated 27 July 2020 inviting her to a second investigation meeting on 11 August 2020. The claimant provided a statement to be read at the meeting, in which she denied having had any form of inappropriate relationship with any prisoner, romantic or otherwise and further denied bringing contraband into prison.

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43. An investigation interview took place with Ms A Dryburgh on 29 July 2020. She confirmed that she had received various pieces of intelligence from multiple sources observing that the claimant was spending a lot of time with Patient A, taking him into one of the nurse's rooms and going into his cell. She explained that when in the nurse's room, SPS staff are meant to be able to observe through the window. However, the claimant kept looking at the window and staring at the staff as if she did not want them to be looking in. She explained that she was concerned by the claimant's response to the

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allegations. She did not answer any of the questions put to her and was very unemotional, and she noted that the intelligence came from multiple sources. She also confirmed that there was no evidence of any contraband being brought into the prison.

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44. Ms K McCormick was interviewed on the same date. Among the matters discussed was a report that Ms K McCormick had provided, in response to the initial request for Prison Healthcare documentary evidence. The report showed all of the clinical intervention entries made on Vision for Patient A between February and October 2019, including the fact that between 14 May 2019 and 3 October 2019 the claimant had made fourteen entries on Vision detailing nursing interventions with Patient A (excluding drug administrations).

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45. She reviewed the report and advised that the number of interventions made by the claimant concerned her as Patient A did not have significant health needs that required regular nursing intervention. She explained that the claimant had been going through a very turbulent time in her personal relationship (as this was not reported to her directly, the details of this information was removed from the interview notes).

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46. Two Vision reports were received on 29 July 2020. The first report contained information relating to all entries made by the claimant between April and October 2019 (for all patients). This showed that the claimant made 2122 electronic footprint entries on Vision for a total of 662 patients, and on average the claimant made three entries per patient (96% of patients had ten or less entries recorded; 3% had 11-30 entries; 1% had 21-42 entries; whereas Patient A alone had seventy-two entries recorded).

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47. The report showed that there were seventeen instances when the claimant checked Patient A's records after a rostered day off, a period of annual leave or a period of sickness but did not then make a corresponding entry in his records recording a clinical intervention.

48. A second investigation meeting took place with the claimant on 11 August 2020. The claimant was asked about a number of matters including the high number of entries recorded on Vision in relation to Patient A. The claimant suggested that she may not have made all of the entries. She said that nurses worked in pairs in the treatment room with one person undertaking the intervention and someone else writing the notes. The claimant said that the nurse recording the entry would not always sign into their own account so, although the record showed the claimant's name, it may have been another nurse who had accessed Patient A's records.
49. The claimant advised that she remembered one clinical intervention with Patient A, namely an entry dated 1 September 2019 when she was asked by an SPS Officer to speak to Patient A who had been upset as his mother had died a few days ago. The claimant said that she remembered this intervention as she had not been required to address a bereavement issue with a patient before. She did not however recall any of the other thirteen entries.
50. Ms E Salmon noted that twenty-six of the accesses could possibly be explained by reference to clinical interventions made by the claimant. However, there were no corresponding clinical interventions made by the claimant in relation to the remainder of the accesses. Following the meeting Ms E Salmon collated copies of staff training and supervision records and shift and attendance reports (which she was not sent until September 2020).
51. A Management Case report was prepared with nine appendices dated 12 October 2020. Ms E Salmon summarised her findings including the fact that there was no dispute in relation to what happened on 3 October 2019 and that there was no evidence to support the allegation that the claimant had brought contraband into prison. In terms of the allegation of an inappropriate relationship she summarised that there were three aspects to the evidence that were relevant which were the SPS intelligence reports, Patient A's disclosures to Dr C Ogilvy and the contents of the Vision reports. There was a statement from Dr C Ogilvy dated 16 October 2019 and her interview notes dated 23 June 2020 in the appendices. She recommended that the matter be

considered further at a Disciplinary Hearing and sent the report to Mr C MacDonald on 22 October 2020.

52. Ms R MacLeod, Head of Adult Services (Sexual Health, Police Custody
5 and Prison Health Care) was asked to chair the claimant's Disciplinary
Hearing. A letter was sent to the claimant on 18 November 2020 inviting her
to attend a Disciplinary Hearing on 7 December 2020 and this included a copy
of the Management Case Report. The three allegations against her were set
out in that letter, along with the fact that Ms E Salmon would attend, and Ms
10 A Dryburgh would be in attendance as a witness. The Management Case
report was attached to that letter.

53. The Disciplinary Hearing took place on 7 December 2020. The claimant was
advised that Ms R MacLeod will not consider the allegation in relation to the
15 claimant bringing contraband into the prison, as there did not appear to be
any evidence to support that. Ms R MacLeod noted that the claimant
displayed no emotion during the hearing.

