EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms L Dougherty	AND	Great Western Hospitals NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT BRISTOL (by video) **ON** 30 September and 1, 2, 4, 7 and 8 October 2024, with 8 October being for the Tribunal only

EMPLOYMENT JUDGE J Bax
Members: Mrs S Maidment
Ms R Barrett

Representation

For the Claimant: **Mr D Plotkin (consultant)**
For the Respondent: **Ms H Patterson (counsel)**

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claim of breach of contract in respect of notice pay was dismissed upon its withdrawal by the Claimant.
2. The claims of discrimination arising from disability are dismissed.
3. The claims that there were failures to make reasonable adjustments are dismissed.
4. The claims of harassment related to disability are dismissed.
5. The Respondent unfairly dismissed the Claimant, however the Respondent proved that if a fair procedure had been followed the Claimant would have been dismissed in any event and the chances of that event was 100%. Further the Respondent proved that the Claimant was guilty of culpable conduct. The Tribunal assessed that the Claimant had contributed to her dismissal by 100% and that such a percentage should be deducted from both the basic and compensatory awards.

REASONS

The claim

1. In this case the Claimant claimed that she had been unfairly dismissed and discriminated against on the grounds of disability. The Respondent denied the claims.

Procedural background and the issues

2. The Claimant notified ACAS of the dispute on 19 April 2023 and the certificate was issued on 31 May 2023. The claim was presented on 28 June 2023. It was common ground that any allegation of discrimination or harassment before 20 January 2023 was potentially out of time.

3. At a case management hearing on 19 December 2023, the issues to be determined were discussed. On 12 January 2024 the parties sent a final agreed list of issues to the Tribunal. At the start of the hearing the issues were further discussed and the matters to be determined were confirmed as follows:

4. In relation to disability the Respondent accepts that at all material times the Claimant was disabled by reason of anxiety. The Claimant also said she was disabled by reason of an essential tremor, which was not accepted to amount to a disability. At the case management hearing it was agreed that none of her claims rested on disability by reason of essential tremor and it was not necessary for the Tribunal to determine that issue.

5. In relation to discrimination arising from disability, the Claimant relied on the 5 allegations of unfavourable treatment set out in the list of issues, which the Respondent accepted were unfavourable treatment. The Respondent did not concede that the matters the Claimant relied upon as arising from her disability existed. Knowledge of disability at all material times was accepted.

6. The Respondent relied upon a justification defence and an aim of ensuring safe and proper provision of patient care

7. In relation to the reasonable adjustments claim, the Claimant relied upon the 5 Provisions, Criteria or Practices (“PCP”) and the substantial disadvantages as set out in the list of issues. The Respondent did not accept that it had the PCPs alleged, except in relation to being accompanied at formal meetings. The Respondent did not accept that the PCPs were applied to the Claimant.

8. The Respondent did not accept the substantial disadvantages relied upon by the Claimant and disputed knowledge of that disadvantage.

9. The following matters were suggested as reasonable adjustments:

   (a) Increasing the time by which the investigation was undertaken;
   (b) Seeking guidance from Occupational Health;
   (c) Permitting the Claimant's partner to accompany her throughout the disciplinary process
   (d) Applying a sanction short of dismissal
   (e) Not submitting a referral to the NMC or one which properly recorded the Claimant's impairments and their effects.

10. The Claimant relied upon the 6 allegations of harassment as set out in the list of issues.

11. In respect of the unfair dismissal claim, the Respondent relied on conduct as the reason for dismissal and also Polkey and Contributory fault arguments

Wrongful dismissal

12. The Claimant considered whether to pursue her claim for notice pay. After discussing it with her representative the allegation was withdrawn and the claim was dismissed upon that withdrawal.

Adjustments during the hearing

13. In order to assist the Claimant, it was agreed that regular breaks would be taken during the hearing every 30 to 45 minutes or sooner if the Claimant was becoming overwhelmed.

The Evidence

14. We heard from the Claimant and also Ms Snowdon (Ward Clerk) and Ms Johns (healthcare assistant)and on her behalf.), Mr Macena (Staff Nurse) provided a statement for the Claimant, however the Respondent did not seek to cross-examine him. We heard from Ms Castro (Junior Sister), Ms Edwards (Senior Sister), Ms Owen (Matron for Maternity & Neonatal Inpatient Services) and Mr Jenner (Deputy Divisional Director of Nursing) on behalf of the Respondent.

15. We were also provided with a bundle of documents of 712 pages. Any references in square brackets, in these reasons, are references to page numbers in the main bundle.

16. There was a degree of conflict on the evidence.

17. The Claimant's evidence was often confused. She provided differing accounts during her oral evidence, for example:

    a. When she discovered that Ms Castro had provided the Facebook extract to the managers. Initially her oral evidence was that it was after her dismissal. Then after her suspension. She also said that she knew shortly afterwards because a colleague said to look at the night shift and she knew it could not be 2 people and she had asked one other person. At the time of the case management hearing she was suggesting that the manager made a false allegation and made no reference to Ms Castro.
    b. She also gave inconsistent accounts in relation to what happened on 12 December 2022. The accounts varied between her oral evidence, her written accounts shortly after the incident, in the investigation and disciplinary meetings and in what she suggested happened at the second appeal meeting and in her witness statement. These inconsistencies were particularly concerning as they related directly to the subject matter of the Respondent's investigation. The Claimant was unable to explain why her recollections in her witness statement were more likely to be correct than the early and contemporaneous accounts. This was concerning because on her case her mental health got worse during the disciplinary process and continued to deteriorate thereafter.
    c. A further incident of inconsistency occurred during the Claimant's oral evidence. When cross-examined about asking a colleague for antibiotics for herself, she said she thought it was OK to take them and replace them because everyone else was doing it. She volunteered that staff would come on shift and ask for the drug cupboard keys having said they had headaches. She gave them the keys and did not know if they took paracetamol or codeine. The account was changed in re-examination, suggesting that the keys were part of handover and that she did not know if medication was taken, but she suspected it was. She also suggested this was a single incident, whereas before she was saying it was repeated. It was also concerning that the Claimant suggested the difference in the accounts was that she was over-exaggerating initially. This was not withstanding that she also said she was very honest.

18. Allowing for the distress she suffered during the hearing, we were not satisfied that she was a reliable witness. We were concerned whether her evidence was an accurate recollection, or were matters she had since convinced herself occurred or were subconsciously embellished. We were however conscious that during the hearing it was apparent that the Claimant was mentally unwell and anxious.

19. The Respondent's witnesses were clear and consistent in their evidence and made concessions where appropriate.

Facts

20. We found the following facts proven on the balance of probabilities, after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

21. The Claimant started her employment on 5 December 2016. At all times material to the claim the Claimant was a Staff Nurse (band 5) on Daisy Ward, Great Western Hospital Swindon.

22. The Claimant's role involved, giving prescribed medication to patients, undertaking procedures such as administering intravenous drugs, providing patients with information and assisting doctors. The Job Description [p509-511], included that she would deal with distressed patients on a regular basis. The Claimant said that was not the case with Daisy Ward because it was an isolated ward. She volunteered that she had worked in A&E and dealt with such patients and when she started on Daisy Ward she would placate and diffuse situations and said it not considered that such patients would be on the ward. The ward admission criteria included, "no major cognitive impairment/acute mental health concerns or complex care plans." The Ward was not a mental health ward and did not accept patients with severe mental health issues, however we considered she still was required to deal with distressed patients. Her training records showed that she was compliant with conflict resolution until December 2025. We were not satisfied that patients in the ward and at the material times fell outside of the admission criteria. We accepted that undergoing surgery is stressful and that the Claimant was expected to deal with distressed patients.

23. The Claimant undertook her mandatory training and completed the Intravenous medication course on 27 February 2017. She accepted in oral evidence that she read the Medicines Control and Administration Policy at that time. The policy included:
    a. All practitioners must obtain authorisation from a suitably qualified practitioner before medicines can be administered to any patient (section 2.3)
    b. 2 competent practitioners must check the administration of the following medicines at the patient's bedside … injectable medicines (including fluids …)
    c. The administration of all IV medicines must be checked by a second registered practitioner

d. Before giving a medicine intravenously the nurse must ensure that the prescription is complete and clear as described in section 2.3.

24. The Conduct Management Policy provided:
    a. 2.6.1 Referrals to Professional Bodies and Other Agencies: Depending on the allegations, where an employee is registered with a professional body the regulatory body may be notified.
    b. The investigation manager will be appointed from outside the subject of the complaint(s) team, and will conclude the investigation without unreasonable delay.
    c. Suspension/exclusion will only normally be considered if there is a serious allegation of misconduct and: … There is a risk to the employee themselves, other employees, patients or property."

25. At all times the Claimant was aware that she needed to uphold the standards of the NMC code. The Code contained the professional standards which all registered nurses must uphold. The code included:
    a. Under 'Treat People as individuals and uphold their dignity':
        1. Avoid making assumptions and recognise diversity and individual choice
        2. Make sure that any treatment, assistance or care for which you are responsible is delivered without undue delay
        3. Respect and uphold people's human rights
    b. Under, 'Listen to people and respond to their preferences and concerns':
        1. Encourage and empower people to share in decisions about their treatment and care
        2. Respect the level to which people receiving care want to be involved in decisions about their own health, wellbeing and care.
    c. Under act in the best interests of people at all times: balance the need to act in the best interests at all times with the requirement to respect a person's right to accept or refuse treatment.
    d. Under 'act without delay if you believe that there is a risk to patient safety or public protection: tell someone in authority at the first reasonable opportunity if you experience problems that may prevent you from working within the Code …
    e. Advise on, prescribe, supply, dispense or administer medicines within the limits of your training and competence, the law, our guidance and other relevant policies, guidance and regulations.
    f. Under uphold the reputation of your profession at all times, "act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment."

26. Key personnel involved with Daisy Ward were as follows:

a. Mr Chris Bull, Divisional Director of Nursing.
b. Mr Darren Pearson, Matron
c. Ms Alison Edwards, Senior Sister and the Claimant's line manager.
d. Ms Josie Castro, Staff Nurse (Band 5) and the Claimant's colleague on Daisy Ward.
e. Ms Dawn Sparkes, day shift Staff Nurse on the Daisy Ward.

The effects of the Claimant's disability

27. The Claimant was absent from work with covid-19 on 3 occasions between 29 December 2020 to 9 May 2021, 3 to 16 January 2022 and 12 to 18 February 2021. She began experiencing anxiety after the second time she caught Covid-19. The Claimant suffered from panic attacks and when doing so had difficulty breathing. On occasions she experienced pain in her chest and could shake. She might scream out or remove herself from a person or situation. She also had feelings of claustrophobia and needed to go outside and have a smoking/vaping break.

28. The Claimant also said in the list of issues that she had an inability to think clearly when exposed to confrontation or aggression. This was not supported by any medical evidence. The only potential incidents of which we were made aware, were the incidents on Daisy Ward on 4 and 12 December 2022. On 4 December the Claimant was faced with a difficult situation with a patient who was being aggressive towards her and who barged past her, striking her with a Zimmer frame in the process. The Claimant talked to the patient and commendably managed to get the patient back to the ward and calmed her down. There was no evidence of an inability to think clearly on this occasion. The Claimant did not complete a Datix report for this incident and she explained that she did not want the patient to get into trouble. On 12 December 2022 the Claimant's accounts of what happened were very inconsistent. The accounts closest in time to the incident detailed how she considered that the patient did not need the medication and it would be unethical to give it to her and made reference to her not wanting the patient to become aggressive. The early accounts made no mention of anxiety or not thinking clearly. The Claimant's case was that her health deteriorated after the start of the investigation and continued to deteriorate through the processes. We did not accept that at the times of the matters subject to the investigation, the Claimant was unable to think clearly when exposed to aggression or confrontation or at that she had incoherent or muddled speech or sought to avoid any confrontation.

29. The Respondent was sent an occupational health ("OH") report dated 18 February 2021 [p144-146], in relation to Covid-19. It said the Claimant was under tremendous pressure due to stressors arising from her domestic caring responsibilities. No information was given about cognitive impairment.

30. On 9 April 2021, OH said, after describing symptoms of long covid, that she should have regular one to ones with her line manager to ensure she coped well with major problems or difficulties with her vulnerable health and psychological life stresses. The stresses were coming from her home life. No information was given about cognitive impairment.

31. An OH referral in September 2021 said the Claimant felt unsupported at work and it was very stressful and at times was struggling to cope with her duties, with apparently short staffing levels. No information was given about cognitive impairment.

32. On OH referral on 29/11/21 referred to the effects of long-covid and coronary and pulmonary conditions. It did not refer to psychological symptoms.

33. On 22 February 2022, the Claimant e-mailed Mr Pearson about the lack of health care assistants on the ward. She referred to having high stress levels and panic attacks being a frequent aftermath of covid. Her blood pressure was increasing, which she thought was down to stress.

34. The OH report of 23 February 2022, referred to the Claimant having frequent panic attacks and the Claimant thought a lack of an HCA was adding to her stress levels. No information was given about cognitive impairment. The Claimant did not report any incidents at work as a result of panic attacks.

35. On 10 March 2022, the OH report said that the Claimant was feeling overwhelmed with increasing stress due to staff shortages. She had experienced increased anxiety and her medication had been increased. Management was encouraged to consider additional staffing opportunities to assist the Claimant. There was reference to 'one of her conditions' being likely to amount to a disability under the Equality Act 2010. A stress risk assessment was recommended. No information was given about cognitive impairment.

36. Ms Edwards met the Claimant and discussed the report. Ms Edwards undertook a risk assessment and said they were recruiting additional HCAs to reduce the likelihood of them being needed on another ward. She explained that it was not always possible for an HCA to be on the ward if they were needed to help with an emergency elsewhere. The Claimant was told to complete an incident report if she was unable to take a break. We accepted that Ms Edwards was concerned about the Claimant and did her best to try and prevent HCAs being moved. Ms Edwards informed the Matron and Band 7s that there was a stress risk assessment for the Claimant. From that time, whenever possible, an HCA was put on shift with the Claimant.

37. On 22 August 2022, the Claimant e-mailed Ms Edwards, saying she felt unsupported. Ms Edwards had a conversation with the Claimant and

suggested she kept a copy of her OH report in her bag so she could show it to the site team if she was challenged by them about the HCA. The Claimant told Ms Edwards that if the HCA was moved away she felt anxious.

38. On 30 August 2022, Ms Edwards made a further referral to OH. She said that the Claimant was still suffering from anxiety when the HCA was moved away. However she also said that the Trust could not ensure the HCA stayed on Daisy and that when patient safety was at risk across the trust the Matron and Divisional directors would move the HCA. When the HCA was moved, they were still required to cover staff breaks on Daisy Ward.

39. Ms Edwards also looked at other alternatives whereby the Claimant could work under a bigger staffing model. Ms Edwards suggested that the Claimant could work on Daisy Ward on day shifts or on a different ward. Working nights on Daisy Ward suited the Claimant and she said she did not want to change wards or move to the day shift.

40. On 2 September OH contacted Ms Edwards and said that they had contacted the Claimant to book an appointment. The Claimant was looking after her grandchildren and said she would contact OH to book an appointment. The Claimant did not arrange an appointment.

41. Ms Edwards then sought to secure the current OH recommendations. In October 2022, Ms Edwards, Mr Pearson and the Claimant had a meeting. The Claimant was told that a decision had been taken that she would be supported by an HCA. From that time an HCA worked with the Claimant. This removed the stress of not always having an HCA on the ward.

42. Members of the team who were band 6 or above were informed of the Claimant's OH report and the recommendation that she was assisted by an HCA. The only other employees, below that band, who were aware of any arrangement were those the Claimant had told.