54. Following the Disciplinary Hearing, the outcome of that hearing was sent to
20 the claimant by way of a letter dated 11 December 2020. Ms R MacLeod
advised that the allegations against the claimant had been proven, but that
allegation two on its own did not warrant dismissal. The claimant's conduct in
relation to allegations 1 and 3 amounted to a breach of the NMC's Code of
Conduct and her actions resulted in an irreparable breakdown in trust in the
25 employment relationship between the claimant and the respondent. The
claimant's actions demonstrated:

- “ *Unprofessional conduct*
- Serious breaches of confidentiality*
- Accessing computer records or files with no authority*
- 30 *Blatant and serious breach of the Board Policies and Procedures*
- Action which is likely to bring the NHS into disrepute.”*

55. In addition, and in compliance with *NHSGGC Employment of Statutory Registered Professional Policy*, the letter stated that the claimant displayed actions and behaviour that may be deemed unprofessional conduct relating to the NMC Code of Conduct: Professional standards of practice and behaviour for nurses, midwives, and nursing associates namely:

5 “□ *Engaging in an inappropriate relationship with a patient that is out with professional boundaries of a registered nurse.*

□ *Denying any knowledge of the patient in spite of overwhelming documentary evidence that you did in fact have knowledge of the patient. The panel considered this act as wilfully dishonest.”*

56. Ms R MacLeod concluded that having considered the evidence and mitigation outlined in her letter she was dismissing the claimant from her post as she deemed the claimant’s actions in relation to allegations 1 and 3 to be serious misconduct and that she was being summarily dismissed without notice. The claimant was also to be referred to the NMC.

57. The claimant sent an email to Jennifer McGuigan on 30 December 2020 setting out her grounds of appeal as follows:

20 “-The length of time to undertake the process from suspension by NHS
- New evidence was produced at Disciplinary Hearing, and was not shared beforehand
- No physical evidence/ documents provided to back up allegations all hearsay, a lot of generalisation by SPS' A. Dryburgh about coercing of young NHS staff , nothing specific about me except the 5X5 intelligence forms, which were not provided.
- No documentation in relation to risk assessment carried out by HR on me, confirming why my suspension would continue”

58. A Statement of Case was provided on behalf of the claimant dated 20 January 2021 and on behalf of Ms R MacLeod on the same date.

59. An appeal hearing took place on 27 January 2021. This was chaired by Mr J Hobson, Assistant Director of Finance.

5 60. A letter was sent from Mr J Hobson to the claimant dated 02 February 2021 confirming that the decision to dismiss the claimant for serious misconduct had been upheld. The letter noted that Ms R MacLeod provided assurance that full consideration was given to the alternative outcomes and that given the seriousness of the claimant's misconduct, its nature and potential impact on patients and public confidence, together with the breakdown in trust and confidence, dismissal was the appropriate outcome. It was also concluded
10 that due process was followed in accordance with the respondent's *Disciplinary Policy and Procedure* and that the claimant's case will be referred to the NMC and to Disclosure Scotland.

15 61. The claimant started employment as a Nurse in Buchanan Lodge Care Home Nursing home on 24 March 2021.

Observations

62. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary
20 to determine the list of issues –

63. The disciplinary investigation took a lengthy period of time. The Tribunal were advised that the respondent's staff were not allowed to go into HMP Low Moss, there were a lot of changes of personnel and all disciplinary investigations, other than the most exceptional, were put on hold due to
25 Covid-19. All these circumstances including the investigation and the nature of the evidence were considered by the Tribunal in relation to the time taken to conclude the disciplinary process.

30 64. There were reasonable grounds to suspend the claimant in October 2019 given the seriousness of the allegations at that time. Her suspension was reviewed in April 2020 in light of the new allegations and a risk assessment undertaken. The decision was reviewed again, informally, in July 2020 and

the decision to suspend the claimant were maintained. It was the respondent's position it was not possible to put in place a robust support package for the claimant and to lift her suspension, and that during the pandemic this was difficult. The Tribunal accepted that the respondent would have had difficulties in terms of this and respondent's account was credible. There was documentary evidence of the suspension being reviewed and maintained by a Professional Nurse Lead who was unconnected with the investigation.

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65. The respondent accepts that taken individually each element of the evidence may not have been sufficient to justify a reasonable belief that the claimant committed misconduct. However the respondent further states that if the evidence collated by them were considered as a whole, that evidence was sufficient to show that the claimant committed misconduct. The respondent also points out that the claimant accepted in cross that not only was the weight of evidence against her, but that she could understand why someone may look at the evidence, consider her denials without much explanation, and believe that the most straightforward explanation was that she had been having an inappropriate relationship with Patient A.

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66. The Tribunal noted that a detailed investigation report was produced by the respondent containing nine appendices. A copy of this was supplied to the claimant in advance of the Disciplinary Hearing.