43. We accepted Ms Castro's evidence that she did not know, until the Employment Tribunal proceedings, about the Claimant's OH reports, their contents or her diagnosis of anxiety. The Claimant suggested in oral evidence that the reason why she had been given an HCA was discussed on the Daisy Ward WhatsApp Group, we rejected that evidence. We accepted Ms Castro's oral evidence that after the Claimant made the suggestion at the hearing, she checked the WhatsApp group back to 2019 and found no such conversation. Ms Castro's understanding of the nightshift roster was that Daisy Ward was supposed to be staffed by 2 trained nurses and 1 HCA each night. She understood that the HCA was there to support the two nurses and to ensure that there was cover for the Claimant's smoking breaks. Ms Castro did not work with the Claimant every week and only did so when their shift patterns coincided. In cross-examination the

Claimant accepted that the HCA was there to help them both and that it was to also ensure that the other nurse had a break in their 12 hour shift.

44. We accepted that the Respondent sought OH reports when they were thought to be needed both ordinarily and during formal processes.

Events in October 2022

45. The Claimant alleged that in October 2022 she was referred to by Ms Castro and Ms Sparkes as 'the special one' and teacher's pet'. In cross-examination she accepted that she never heard this herself and said she had been told by someone else. Her evidence as to when she discovered it was inconsistent, in that at one stage she said it was before her dismissal and later that it was in October 2022. She also said that she was not aware of who had been saying it and later that she discovered it in February 2023, at some point before her dismissal. Ms Johns gave evidence that Ms Sparkes made a comment that 'what's so special about Lesley' and 'why does she get what she wants and none of us have a say in the matter'. Such comments were not witnessed by Ms Edwards and the Claimant did not raise a complaint about them. Ms Castro did not accept she made the comments alleged and it was not put to her that she did. It was put to Ms Castro that she said what is so special about Lesley, which she did not accept. We did not accept that Ms Sparkes made such comments. We did not accept that the Claimant was referred to as the 'special one' or 'teacher's' pet by Ms Castro. Ms Castro was wholly unaware that OH had made recommendations that the Claimant was supported by an HCA or the reasons behind it.

46. In October 2022, Ms Price, a nurse, approached the Claimant and said that Mr Pearson apologised because an HCA was not on the ward. Ms Castro was also present and asked why he was not apologising to her and only to the Claimant. Ms Castro was told that it was a personal apology and said no more. The Claimant's evidence was that this deeply hurt her.

47. The Claimant also alleged that Ms Castro said, 'I don't understand why you get this and we don't', with reference to an HCA. Ms Castro did not accept that that she made the comment and her evidence on this point was not challenged. We preferred Ms Castro's evidence and did not accept she made the comment.

Conversation with Ms Edwards on 25 October 2021

48. In addition to working for the Respondent, the Claimant also undertook private Botox treatment work. She was signed off sick on Tuesday 11 and Wednesday 12 October 2021 with a sickness bug. On 15 October 2021 she put a post on Facebook about a treatment she had given a client. She

returned to work on 17 October 2021 for the start of her normal 3 day pattern of Monday to Wednesday.

49. Ms Lawson, staff nurse and friend of the Claimant, raised with Ms Komisarek, Junior Sister and friend of the Claimant, that the Claimant might have been working whilst off sick. Ms Komisarek spoke to Mr Bull about the concern. At this time Ms Edwards was on leave. On Ms Edwards return from work she asked Ms Komisarek if there was any evidence of the Facebook post. Ms Komisarek replied, sending the image and saying it did not appear she worked on Tuesday or Wednesday. She said she had spoken to Ms Lawson and Ms Castro and asked for the image. Ms Edwards responded by saying she would speak to the Claimant and say that she needed to fill in a self-certificate and say she has not worked. She also said she would speak to her about the anti-biotics and the food.

50. At the same time Ms Komisarek and another colleague, told Ms Edwards that the Claimant had been taking sandwiches prepared for patients and she had also taken bread.

51. On 16 October 2022, Ms Komisarek e-mailed Ms Edwards and informed her that the Claimant had asked on 3 occasions on Sunday for anti-biotics to be given to her from the drug cupboard because she had a chest infection.

52. On 25 October 2022, Ms Edwards had a conversation with the Claimant about these matters. In relation to the Facebook post, Ms Edwards considered that the dates were not clear from the post and said that it had been questioned by some staff whether she had been working whilst off sick, which the Claimant denied. This was accepted by Ms Edwards and she asked the Claimant to complete a self-certificate and said there was no evidence she worked whilst off sick. The bread and sandwiches were discussed and the Claimant said that they were out of date and would go in the bin and she took the bread to feed the swans on the way home. The Claimant was told that even if it was out of date they could not take patient food and colleagues did not know it was out of date. They discussed how it may have appeared to colleagues and no action was taken. The anti-biotics were also discussed. The Claimant was told she was putting her colleagues in an awkward position. The Claimant said she thought she could take a couple and replace them when her GP gave her some. She was told that she could not do this and it went against the code of conduct. She was told they can never take any tablets from the ward, even with a prescription and in any event a prescription must be obtained from a GP and the drugs obtained from a pharmacy. No further action was taken.

53. In cross-examination, the Claimant did not accept that if a colleague thought she had been working whilst off sick, during a staff shortage, that it would be reasonable to be concerned. She suggested they should have asked her

first. In relation to the sandwiches she said that the Serco lady said she could take the sandwiches which were going out of date and she accepted they had been intended for patients.

54. When cross-examined about the anti-biotics the Claimant accepted that she had asked for them and said everyone did it. As a way of trying to justify her actions, she volunteered that when some staff came on shift they asked for the drug cupboard keys, she did not ask them what they were doing but handed over the keys. When questioned about it being a question of judgement and if she thought colleagues were using the medicine key to take medication which was not prescribed and she ought to have escalated it, the Claimant said she trusted everyone and she did not snitch on people. She referred to someone saying they had a bad headache and asked for the keys and she handed them over and she did not know if they took paracetamol or codeine. Her initial evidence was that this happened on more than one occasion. She also accepted that when she did her drug course they had been told never to give anything out, but in her ward they had trust. In re-examination the Claimant provided a different account and said that she did not think she had represented it as it happened and suggested that it happened on one occasion. She said the person had said they had a headache and the Claimant looked for paracetamol in her bag and had none. The colleague asked for the keys and the Claimant asked how they were going to manage and as told they would and she did not know what was going to happen with the keys. She did not know if medication was taken and it was an assumption and she weas maybe over-exaggerating the point because she had been accused of asking for medication from the trolley. She then subsequently said she suspected they might take some medication. We considered that the first version of events was more likely. We did not accept her suggestion that her rational judgment was impaired in these incidents.

55. The Claimant wanted to know who reported her and told Ms Edwards she would not rest until she found out. Ms Edwards did not tell the Claimant who had raised the concerns as they fell within the speak up policy which permitted matters to be raised anonymously. The Claimant often raised who had raised the concerns at the nurses station, in particular about the Facebook post. Ms Edwards considered that the Claimant was angry that the matters had been raised. The Claimant denied this and said that she was hurt. In cross-examination she accepted that she was not going to let the matter rest and that she knew who had said about the bread and anti-biotics but not who had sent the Facebook post. She wanted to know who had sent it so she could have a discussion with them and lay the matter to rest and clear her name.

56. The Claimant's evidence was that it was Ms Castro who sent the Facebook image. Her evidence as to when she discovered this was inconsistent. On

the first day of her evidence she said it was after dismissal. She later said that she knew it was her when she administered the saline on 12 December and that was why she had not been happy to speak to her on that occasion. At the case management hearing it was not suggested Ms Castro made the allegation, instead it was her manager. When questioned about the varying accounts the Claimant said that Ms Komisarek said to stop looking at the day staff and focus on night staff. She knew it would not be Pedro or Ms Lawson and had spoken to one other so knew it would have to be Ms Castro and later in the bundle for the hearing she saw it was Ms Castro. In cross-examination Ms Castro denied sending the post to management, and we accepted her evidence. It was in fact Ms Lawson who had raised it with Ms Komisarek. The Claimant subsequently gave evidence that if on 12 December she had thought she could not treat the patients she could have asked Ms Castro to take over and she would have done. This was inconsistent with the account that she knew it was Ms Castro on 12 December. The Claimant did not know who had reported her and was trying to find out, but she was not being told. We accepted Ms Edwards evidence that the Claimant was angry about it and had said she did not trust anyone and wanted a name.

57. The Claimant felt isolated by this and thought someone was out to get her.

Incident with the patient on 4/5 December 2022

58. A patient was admitted to the ward on 4 December 2022, who was challenging. The patient was prescribed Cyclizine, an anti-sickness drug which can only be taken 3 times a day, on a PRN (when required) basis. The Cyclizine was prescribed to be provided intravenously ("IV"). The Claimant suggested that it was known that the patient had been discharged from her GP surgery for shouting and screaming about her dressings and relied on Ms Sparkes' subsequent interview. Ms Sparkes interview said that the incident at the GP surgery had happened after the incident on Daisy Ward.

59. During the night shift the patient said she felt sick and asked for Cyclizine. The Claimant's first written account set out that she had a discussion as to whether it could be taken orally and the patient said she had a hole in the roof of her mouth. The Claimant was given the drug by IV. There was a complaint about it stinging. When the drug had been provided the patient told a colleague the Claimant had not given her all of it and thrown it in the bin. The patient was spoke to by the Claimant and they started screaming at her. The patient said she was going to self-discharge. The Claimant took her to day surgery and tried to speak to her, following which the patient tried to leave. The Claimant called security. An HCA was trying to get the patient to go back to the ward. The Claimant tried to explain they could not go with bare feet and when they were not properly dressed. The patient tried to push past the Claimant by ramming the Zimmer frame into her legs. The patient

was still in a distressed state. The Claimant sought to help and calmly spoke to them and persuaded them back onto the ward. We were not satisfied that the Claimant was not thinking clearly during this incident.

60. The incident was not recorded in the patient's notes in terms of aggression towards the Claimant and the Claimant did not raise a Datix report. The patient later apologised to the Claimant. The Claimant said in cross-examination that she did not want to get the patient into trouble.

61. The Claimant's oral evidence was that she made a deal with the patient that she would give oral cyclizine. This was described as a care plan, however it was not recorded anywhere and the Claimant did not write it down. The Claimant continued to care for the patient on the nights of the 5 to 7 December 2022 without any incident.

12 December 2022

62. On 12 December 2022, the Claimant started her first of 3 shifts that week. The patient was still on the ward. By this time the patient had a long line canula fitted for the provision of IV medication. It was agreed that during the shift the patient asked the Claimant for Cyclizine. The patient was not given Cyclizine. The Claimant gave the patient IV saline and put a label on the bag saying "placebo". The Claimant did this on her own and did not obtain a prescription from a doctor. It was not recorded on the patient's notes. The Claimant referred to it in the handover the following morning.

63. The Claimant's accounts as to what happened on 12 December 2022 varied over time. Her mental health has deteriorated over time and she is now recognised by the DWP as being unfit for work because of it.

64. The Claimant's evidence to the Tribunal can be summarised as follows:

    a. A colleague informed her that the patient had been seen on the ward putting her fingers down her throat and requesting medication. That triggered thoughts of what happened the week before and she was overcome with fear, her anxiety levels were beyond control and her mind was filled with thoughts of the patient harming her. She felt like she was having a panic attack and was unable to breath or think straight. Whilst in that state she told the patient that she could not give cyclizine because it was not due. Her evidence was that she thought she might have been in theatre that day and it would not be safe to give the medication. In oral evidence she said they were informed this in handover and remained resolute in the assertion, we rejected that evidence. The patient's records showed that they had not been in theatre since 6 December and she had not referred to it in her early accounts to the Respondent.

b. She was fearful the patient would do something if the Claimant did not do anything and so she told them that she was going to put something up to make them feel better. She hung up saline.
c. Ms Castro saw the bag and asked what it was and the Claimant replied that the patient had been sick and she was giving saline. Ms Castro's account to the Respondent and Tribunal made no reference to the Claimant saying it was saline in front of the patient and it was not put to Ms Castro in cross-examination. Ms Castro in her interview denied speaking to the Claimant about the contents of bag at the time they were with the patient. We preferred Ms Castro's evidence and rejected the Claimant's evidence about the discussion at the bedside.
d. The Claimant's evidence was that she believed Ms Castro was responsible for providing the Facebook post and that made her more anxious and prevented her from seeking her input. This was inconsistent with oral evidence to the Tribunal that she could have asked Ms Castro to take over and that Ms Castro would have done.

65. In the Claimant's reflections documents made on 14 January 2023 she said:
    a. The situation was very challenging and difficult to handle. In her professional standing it was unethical to give a patient something they expect rather than need. On assessment she did not conclude she required antiemetic as she was forcing herself to be sick. The medication was PRN and as a professional she did not think it was necessary.
    b. The patient did not ask for Cyclizine, she said medication for sickness. The Claimant said she didn't imply she was giving her the medication and the patient did not ask. She felt she had to do something as she did not want her to become aggressive
    c. In hindsight she could have asked a colleague to take over because of the previous abuse, but she thought she could handle it
    d. The patient was happy, no harm came to her, had she been poorly and truly sick and obviously she would have been given the medication no question.
    e. The incident on 12 December had caused her great anxiety and sorrow. She did not say she was anxious at the time of the incident.
    f. In her second reflection document she said that when the patient said she had been sick and needed her medication she said she would see if it was due and in the meantime give her something to make her feel better. Further that she would give her an anti-emetic if she did not feel better. She did not say Cyclizine was in the bag and the patient did not ask.

66. In her investigation interview with Ms Bristow on 16 January 2023 the Claimant said:
    a. She detailed the incident on 4 December 2022.

b. On 12 December the Claimant was self-harming by putting her fingers down her throat. She thought to herself that the patient was testing her patience and she did not know what to do with her and whether she should give Cyclizine because the patient clearly did not need it because she was making herself ill to get it. She told the patient she would check when it was due and did not want a repeat of the previous week and thought she would give saline
c. She did not check with anyone and put the saline up without being accompanied for the required check under the policy.
d. She said she wanted to help the patient and make them feel she was doing something.
e. She did not mention Cyclizine and neither did the patient and said she was putting it up to make the patient feel better.
f. She said she had never read the administration of medication policies
g. The patient did not know what was in the fluids, but they did not ask and the Claimant did not tell them.
h. Ms Castro had not said anything to her on the night
i. She did not think she had done anything wrong. It was to calm the patient down so she would not have to put up with what she had before.
j. She said a placebo was a supplement to something else and accepted only a doctor can authorise a placebo but she had to write something.
k. She referred to having panic attacks in the week of the interview and that she suffered with anxiety. She did not say she was in an anxious state on 12 December.

67. At the disciplinary hearing on 20 February 2023 she said:
    a. On 4 December 2022 she had called the orthopaedic surgeon for a different prescription. She was unable to explain why she did not do that on 12 December 2022.
    b. She believed the patient did not need the medication. She considered in her professional experience she should be able to review if a patient needed medication or not.
    c. She was unsure why she wrote placebo because she did not need to.
    d. She did not say she was anxious or the time or was unable to think clearly

68. At the appeal hearing on 15 March 2023 she did not know why she wrote ‘placebo’. She did not say she was overly anxious at the time. the hearing was adjourned so that the Claimant could review documentation.

69. In a statement prepared for the final appeal hearing the Claimant said

a. They did not think about a nurse with severe anxiety dealing with a patient who was clearly disturbed and would her cognitive thinking and reactions be slightly different.
b. Giving saline to pacify a patient is not as dangerous as overdosing with Cyclizine.
c. The patient was kept well informed about what was going on and was happy.

70. In the appeal meeting on 17 April 2023, the Claimant said:
    a. She was not mentally well at the hearing.
    b. She had gone through everything with a fine tooth comb.
    c. She could not say why she wrote 'placebo' on the bag.
    d. She had told the patient they needed to settle them down first because they were not due anti-sickness medication. When she hung the bag up she said, 'if you do need an anti-sickness when it is due we'll give you something".
    e. She did not want a repeat of the previous week.
    f. The patient knew it was only water because she had said that to her.
    g. She was asked if she felt her judgment was clouded at all. The Claimant said not about the patient. Further that people get alarmed, upset and anxious and it just washes over your head.
    h. The circumstances on the 12th were nothing to do with the patient. She was feeling downtrodden and picked on.
    i. The Claimant did not say that she had been unable to think properly and that was a factor in her decision making.