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67. It is not clear why the claimant and Ms E Salmon were not provided with a copy of the Datix report prepared by Dr C Ogilvy as it was reasonably accessible to the respondent, and it was clearly a relevant document. The Tribunal observed that the content of the Datix report was similar to other material provided by Dr C Ogilvy during the investigation process (including in her statement and interview). This information was not subject to any significant challenge during cross examination, other than in relation to the use of certain terms and the extent of the investigation that was conducted.

68. It was not clear to the Tribunal why the allegation in relation to bringing contraband into prison was not dismissed prior to the Disciplinary Hearing. This allegation did not have any substance based on the investigation report.

5 69. The claimant accepted that she had breached the respondent's rules in relation to the medication incident. She said that if she had found the drugs in question when she arrived home, she would have destroyed them herself. The claimant states that this was stated in exasperation, the disciplinary panel did not accept her mitigation and considered the incident as evidence of the
10 claimant's wilful misconduct without taking account of the circumstances.

70. Ms R MacLeod referred to the claimant displaying no emotion during the Disciplinary Hearing. The claimant's position is that at each stage her passive demeanour was commented upon by the respondent as a negative
15 circumstance. The respondent's position was that there was no evidence of any bias, that the claimant did not demonstrate any remorse or provide a reasonable explanation for her behaviours.

71. There was recognition by the respondent's witnesses that intelligence evidence did not contain certain details. The SPS had provided limited
20 information. The respondent relied on a combination of the intelligence reports along with Dr C Ogilvy's evidence and the Vision reports.

72. The Tribunal observed that Statements of Case were provided by the claimant and the respondent as part of the internal appeal process.
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Relevant law

73. To those facts, the Tribunal applied the law –

74. In order to determine whether a dismissal is fair or unfair, it is first necessary
30 to consider whether the reason for the dismissal is one of the potentially fair reasons set out in the *Employment Rights Act 1996* ("ERA"). Section 98(2) of the ERA sets out the potentially fair reasons for dismissal. These include a reason that relates to the conduct of the claimant (section 98(2)(b)).

75. In the event that an employer has established a potentially fair reason for dismissal, that is not the end of the matter. Where a Tribunal is satisfied that an employee was dismissed for a potentially fair reason, a Tribunal must then apply its mind to the provisions of section 98(4) of the ERA which state:

5 *“Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a)– depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably*
10 *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.”*

This requires the Tribunal to consider whether in all the circumstances, including the procedure, which was followed, the dismissal of an employee
15 was fair.

76. In *A v B* 2002 WL 32067939 the Employment Appeal Tribunal (“EAT”) held that the circumstances to be considered in terms of the standard of reasonableness to be applied included the gravity of the charge and its
20 potential effects on the employee. The effect of the dismissal in that case was that the claimant was no longer able to be employed in the particular field in which he had chosen to make his career. The EAT also considered that conducting such investigations as are reasonable in all the circumstances necessarily involves a consideration of any delays. In certain circumstances
25 a delay in the conduct of the investigation might of itself render an otherwise fair dismissal unfair. In that case the delay between the allegations being put and the Disciplinary Hearing were some 2.5 years, the justification was not accepted by the EAT, and the delays were characterised as grossly improper.

77. In *Salford Royal NHS Trust v Roldan* 2010 ICR 1457, the Court of Appeal (“CA”) cited *A v B* and upheld the Tribunal’s decision and given the facts found
30 by the Tribunal the dismissal was held to be unfair in circumstances where the claimant had over 4 years’ service (apparently without complaint), there

was a real risk that her career will be blighted by her dismissal, her work permit and right to remain in the UK will be removed and she would be deported.

5 78. In *Michael Strouthos v London Underground Ltd [2004] EWCA Civ 402* the CA stated that care must be taken with the framing of a disciplinary charge, and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. A charge may be amended, and the court emphasised that the overall fairness of a procedure must be considered.

10 79. In an unfair dismissal case in which it is alleged that conduct was the reason for dismissal the Tribunal is required to apply the test set out in the case of *British Home Stores Ltd v Burchell [1978] IRLR 379* namely whether:

- 15 i) The employer genuinely believed the employee to be guilty of misconduct.
- ii) The employer had in its mind reasonable grounds for believing that the employee was guilty of that misconduct.
- iii) At the time it held that belief, it had carried out as much investigation as was reasonable in all the circumstances of the case.

20 80. What constitutes gross misconduct is a mixed question of fact and law and it connotes either deliberate wrongdoing or gross negligence (paragraphs 110-113 *Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09/LA*). It must amount to a repudiation of the contract by the employee. What is gross misconduct must be considered in relation to the
25 particular employment and the particular employee (para 9 of *Hamilton v Argyll & Clyde Health Board [1993] IRLR 99*).

30 81. A reason for dismissal has been described as a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee (*Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA*).