71. On 13 December 2022 there was a discussion between Ms Castro and the Claimant. The Claimant referred to this in her reflection document on 14 January 2023. The Claimant said that Ms Castro said she was not happy that she had not given the patient cyclizine and that she had tricked her. The Claimant's oral evidence was that when Ms Castro said that patient thought there was cyclizine in the bag she had said that the patient had been in surgery and she could not give it. Ms Castro's account on 16 January 2023 and in her e-mail dated 20 December 2022 was that she had raised this and had asked why that the Claimant had not approached a doctor and was told they were there to make patients feel better. The Claimant told her that she had not said anything because she knew Ms Castro would have disapproved and she was testing the patient's mental health to see if she didn't need it after all. Further that by giving the placebo the Claimant found out she did not need the Cyclizine. The account given by Ms Castro was not challenged and we accepted that it was an accurate record of what had been said.

72. The Claimant's accounts as to what happened changed over time. initially she was saying it was a matter of professional judgment and that she knew Ms Castro would not approve. She did not say that she was unable to think

clearly. The Claimant was not exposed to aggression or confrontation by the patient on 12 December. Her account at the final appeal meeting did not say that she was so anxious that she was not thinking clearly. The early accounts made no such reference and sought to justify what she had done. We did not accept that the Claimant was in a state of panic or that her mental state was such that she was not thinking clearly on 12 December. Her early accounts, that she did not think the Claimant needed the medication, were more likely to be correct, it being made much nearer the time and on the Claimant's evidence when her mental health was in a much better state than it was by the time of the appeal. We did not accept that the Claimant was not thinking clearly during her interactions with the patient on 12 December 2022.

73. We did not accept that the Claimant said to Ms Castro, in front of the patient, that there was saline in the bag. The Claimant told the patient that she was giving her something to make them feel better and did not say what it was. She did not have a prescription for saline and its administration was not authorised by a prescriber. The Claimant administered the saline on her own. We considered it was unlikely that the Claimant did not know what a placebo was.

74. At the handover to the day shift on the morning of 13 December 2022, the Claimant said that she had given the patient saline. Ms Sparkes was present at the handover. Ms Sparkes then asked Ms Castro if she knew anything about it. Ms Castro said that she had been asked by the Claimant to check the IV medication because it was dripping and had seen placebo was written on it. Ms Castro said that she would e-mail Ms Edwards about it. On 12 December Ms Sparkes asked Ms Castro to provide a statement about what happened.

75. On 20 December 2022, after Ms Edwards return from leave, Ms Castro sent an account of what happened on 12 December to Ms Edwards and Mr Pearson. Ms Castro said the patient had sounded her bell and complained the IV medicine was not connected properly and was dripping. She then checked what the medicine was and saw that it was saline with placebo written on it. The Claimant repeated this in the morning. The following day she had spoken to the Claimant about it and she was not comfortable about not being honest with the patient. The Claimant told Ms Castro that she had not discussed it with her because she knew she would not approve and she wanted to test the mental health of the patient and by giving the placebo she found out they did not need IV Cyclizine. The Claimant also had not entered her observations into the nerve centre straight away [p214-215].

76. Ms Edwards was concerned about the contents of the e-mail. She was concerned that if the patient was sick she could lose more fluids and it was for doctors to make decisions about medication. She knew there was a

doctor who would have been on call. Ms Edwards signed off an incident report.

77. Ms Edwards then spoke to Mr Pearson , Mr Bull and HR as to what to do next. On the basis of Ms Castro's e-mail she considered saline had been put up and the patient thought it was Cyclizine. We accepted that when significant incidents occur on a ward it was normal to inform Mr Bull. Mr Pearson was new to his role.

78. On about 4 January 2023, Mr Bull asked Ms Finney, Matron of Acute Medicine, to speak to the Claimant. We accepted that Mr Bull wanted the Claimant to be spoken to that night and Ms Edwards had gone home because her shift had ended. Mr Bull wanted the Claimant to be informed there would be an investigation and to find out what happened.

79. Ms Finney spoke to the Claimant and said Mr Bull had asked her to speak to her and said what the allegations were and an investigation was underway and asked her some questions. Ms Finney told the Claimant that she should write a statement. Ms Finney then e-mailed Mr Bull. She reported the Claimant had said in relation to the saline that "she clearly recalls doing so and that there were good reasons why she did, that the patient was difficult and manipulating the staff and did not require IV cyclizine and was sticking her fingers down her throat and making herself sick." This e-mail did not form part of the investigation and was not included in the investigation report. The Claimant accepted in cross-examination that it reflected what she had said to Ms Finney.

80. On 5 January 2023, Mr Pearson sought advice from the NMC. He was advised that the risk was not high enough for the NMC to issue an interim notice and a referral was not necessary at that stage based on his summary. The concerns should be managed locally. If an individual is dismissed it would not automatically warrant an NMC referral [p218].

<u>The suspension of the Claimant</u>

81. On 5 January 2023 Mr Pearson told the Claimant that she was suspended and handed her a letter. She was told in the letter that a referral had been made to the NMC. She was informed she was being investigated into allegations that:
    a. She withheld prescribed medication from a patient who had requested it.
    b. Instead she administered intravenous saline which was not prescribed.
    c. She did not inform the patient of this and therefore the patient believed they had received Cyclizine as requested and prescribed.

82. We accepted Ms Edwards evidence that Mr Bull had spoken to the chief nurse about the situation, following which there was concern that there was a risk to patient safety if the actions were repeated.

83. Ms Edwards was cross-examined on the basis that an informal route could have been taken in relation to the incident and the Claimant's health had not been taken into account. We accepted that the decision making tool required the event itself to be looked at and that due to what had happened a full investigation was required. The decision was based on the nature of the allegation, the potential severity of it and the risk it might happen again until it was investigated.

84. The Claimant's evidence was that suspension was inappropriate because 2 of the allegations were not true and she thought the first allegation related to 4 December 2022.

85. That evening Mr Pearson telephoned her and said there was an error in the letter and she had not been referred to the NMC. The Claimant's evidence was that he said the NMC had told him they were not interested in pursuing the matter. Mr Pearson suggested that she write a reflection of what happened.

86. In oral evidence the Claimant suggested that Mr Pearson had said that the NMC told him that it was not a suspendable offence as had been the advice from hospital staff. This was not in the Claimant's witness statement. She was unable to explain why Mr Pearson would say it was not suspendable but keep her on suspension. The Claimant accepted that the allegations were serious. The Claimant's witness statement referred to Mr Pearson's interview in the disciplinary investigation. Mr Pearson said that after he had been notified of the incident he did not think it was a suspendable event. When they started completing forms for an investigation Mr Bull became involved and he suggested potential suspension. We did not accept that Mr Pearson told the Claimant he did not think it was suspendable in the telephone conversation. The Claimant became aware of the comment in Mr Pearson's interview and incorporated it into her oral evidence. If he had told her that it was not suspend able it would have featured in her witness statement. The Claimant suggested that she did not fit into the suspension criteria.

87. After the Claimant was suspended her mental health started to deteriorate.

<u>The investigation</u>

88. On 6 January 2023, Ms Bristow, senior sister, was appointed to investigate the allegations. Ms Edwards said she would be grateful if the report was provided by 18 February 2023. She was reminded that the policy required

investigations to be conducted in a timely manner and asked her to keep her informed if there was a delay or she wanted to expand the scope of the investigation [p229].

89. The Claimant was cross-examined about what disadvantage there was to her. She said she wanted Ms Owen to listen to the recordings and there was insufficient time to go to OH. The Claimant accepted that she did not provide any medical evidence to Ms Bristow. She was unable to say what happened to other people in respect of OH referrals.