82. The CA in *Shrestha v Genesis Housing Association Ltd [2015] IRLR 399* stated to say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the *Burchell* test. The investigation should be looked at as a whole when assessing the question of reasonableness. The extent to which a line of defence was to be investigated will depend on the circumstances as a whole (and to talk in terms of distinct lines of defence were misleading), and also the particular issue under consideration and the employee's explanations had to be considered.
83. A Tribunal must always keep at the front of its mind that it should not stray into what is called a 'substitution mindset.' Rather it should assess the actions of an employer in the context of a band of reasonable responses of a reasonable employer. The range of reasonable responses test applies equally to the investigation undertaken, as to the decision to dismiss (*Sainsbury's Supermarkets Limited v Hitt (2003) IRLR 23*).
84. The Tribunal must consider whether the decision to dismiss the employee fell within the "band of reasonable responses 'which a reasonable employer might have adopted'" (*Post Office v. Foley & HSBC Bank plc (formerly Midland Bank plc) v. Madden [2000] IRLR 827 CA*). It is not for the Tribunal to ask whether a lesser sanction would have been reasonable, but whether or not dismissal fell within the range of reasonable responses (*Boys and Girls Welfare Society v McDonald [1996] IRLR 129*).
85. The band of reasonable responses test is applicable to both the procedural and substantive elements to the decision taken by the employer (*Whitbread –v- Hall [2001] IRLR 275*). Procedural issues do not sit "in a vacuum to be assessed separately" (*Sharkey v Lloyds Bank plc [2015] UKEAT/0005/15*) and should be considered together with the reason for dismissal, in assessing whether, in all the circumstances, the employer acted reasonably in treating the reason as a sufficient reason for dismissal (*Taylor v OCS Group Limited*

[2006] IRLR 613 (CA)). It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.

- 5 86. In *Sandwell & West Birmingham Hospitals NHS Trust v Westwood* UKEAT/0032/09, the delay had been fastened on by the Tribunal but that delay which was recognised by the employer's disciplinary panel had not been shown to be causative of any disadvantage or injustice suffered by the claimant. The CA found that although the Tribunal focussed on the alleged shortcomings of the process, "...it had failed to demonstrate that any of these matters should have affected the outcome or, putting it another way, that a reasonable employer, faced with delay and the shortcomings in the investigation could not have reached the same conclusion as the Trust."
- 10
- 15 87. In *RSPCA v Cruden* [1986] IRLR 83 where an employee's dismissal was found to be procedurally unfair and the compensatory award was reduced to nil, the CA said that the basic and compensatory award should be reduced to zero as the Tribunal found that the claimant suffered no prejudice as a result of any procedural failings. In the *RSPCA* case a delay of seven months before any proceedings were commenced was held to be unjustified and made the dismissal unfair. In that case the Tribunal had rejected the reasons given by the employer for the delay which included the existence of prior disciplinary proceedings, various members of the employer's staff having holidays booked, the employee being off sick for a period of time, along with issues with the union (the disciplinary procedure provided that once a form of complaint was issued the disciplinary proceedings had to take place within 28 days unless otherwise agreed) and there were pending criminal proceedings.
- 20
- 25
- 30 88. In *Polkey v AE Dayton Services* [1987] IRLR 503 Lord Bridge sets out procedural steps which should include a full and fair investigation of the conduct and a fair hearing in terms of an employee's explanation, mitigation, and defence. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Tribunal is not permitted to ask in applying the test of reasonableness is the hypothetical question

whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. He further states:

5 *“It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied.”*

10 89. In *BBC –v- Nelson [1979] IRLR 346*, the CA stated that if the dismissal were unfair, the claimant could still be responsible for his dismissal if the conduct on his part relied upon as contributory was culpable or blameworthy. This included conduct that was a breach of contract, a tort, perverse or foolish,
15 bloody-minded, and “...*action which, though not meriting any if those more perjorative epithets, is nevertheless unreasonable in all the circumstances.* But all unreasonable conduct is not necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.” There is a requirement to identify the relevant act or omission and to determine that it is
20 just and equitable to reduce the claimant’s loss to a specified extent.

Submissions

25 90. Parties made detailed written submissions (including replies) which the Tribunal found to be informative. The Tribunal read both parties’ representative’s submissions and referred to the authorities cited therein. References are made to essential aspects of the submissions and authorities with reference to the issues to be determined in this judgment, although the Tribunal considered the totality of the submissions and authorities.

30 91. The respondent said the procedure which had been followed was fair in terms of its disciplinary procedure and the ACAS Code of Practice, that any failings were justified and did not unduly prejudice the claimant.

92. The respondent's submissions summaries the respondent's conclusion that the claimant had had an inappropriate relationship with a patient, had repeatedly lied about it, and had breached its policies on the safe and secure handling of medicines. The respondent states that reasonable employer is
5 entitled to take the view that this behaviour by an employee in such a position of responsibility and trust, constituted gross misconduct and that accordingly, dismissal was the fair and correct sanction. The respondent refers to consideration being given to alternatives to dismissal at the dismissal and appeal stages but were ultimately rejected. Alternatively the respondent
10 seeks a 100% reduction in terms of any compensatory award by reason of the claimant's conduct or alternatively that any basic and compensatory award should be reduced by 90-100% to reflect the fact that the outcome would have been the same applying the principles in the *Polkey* case.

15 93. The claimant submits that no reasonable employer could have genuinely formed the view at the time of the dismissal that the claimant was guilty of serious misconduct and that the respondent had no basis upon which to form that belief. The claimant states that the investigation took over 12 months from the claimant's initial suspension, there is no reasonable explanation for the
20 delay, there was no investigation into either allegation 1 or 3 conducted or contemplated by SPS, that there was no actual evidence of any wrongdoing, and the delay in instigating the investigation meant staff had moved on or evidence was unobtainable.

25 94. The respondent accepts that the delay between the claimant's suspension and the Disciplinary Hearing was "*regrettably long.*" The respondent's position is that the delay did not make the dismissal unfair, and that the Tribunal must focus on whether a reasonable employer faced with delay could have reached the same conclusion as the respondent.

30 **Discussion and decision**

95. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

5 (i) *Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of s98(1) or (2) of the Employment Rights Act 1996 (the ERA)? The respondent states that the claimant was dismissed due to his conduct.*

96. The respondent relied on misconduct as the reason for dismissal. This was evidenced by Ms R MacLeod and Mr J Hobson's evidence. There was no evidence of any other reason for dismissal before the Tribunal. The Tribunal
10 accepted that they formed a genuine belief as to the claimant having committed misconduct.

97. Misconduct is a potentially fair reason for dismissal in accordance with section 98(2)(b) of the ERA.

15

(ii) *Was the claimant's dismissal for that reason fair in all the circumstances, in terms of s98(4) ERA?*

(iii) *Was it reasonable for the respondent to believe that the claimant was guilty of gross misconduct against the claimant's contention that no
20 such reason could be ascertained?*

25

98. The respondent having met the requirement to show that the claimant was dismissed for a potentially fair reason, the Tribunal went on to consider whether the dismissal was fair or unfair having regard to the claimant's conduct. In terms of section 98(4)(a) of ERA, this depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking), the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing her. This must be determined in accordance with equity and the substantial merits
30 of the case in terms of section 98(4)(b) of the ERA.

99. When considering whether the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing her, the Tribunal must have regard to whether the decision to dismiss fell within the

“band of reasonable responses” of a reasonable employer. It is not for the Tribunal to consider how it would have responded to the claimant’s conduct. It must consider whether a reasonable employer might reasonably have dismissed the claimant in response to her conduct.

5

100. Whether the respondent acted reasonably or unreasonably will depend on the circumstances of the case. Applying *Burchell*, this involves the Tribunal being satisfied that (i) the respondent believed that the claimant was guilty of the misconduct for which he was dismissed; (ii) the respondent had in mind reasonable grounds upon which to sustain that belief & (iii) at the stage at which the respondent formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

10

101. The Tribunal was satisfied that Ms R MacLeod (and Mr J Hobson who heard the appeal) believed the claimant had committed serious misconduct. This was clear from his evidence before the Tribunal. Ms R MacLeod’s belief was based on the claimant’s conduct in relation to allegations i. to iii. which were investigated and set out in the management case report.

15

102. The Tribunal accepted that the respondent carried out a detailed investigation. An investigation report was produced with nine appendices. The claimant was given this in advance of the Disciplinary Hearing, and she had a reasonable opportunity to comment on this during the hearing.

20

103. The allegations found proven following the Disciplinary Hearing were:

25

(a) Combined allegations i. and ii.:

i. Intelligence information received from the Scottish Prison Service on 3rd October 2019 alleges that you behaved in an unprofessional and non-compliant manner in relation to Scottish Prison Service policy, specifically regarding bringing contraband into a prison and an alleged inappropriate relationship with a prisoner.

30

5 *iii. Information received from an NHS Consultant Psychologist on 15th October 2019 states that a patient has alleged you engaged in an inappropriate and unprofessional relationship with him, namely using an illegal mobile phone to maintain contact, engaging in a romantic relationship, sharing personal information and exchanging money for bringing contraband into the prison.*

(b) Allegation ii.:

10 *It is alleged that on 3rd October 2019 you failed to follow the Safe and Secure Handling of Medicines in NHS Greater Glasgow and Clyde Prison Healthcare – namely failure to transport medication to and from a clinical area and leaving the workplace with medication on your person. Information received from the Scottish Prison Service on 3rd October 2019 confirmed that this medication was found on your person when you returned to the workplace.*

15

104. In relation to the combined allegations (i) and (iii), the respondent concluded that there was no evidence to support the allegation that the claimant had brought contraband into the prison. The respondent properly reached this conclusion as there was no information or supporting evidence provided in relation to this allegation. There was also no evidence that the claimant used an illegal mobile phone to maintain contact. No reasonable employer would have concluded that these aspects of allegations (i) and (iii) were proven based on the evidence before the respondent (and indeed, the respondent recognised this by not upholding these aspects of allegations i and iii).