90. On about 13 January 2023, Mr Bull had a meeting with the patient at which they were informed of the drug incident and that an investigation was being undertaken. This was in accordance with the Trust's duty of candour.

91. On 10 January 2023, the Claimant was invited to attend an investigatory meeting on 16 January 2023. The Claimant was informed that she could be accompanied by a colleague or union representative. The Claimant suggested that she did not receive the letter, however it was sent by e-mail.

92. On 14 January 2023, the Claimant produced the reflections documents referred to above.

93. The Claimant attended the investigation meeting on 16 January 2023 and was accompanied by Ms Komisarek. The Claimant's explanations are set out above. In the interview she also referred to IV Cyclizine giving patients a buzz. That the patient clearly did not need it because they were making themselves ill and they were literally self-harming to get it. when discussing the patient being a mental health patient she said that she did not know whether it was on the notes that they were 'mental', but from the way they were reacting they had as serious problem.

94. Ms Bristow held investigatory meetings with the following staff on 16 January 2023:
    a. Ms Castro, who explained about seeing placebo being written on the bag when the patient said it was dripping and that she did not speak to the Claimant at that time. That she was approached by Ms Sparkes after handover. She also referred to the conversation she had with the Claimant on 13 December 2022.
    b. Ms Sparkes.
    c. Mr Pearson.

95. On 7 February 2023, Ms Bristow produced an investigation report. The report summarised the Claimant's explanations for not providing Cyclizine and that the Claimant believed the patient had mental health issues and was addicted to cyclizine. The Claimant had admitted she administered IV saline without prescription and said she did not realise it needed to be prescribed.

The Claimant had not followed the IV policy. It referred to the Claimant not telling the patient it was not Cyclizine but instead it was something to make her feel better, attaching a label would give an impression cyclizine had been administered. It was said that the allegations had been admitted. Proceeding to a formal hearing was recommended. The appendices to the report were the recordings of interviews (available on request) and transcripts of them, although a transcript for Ms Castro was not listed.

96. Ms Edwards reviewed the report and decided to proceed to a formal hearing.

97. The Claimant suggested during her evidence that Ms Snowdon, who was present at the handover after the incident and also the HCA and security guard who were involved in the incident on 4 December 2022 should have been interviewed. She suggested Ms Snowden should have been interviewed because the Claimant said she did not refer to a placebo at the handover, however she did accept that she wrote it on the label.

Disciplinary Hearing

98. On 10 February 2023, the Claimant was invited to attend a disciplinary hearing on 20 February 2023 to consider the allegations. The dates of the alleged incidents was said to be on 12 December 2022. She was informed it was potential gross misconduct. She was informed of her right to be accompanied by a colleague or trade union representative. The investigation report was attached. The appendices to the report referred to the recordings of interviews which were available on request and transcripts of the meetings with Mr Pearson and Ms Sparkes. There was not a transcript of the meeting with Ms Castro.

99. Ms Owen, Matron for Maternity and Neonatal Services was appointed to hear the disciplinary hearing. We accepted Ms Edwards evidence that the terms of reference would not refer to medical conditions and that it was for the Claimant to refer to them if she thought it was relevant. Prior to the hearing Ms Owen was given the investigation report, The Conduct Management Policy, The Medicine Control and Administration Policy and the NMC code. Ms Owen reviewed the report thought it was thorough and balanced.

100. On 19 February 2023, the Claimant e-mailed Ms Owen and said she would be accompanied by Mr Macena. She did not ask if she could be accompanied by her partner.

101. On 20 February 2023, the Claimant attended the disciplinary hearing. She was accompanied by Mr Macena, a colleague. The audio recording of the meeting failed. The notes taken at the time detailed the following information:

a. The Claimant said she had not received the recording of Ms Sparkes and one other person but she had the transcripts. This was clarified in oral evidence as being that she had half of Ms Sparkes' transcript and the e-mail sent by Ms Castro. The Claimant was asked if she wanted to reconvene so she could review the documents and recordings, however she said she wanted to continue.
b. She said her colleagues had lied.
c. She said she was not testing the mental health of the patient.
d. At the time of the incident she had not read the Medicines Control and Administration Policy or the NMC code of conduct but she had now.
e. She made the points referred to above.
f. She also raised that she had been accused of stealing bread and about the Botox work.

102. The Claimant read from a pre-prepared statement, which accepted she hung up saline but she denied withholding a drug because the patient did not need it. She provided comments on Ms Castro's and Ms Sparkes' statements. She was concerned that Ms Sparkes had not witnessed the incident. She said she was yet to establish who sent the Facebook picture and referred to being accused of taking food. The incident had caused her anxiety and she had been to her doctor, who had prescribed medication.

103. The Claimant's evidence was that she was not given a chance to explain what had happened on 12 December and she had not mentioned that she made an error of judgment because of that. We rejected that evidence, the notes showed that she provided explanations and had set out her version of events in her prepared statement and in her reflections and interview documents.

104. The Claimant was upset and she cried. Ms Owen considered that this was a normal reaction to having to deal with the allegations made against the Claimant. We accepted that she did not think the Claimant was presenting in such a way that meant the hearing should be postponed and her reaction was entirely proportionate to the seriousness of the allegations.

105. Ms Owen adjourned the hearing so that further investigation could be carried out. She e-mailed Mr Bull and asked if he could share any information from the patient, because of the duty of candour. Ms Owen was informed on 21 February 2023 that the patient had raised with a female nurse that she did not receive the cyclizine as she did not get the same feeling as before and she felt the nurse was not compassionate [p342-343]. The Claimant was not provided with this e-mail to comment on. Ms Owen considered that the Claimant had given a thorough explanation and sufficient time and an explanation was not needed.

106. The disciplinary hearing reconvened on 28 February 2023. The Claimant was not accompanied and this was discussed. The Claimant confirmed that she was happy to continue without a companion. Ms Owen explained that she believed the Claimant had failed to adhere to the NMC code and Trust STAR values and that her actions amounted to gross misconduct. It was confirmed she was being dismissed. The Claimant said she understood why she had been disciplined for putting up the saline but that was the only thing she did wrong. She said everyone lied about her. In cross-examination the Claimant suggested that she had done the right thing.

107. Ms Owen explained her decision:

a. In relation to withholding medication the patient was the decision maker under the PRN prescription and the Claimant had said in her professional opinion the patient did not need it. The Claimant was unable to justify why she had not escalated or shared her concerns with the medical team, who could have advised or given a different prescription.
b. She admitted she administered IV saline without a prescription. It was a clear breach of Medicines and Controls Administration policy which required a prescription and two registered practitioners needed to check and sign the administration of it.
c. She had confirmed she did not tell the patient what the IV medication was. There was a reasonable belief that the patient would have perceived it to be cyclizine when the patient had requested it multiple times previously and it had been administered through IV. Inappropriate and non-compassionate language had been used, with reference to the patient being someone who enjoyed conformation and their attitude could not be dealt with and if they were not mentally ill there was something wrong with them.
d. She had considered action short of dismissal. The allegations were serious and redeployment was not an option due to the exposing the Respondent and patients to significant risk. Her actions had a serious impact on her ability to work independently and have a trusting relationship with colleagues and leaders across the Respondent.

108. The Claimant was sent an outcome letter the same day. The letter recorded that:

a. The Claimant had said in her statement that she felt she had not withheld a drug from a patient because in her professional assessment they did not need it. Further in her reflection 2 that she could have given oral cyclizine if needed and that after giving saline she had told the patient that she would give an antiemetic if they did not feel better because it was prescribed as a PRN. She had been unable to provide justification as to why she did not share her concerns or escalate to the medical team who could advise further and review the prescription and medication. This was further

explained by Ms Owen in cross-examination that the Claimant was saying this was in her professional judgment.

b. She had admitted she hung up a bag of saline without prescription. This was a breach of the Trust's medicines Control and Administration Policy, including that authorisation must be obtained before medicine is administered to a patient and the intravenous Administration Policy required two registered practitioners checking and signing the IV prescription.
c. She had administered in the investigation and formal conduct meeting that she had not told the patient what the IV medication was and had said she was making a deal with her and giving something to make them better. It was considered the patient would have believed it was cyclizine. The Claimant was unable to justify why she had used the word placebo in her formal meeting.
d. It was considered that the Claimant had used non-compassionate language about the patient.
e. Her behaviour constituted a serious breach of trust and confidence.
f. Consideration was given to action short of dismissal. It was considered the breaches of the NMC code of conduct were such that redeployment was not an option and would pose the trust and patients to significant risks. She was dismissed for gross misconduct.
g. The Claimant was informed of her right to appeal.