20

25

105. The respondent stated that the Management Case in respect of the allegation that the claimant had an inappropriate and unprofessional relationship with Patient A was reasonable and balanced. References were made to the evidence and statements that were collated. Ms R MacLeod concluded that there was sufficient evidence to support both allegations i. and iii. and the claimant's conduct in relation to these amounted to serious misconduct.

30

106. The claimant accepted that she was aware of the *Safe and Secure Handling of Medicines in NHS Greater Glasgow and Clyde Prison Healthcare policy*, and she admitted that she had knowingly breached this policy by carrying medication prescribed for patient administration in her uniform pocket. The claimant left her workplace with the medication in her uniform pocket, and this was discovered on her person when she returned to work. When asked what she would have done if she had travelled home with this medication on her person, she replied that she would 'probably have binned it.' The respondent determined that this was a breach of its policy, that this was poor practice, and that the fact the claimant chose not to report the poor practice that was taking place was a serious breach of trust.
107. In respect of allegation 2 the respondent felt this allegation in itself did not warrant dismissal but combined with the evidence provided by management and the statements in respect of allegations 1 and 3 the claimant's actions and behaviour were a breach of the NMC Code of Conduct and also resulted in an irreparable breakdown in trust in the employment relationship.
108. The Tribunal accepted that the medication issue in allegation ii. did not warrant a finding of serious misconduct alone but that taking this into account along with the respondent's findings in relation to allegations i. and iii. the Tribunal was of the view that the totality of the findings made by the respondent could have led a reasonable employer to believe that the claimant's actions amounted to serious misconduct.
109. Ms R MacLeod and Mr J Hobson both agreed that these matters amounted to serious misconduct together with the breakdown in trust and confidence in the employment relationship. The Tribunal accepted their evidence on this.
- (iv) *If so, having regard to the tests set out in Burchell v British Home Stores, had the respondent carried out sufficient investigation so that at the time of dismissal they had a genuine belief based on reasonable grounds of the claimant's misconduct.*

110. The Tribunal did not doubt that Ms R MacLeod formed a genuine belief that the claimant had committed misconduct, and it was persuaded that at the time she formed that belief the respondent had conducted as much investigation
5 into the matter as was reasonable in all the circumstances. The Tribunal concluded from the evidence before it that Ms R MacLeod had not been involved in the disciplinary investigation and process at the time the claimant was asked to attend a Disciplinary Hearing.
111. The management case report was provided to Mr C MacDonald on 22
10 October 2020 and subsequently to Ms R MacLeod and to the claimant (it was sent to the claimant on 18 November 2020).
112. The nine appendices within the report included the suspension
15 correspondences, statement and interview records relating to the claimant, Dr Ogilvy's statement and interview notes, a statement from A. Lockheart, a statement from A. Dryburgh, a statement from K. McCormick, a roster dated 03 October 2019, the claimant's attendance report, Vision Reports showing the claimant's general accesses in addition to accesses relating to Patient A,
20 a report showing entries in relation to Patient A's records, prescription and recording sheet relating to Patient A, and the respondent's relevant policies.
113. The Datix report and the hall diary were not obtained. The Tribunal were not
25 provided with a clear explanation in respect of the reasons for this. In terms of the Datix report similar information was contained in the other documentation from Dr C Ogilvie. It is unclear what further information (if any) the hall diary would have added based on the evidence before the Tribunal.
114. There was evidence that the dismissing and appeal managers in this case
30 gave recognition to the challenges posed by the SPS intelligence and took this into account in reaching their decisions.
115. The claimant submits that the information not provided included a lack of comparative evidence. It was not clear what this information would have

shown. In any event the respondent considered the relevant information and analysed the data including the average number of accesses per patient.

5 116. The claimant points out that the impact on her professional status should have meant that the respondent should have followed a more rigorous standard of investigation. There was no evidence to suggest that the claimant had lost her career as a nurse. Although there was a referral to the NMC, there was no evidence before the Tribunal that any conditions or other sanctions had been imposed or were likely to be imposed on the claimant's ability to practice. The
10 claimant's witness statement confirmed that she started working as a nurse shortly after her dismissal.

(i) Was a fair procedure followed with particular reference to any disciplinary procedures. Did the respondent fail to follow the ACAS
15 Code of practice on Disciplinary procedures?

117. The Tribunal found that the process followed as a whole was fair and reasonable in all the circumstances.

20 118. Ms R MacLeod upheld the 3 allegations, save that there was no evidence of the claimant illegally using a mobile phone or bringing contraband into prison.

119. She also provided the claimant with an opportunity to comment on the investigation report during the disciplinary meeting. The claimant had almost
25 3 weeks to consider the report and provided a statement to the respondent.

120. The claimant's submissions state that the claimant was not asked any questions during the appeal hearing and minimal questions during the Disciplinary Hearing. The Disciplinary Hearing notes show that questions
30 were asked of Ms E Salmon and the claimant during the Disciplinary Hearing. The claimant was asked for background information including in relation to her nursing career, the medication incident, and in relation to the allegation relating to an inappropriate relationship with Patient A.