109. Ms Owen also took into account:

a. That some nurses can be prescribers, however the Claimant was not one. It was not for the Claimant to decide what to prescribe and it felt arrogant and inappropriate. Daisy Ward was a surgery ward and many patients have IV drips and it was not a new area for her.
b. The meaning of placebo is the giving of a substance to someone who is told it is a specific medication, but it is not that medication. It is given to make them feel they are getting better or to compare with others who are on the medication. Giving placebos was not undertaken at the Trust because it was dishonest and misleading
c. The Claimant did not say that anxiety was a cause of the way she acted. She said it was her opinion was that the medication was not needed. If the Claimant had said that anxiety influenced conduct she would have sought OH advice.
d. The Claimant had suggested Ms Sparkes and Ms Castro colluded, however the Claimant made admissions which were sufficient to make a decision, without their evidence.

110. We accepted Ms Owen's evidence that she considered the Claimant's responses to show a lack of insight into what had happened. The Claimant did not appear to express remorse and came across as comfortable with her decision. It did not appear to her the Claimant understood the seriousness of what had happened and she was not assured

it would not happen again. She was concerned about what other decisions she could make with vulnerable patients We accepted that she considered providing IV medication was a dangerous procedure and there are cases when the wrong bag has been picked up, hence why 2 people need to administer it. Ms Owen viewed these allegations as very serious. She did not consider further training would have been appropriate on the basis that what happened was basic and IV medication was very different. A lesser sanction was not appropriate because the Claimant had not demonstrated learning.

111. On 28 February 2023, the Claimant appealed against the decision to dismiss her. She said that conclusion was too extreme and judgmental and witnesses had been dishonest. She had been suspended before she could write a statement of events. She wanted all evidence sent to her.

NMC referral

112. On 1 March 2023 Ms Owen referred the Claimant to the NMC [p527-540. The referral set out the findings of the disciplinary policy. It was stated, there was a reasonable belief that her actions may have a serious impact no her ability to work independently and to have a trusting relationship with peers and senior leaders cross the Trust. Further that she had shown no remorse or insight throughout. There were questions whether there was a physical health concern or disability or mental health or well-being concern at the time of the incident that may have impacted her performance. Ms Owen answered no to those questions. Ms Owen said she did not refer to the Claimant's anxiety on the basis that it had not been raised as a factor as to the Claimant's decision making.

113. The Claimant said that she was put to a substantial disadvantage in the referral because the Respondent had not said that she was disabled. This was not the question answered by Ms Owen. The Claimant referred to the Respondent subsequently conceding that she was disabled in the Tribunal proceedings and that therefore Ms Owen should not have denied it in the referral.

The appeal

114. Mr Jenner, Deputy Divisional Director of Nursing, was appointed to hear the appeal. On 3 March 2023 he invited the Claimant to attend an appeal hearing and informed her of her right to be accompanied by a colleague or trade union representative. Mr Jenner was not provided with any of the OH reports before the appeal and was not aware of any wellbeing discussions the Claimant had.

115. The Claimant had told a practitioner at a counselling session on 14 March 2023 that she had been suicidal after the meeting when she was sacked, but was not currently having such thoughts [p329].

116. The Claimant attended the appeal meeting on 15 March 2023 and was accompanied by Ms Snowdon, a colleague and friend.
    a. The Claimant said she had received half of Ms Sparke's statement and had not received Ms Castro's statement, but she had listened to the recording. She said she had not received Ms Price's statement. The Claimant also said that she had not received the dismissal letter, although she had responded to it in her appeal.
    b. The Claimant was concerned that Ms Sparkes had made a statement.
    c. Mr Jenner said that all information would be sent to the Claimant and they would reconvene.
    d. Mr Jenner explained that the Claimant had not been dismissed for the events on 4 December and it was not about when the patient tried to exit. It was about the decision when she administered the saline and how she administered it. He said that how the patient acted on that day should have any influence of how she treated them a week later. He also said the background of the patient was understood and that they were difficult to manage.

117. The hearing was then adjourned so the Claimant could consider the documentation. The Claimant was provided with the investigation interviews and made comments on them.

118. On 20 March 2023, the Claimant's GP increased her medication, this was not known to Mr Jenner.

119. On 27 March 2023, the NMC imposed an interim order on the Claimant.

120. On 17 April 2023 the Claimant attended the reconvened appeal hearing. The Claimant was accompanied by her partner, Mr Blake. Mr Blake, in front of Ms Edwards, banged his hand on a filing cabinet and said that if they did not get what they want there were other ways. It was not explained at the hearing he was the Claimant's partner, rather a former colleague and he implied he was a legal adviser.

121. The Claimant provided a written statement [p549-555], which Mr Blake said set out her case and she would not answer any questions. The statement included the matters set out above and also made the following comments:

a. You wanted to give an anti-sickness drug to a patient that was forcing themselves to be sick. That is like giving a suicidal a patient a gun for Christmas
b. Giving saline was less dangerous than Cyclizine. The patient had been to theatre and had been given cyclizine.
c. She had been sacked without consideration of bullying

122. The document had an angry tone. The Claimant accepted in cross-examination that it might have been ill-judged. The Claimant said the Respondent made out the drug was lifesaving and it was to stop someone being sick. The Claimant explained this meant that she thought the Respondent had overreacted. She made references to suffering from anxiety at the time of the incident.

123. The Claimant was tearful in the meeting and at times struggled to speak and said she felt stressed. Mr Jenner offered to adjourn the hearing but the Claimant said she wanted to continue. He also offered her the opportunity for breaks. Mr Jenner was aware that the Claimant had been dismissed and thought that it would be normal for someone to be upset and down.

124. Although Mr Blake said that the Claimant did not want to say anything, Mr Jenner wanted to hear what she had to say and not just base his decision on the statements. During the hearing the Claimant asked Mr Blake to leave because he was raising his voice and not listening to what others were saying. The Claimant answered Mr Jenner's questions about the incident. Mr Jenner had said that the focus of the meeting was the allegations made against the Claimant.

125. The Claimant had focused on the statement made by Ms Sparkes and why she had made it. Mr Jenner was aware that the most significant statements at the disciplinary hearing had been those of the Claimant.

126. Mr Jenner was cross-examined about the Claimant's written statement and the reference to a nurse suffering with anxiety. Mr Jenner considered that the investigation and disciplinary meetings were relying on what the Claimant had said. He considered that if the Claimant was suffering from anxiety about treating the patient and noting that she treated them after 4 December and before 12 December that he would have expected it to be escalated. She had not highlighted this until late in the process. She had not referred to anxiety on 12 December but making a deal.

127. In the appeal hearing the Claimant referred to bullying and everyone knew she suffered from anxiety. Mr Jenner explained that the focus of the appeal was on the allegations. He explained other things were picked up.

The Claimant still provided information on those matters. Mr Jenner did not tell the Claimant that her anxiety was not relevant.

128. Mr Jenner did not consider it was apparent that there was evidence of bullying or that the Claimant raised concerns through the grievance process.

129. After the hearing Mr Jenner e-mailed Mr Bull and asked if the patient was aware whether she was being administered with saline and whether she was informed of it by the nurse. A response was sent saying the patient was not aware but did question it as she did not feel the same as in the past. This was not provided to the Claimant. Mr Jenner said it was not normal to use a patient to provide evidence and he had been advised not to share it.

130. On 19 April 2023 the Claimant e-mailed Ms Quinn and said she could not be involved in the process anymore because her mental health could not cope with it.