121. The claimant had an opportunity to question Ms A Dryburgh at both hearings on the further information disclosed. At the Disciplinary Hearing Ms E Salmon and Ms R MacLeod were also given the opportunity to ask her questions.
- 5 122. During the appeal hearing the claimant was asked to make comments and her union representative asked a number of questions on her behalf. Mr J Hobson agreed with Ms R MacLeod's decision to dismiss the claimant and to report her to the NMC.
- 10 123. A fair procedure was followed and there was no evidence of any bias or unfairness. Considering the procedure that was followed, the Tribunal could not find any breach of the ACAS Code of Practice.
- 15 124. The claimant submits that at each stage of the respondent's process the respondent commented on the claimant's passive demeanour as a negative circumstance and evidence that the claimant was concealing that she had been subjected to coercion (for which there was no evidence). There is a growing understanding of the difficulties with evaluating credibility from appearance and demeanour particularly in an unfamiliar and stressful
20 environment that can be present in an investigation or a Disciplinary Hearing and scepticism about a decision maker's ability to perform this task is not new. An employer needs to be live to this issue. While there was little evidence about the respondent's detailed reasoning in relation to the extent of its consideration of the claimant's demeanour, it is clear that the respondent
25 considered a range of evidence including but not limited to the claimant's overall response to the allegations.
- 30 125. The Tribunal took account of the fact that the allegations put forward by the respondent for the Disciplinary Hearing had been amended by the respondent, and that the amendment took a fairly lengthy amount of time to materialise. It is an essential part of a fair process that employees know the allegations they have to meet and that allegations are framed accurately. The Tribunal having considered the overall fairness of the procedure were satisfied that the claimant were aware of the allegations against her prior to

the Disciplinary Hearing, that the claimant had a reasonable opportunity to consider those allegations and to put forward her defence and mitigation. The claimant was also afforded a right of appeal.

5 126. The Tribunal also considered the issue of delay and respondent's reasons for delay. The claimant properly draws the Tribunal's attention to the fact that the respondent took nine months to commence an investigation and that the information needed to undertake the disciplinary process was at the respondent's disposal when the claimant was initially suspended.

10 127. The respondent acknowledges that the delay was regrettably long, and it submits that both decision makers addressed their minds to this. The respondent chose to pursue the allegations of misconduct given that there were potential patient safety risks. The initial allegations did not include any
15 reference to an inappropriate relationship with a patient.

128. Given the seriousness of this allegation, on becoming aware of the error in
early 2020, it was incumbent on Mr C MacDonald to revisit the terms of
reference. In usual circumstances these should have been reissued within
20 weeks, but these were not reissued until 27 April 2020. However, the
respondent's position is that from February 2020 the respondent was dealing
with the Covid-19 pandemic and that this was a difficult and uncertain time.
The Tribunal heard evidence from the respondent's witnesses as to the extent
to which the COVID-19 pandemic impacted on the respondent's ability to
25 manage a disciplinary investigation (including identifying witnesses and
locating documents) within normal timeframes.

129. Further, the respondent was regularly chasing the SPS to ascertain the
outcome of the SPS investigation. The respondent had been advised that the
30 investigation was underway, and the respondent allowed time for this to be
concluded as it may have produced evidence which impacted on the
respondent's investigation. The respondent was not advised until May 2020
that the SPS had concluded its investigation and awaiting this decision would
have necessarily caused a delay in the respondent's investigation.

130. As the RCN position in terms of attending remote hearings was not clarified until 11 May 2020 there was a delay in terms of arranging the first investigation meeting with the claimant. The claimant was not interviewed until 24 June 5 2020 following a desktop review required in partnership with unions.
131. The respondent submits that the Tribunal must focus on whether any of the matters identified should have affected the outcome, or putting it another way, that a reasonable employer, faced with delay could not have reached the 10 same conclusion as the respondent. The claimant advised that the delay impacted her mental health and her professional abilities. It is not disputed that it would have been a challenging time for the claimant but the respondent states that any impact on the claimant's mental health was not so significant as to prevent her from applying, interviewing, and being appointed to a new 15 role within the respondent, during her suspension. Further, the fact she was appointed to this role and has been working as a nurse since her dismissal demonstrates that her professional abilities were not impacted.
132. The respondent's submission is that the delay did not prejudice the claimant 20 financially as she was suspended on full pay throughout. Had the investigation been concluded within more normal timeframes the outcome would have been the same. The claimant submits that there was prejudice including the fact that people moved on, and evidence was not available. The claimant states that the record of which hall the claimant worked on most, the hall diary, 25 and the treatment room patient list were not provided to her. The respondent did not rely on or draw any conclusions from the hall diary and Ms E Salmon did not see this document. Although the claimant made several references to the hall diary in her witness statement, she did not set out how this would have assisted her in terms of her defence and what difference this would have 30 made to the respondent's investigation and conclusions (if any).
133. The Tribunal accepted that whilst any delay to the process was frustrating for the claimant and may have affected her health, the respondent had a number

of reasons to explain the unusual period of delay prior to the allegations progressing to a Disciplinary Hearing. The Tribunal accepted that these were credible reasons to explain why there had been a delay and that the decision to progress to a Disciplinary Hearing had been made on grounds of potential patient safety concerns. Notwithstanding this, the Tribunal was not satisfied that the claimant suffered prejudice or that this led to a shortcoming in terms of the overall process and fairness of the proceedings.

5

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134. The Tribunal considered the *RSPCA* case where an unjustifiable delay of seven months made an otherwise fair dismissal unfair. Unlike the *RSPCA* case, the Tribunal concluded that the respondent had a reasonable explanation for the delay. The circumstances in which the respondent found itself were unusual and the reasons for delay were multi factorial.

15

Was dismissal within the band of reasonable responses?

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135. The Tribunal considered whether dismissal fell within the “band of reasonable responses” and was mindful that it must not substitute its own view. The Tribunal found that respondent acted reasonably in treating the claimant’s conduct as a sufficient reason for dismissing her. The Tribunal was not persuaded that summary dismissal fell outside the “band of reasonable responses” of a reasonable employer. When deciding to dismiss the claimant, Ms R MacLeod found that the allegations that the claimant had an inappropriate and unprofessional relationship with a prisoner and that the claimant breached the respondent’s medication management policies including *Safe and Secure Handling of Medicines in NHS Greater Glasgow and Clyde Prison Healthcare policy* were proven. Although in relation to the latter allegation the claimant accepted that she had placed medication into her pocket and that this was discovered on her person after her lunchbreak, the claimant denied that she had an inappropriate relationship with a prisoner, that the respondent did not have evidence of this, and it was submitted that she could not challenge the SPS intelligence evidence.

136. However, even if the SPS intelligence evidence was disregarded, Ms R MacLeod could rely on the allegations made by Patient A which were reported by Dr C Ogilvie, Dr C Ogilvie was interviewed, further details were obtained during interviews, the respondent had evidence from the Vision records showing that the claimant had accessed Patient A's medical records an excessive number of times, and the number of times the records were accessed. The respondent considered the evidence including that there was no apparent motive for Patient A to make up allegations, and they accepted the account provided by him during his consultation with Dr C Ogilvie, which was reflected in Dr C Ogilvie's statement and investigation interview notes.

137. Consideration was also given to whether the claimant had given a reasonable explanation for the events that occurred or showed any accountability for what took place, and the respondent rejected the claimant's explanation. There was no evidence of any previous disciplinary action against the claimant or that she had been issued with a final written warning in relation to any of her conduct, albeit Ms R MacLeod made clear that the claimant's mitigation was considered. Ultimately the respondent assessed the evidence and concluded that the allegations in relation to the claimant's breach of the respondent's policy relating to medication management and having an inappropriate and unprofessional relationship were proven. Whilst a different employer may have reached another conclusion (and bearing in mind that it is not appropriate for the Tribunal to substitute its view), the conclusion reached was open to the respondent. Viewed objectively, the Tribunal was persuaded that the claimant's conduct was a sufficient reason to justify summary dismissal.

138. The respondent also concluded that the claimant showed no insight into her wrongdoing. The respondent's witnesses took this into account and the continued risks involved in terms of continuing to employ the claimant.

139. Ms R MacLeod indicated that full consideration had been given to alternative outcomes before taking the decision to terminate the claimant's employment. However Ms R MacLeod concluded (and that conclusion was upheld by Mr J Hobson) that it was clear that given the seriousness of the claimant's

misconduct, the nature of the misconduct, and its potential impact on patient and public confidence together with the breakdown in trust and confidence in the employment relationship this could not be considered.

5 140. In view of those circumstances and the Tribunal's findings, the Tribunal found that the respondent's decision to dismiss the claimant was within the band of reasonable responses.

(vii) Polkey reduction, (viii) Conduct, and (ix) Compensation

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141. As the claimant's claim for unfair dismissal does not succeed, it is not necessary to consider issues relating to remedy.

Conclusion

15 142. The Tribunal were satisfied that there was a fair reason for the claimant's dismissal, namely misconduct.

143. The Tribunal considered whether the dismissal was fair and reasonable in accordance with section 98(4) of the ERA including the size and administrative resources of the employer and found that the dismissal was
20 fair and reasonable in all the circumstances.

144. The claimant's claim for unfair dismissal does not succeed.

Employment Judge: Beyzade Beyzade

Date of Judgment: 05 January 2022

25 Entered in register: 06 January 2022

and copied to parties

30 *I confirm that this is my judgment in the case of 4109250/2021 Miss S Ketterer v Greater Glasgow Health Board and that I have signed the order by electronic signature.*