131. On 16 May 2023 the Claimant was sent the outcome of the appeal [p470-472]. The appeal was dismissed and the original findings were upheld. The panel was concerned that the claimant did not seek advice about the patient when not providing cyclizine. In relation to the provision of saline, the Claimant had confirmed she understood the process for administering IV medication. She had provided something which had not been prescribed. Reliance was placed on her statements saying that the decision was her professional judgement. In relation to the third allegation it was considered that the application of a sticker to the bag was to imply to the patient that they were receiving medication for sickness symptoms. Concern was also expressed about statements the Claimant had made in her written response for the appeal hearing. The suspension was due to the seriousness of the allegations and was not related to comments she had made about the patient.

132. Mr Jenner was concerned that a placebo had to be approved by the Ethics Committee and must be explained to the patient. He was not satisfied that there was evidence of this. The Claimant did not have the qualifications to make an assessment on prescriptions. If she had concerns about her colleagues she could have spoken to a doctor. We accepted Mr Jenner's evidence that the Claimant did not raise anxiety as being a cause of her actions during the appeal hearing, he considered her version of events was that the patient was making herself sick and did not need medication and she appeared to have lost compassion for them.

133. We accepted Mr Jenner's evidence that when hearing the appeal he was looking for statements of kindness and learning in what the Claimant said. He considered her statements, such as 'the gun' reference,

demonstrated a lack of compassion and not in keeping with the NMC code. We accepted Mr Jenner's evidence that he considered people do things in the heat of the moment and then go away and reflect, but in this case there was a lack of remorse shown in the way the patient was referred to. He considered that some patients will put their fingers down their throat if they feel sick and there was a lack of insight.

134. Mr Jenner considered whether dismissal could be avoided if she demonstrated some learning, however the Claimant fixated on why Ms Sparkes gave a statement. He took into account that patients behaving in such a way was not a strange situation in the NHS. Mr Jenner was concerned that a similar incident could happen again and he needed to take into account patient safety. He took into account that the Claimant had been a registered nurse for a long time. Mr Jenner considered that he had not received any real assurance that it would not happen again and that additional learning would not address that concern. We accepted Mr Jenner's evidence that he would have made the same decision without the statements of the Claimant's colleagues and thereby basing it on what the Claimant said alone.

135. In relation to being accompanied at formal hearings, the Claimant did not explain why she was at a disadvantage in her witness statement. In oral evidence she said that for her third meeting with Ms Owen Mr Macena had been unable to attend the meeting and she could not organise a different companion. She did not seek to bring someone else. The Claimant said that her partner would have known how she was feeling and that she was having suicidal thoughts. The Claimant was offered a postponement of the disciplinary outcome hearing, which she declined.

Time

136. The Claimant had not addressed the question of time limits in her witness statement. She gave oral evidence that the reason why she did not bring her harassment claims earlier was because she did not know who had provided the Facebook post and Ms Edwards would not tell her. She said bullying did not start until October. Her evidence was that she did not know that she could bring a claim in the Tribunal until she spoke to a friend after she had been dismissed and was put in touch with her representative. We considered it was unlikely that the Claimant had not heard of the Tribunal during her employment.

The law

137. The claim alleged discrimination because of the Claimant's disability under the provisions of the Equality Act 2010 ("the EqA").

138. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(20, this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

139. The provisions relating to the duty to make reasonable adjustments are found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

140. S. 26 EqA provides:

> 26 Harassment
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.

141. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the

court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

Discrimination arising from disability

142. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England [2016] IRLR 170, EAT, at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment, but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

143. When considering a complaint under s. 15 of the Act, we had to consider whether the employee was "*treated unfavourably because of something arising in consequence of her disability*". There needed to have been, first, '*something'* which arose in consequence of the disability and, secondly, there needs to have been unfavourable treatment which was suffered because of that '*something*' (Basildon and Thurrock NHS-v-Weerasinghe UKEAT/0397/14). Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might be several links in the causative chain (Hall-v-Chief Constable of West Yorkshire Police UKEAT/0057/15 and iForce Ltd-v-Wood UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause (Pnaiser-v-NHS England [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (Sheikholeslami-v-University of Edinburgh UKEATS/0014/17).

144. In IPC Media-v-Millar [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

145. No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (Williams-v-Trustees of Swansea University Pension and Assurance Scheme [2019] ICR 230, SC).

Justification

146. in assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (McCullough v ICI Plc [2008] IRLR 846).

147. In Hensman v Ministry of Defence UKEAT 0067/14/DM, Singh J held that when assessing proportionality, while and an Employment Tribunal must reach its own judgment, that must in turn be based upon a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. Proportionality in this context meant 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in Hensman-v-MoD UKEAT/0067/14/DM at paragraphs 42-3). Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (Homer-v-West Yorkshire Police [2012] IRLR 601 at paragraph 25 and Kapenova-v-Department of Health [2014] ICR 884, EAT). It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc v Lax [2005] IRLR 726 CA).

148. The test of proportionality is an objective one.

149. A leading authority on issues of justification and proportionality is Homer v Chief Constable of West Yorkshire Police [2012] ICR 704 in which Lady Hale, at paragraph 20, quoted extensively from the decision of Mummery LJ in R (Elias) v Secretary of State for Defence [2006] 1WLR 3213

> *20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213 para 151:*

"the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

He went on, at para 165, to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 , 80:
"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] ICR 1565 , paras 31, 32, it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.

150. At paragraph 24 Lady Hale said

"24. Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer."

151. Pill LJ's comments in Hardy & Hansons plc v Lax [2005] IRLR 726 in relation to the Sex Discrimination Act 1975 at paragraph 32 also provide assistance in that the statute:

"Section 1(2)(b)(ii) [of the Sex Discrimination Act 1975] requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word "necessary" used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and

detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary…"

And further at paragraph 33

"The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action."

152. If a respondent relied upon the rationale for a policy or practice, it had to justify the manner in which it was applied to a claimant in order to meet the defence in the section (Buchanan-v-Commissioner of Police for the Metropolis UKEAT/0112/16).

153. A tribunal will err if it fails to take into account the business considerations of the employer (see Hensman v Ministry of Defence) but the tribunal must make its own assessment on the basis of the evidence then before it.

Reasonable adjustments

154. In relation to the claim under ss. 20 and 21 of the Act, we took into account the guidance in the case of Environment Agency v. Rowan [2008] IRLR 20 in relation to the correct manner that we should approach those sections. The Tribunal must identify:

(i) the provision, criterion or practice applied by or on behalf of the employer; or
(ii) the physical feature of the premises occupied by the employer,
(iii) the identity of the non-disabled comparators (where appropriate); and
(iv) the nature and extent of the substantial disadvantage suffered by the claimant

before considering whether any proposed adjustment is reasonable.

155. It is necessary to consider whether the Respondent has failed to make a reasonable adjustment in applying the PCP and whether reasonable steps were taken to avoid the substantial disadvantage to which a disabled person is put by the application of the PCP (Secretary of State for Justice v Prospere UKEAT/0412/14/DA).

156. We have also been reminded that, in the context of defining a PCP, a 'practice' has been said to imply that an element of repetition was involved

(Nottingham City Transport-v-Harvey [2013] Eq LR 4 and Fox-v-British Airways [2014] UKEAT/0315/14/RN).

157. In Ishola v Transport for London [2020] EWCA Civ 112 the Court of Appeal held.

> 35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means "done in practice" begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice". It is just done; and the words "in practice" add nothing.
>
> 36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. … To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.
>
> 37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

> 38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.
>
> 39. In that sense, the one-off decision treated as a PCP in Starmer is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of the element of repetition about it. In the Nottingham case in contrast to Starmer, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way."

158. In relation to the second limb of the test, it has to be remembered that a Claimant needed to demonstrate that he or she is caused a substantial disadvantage when compared with those not disabled. It is not sufficient that the disadvantage is merely some disadvantage when viewed generally. It needs to be one which is substantial when viewed in comparison with persons who are not disabled and that test is an objective one (Copal Castings-v-Hinton [2005] UKEAT 0903/04).

159. Further, in terms of the adjustments themselves, it is necessary for them to have been both reasonable and to operate so as to avoid the disadvantage. There does not have to have been a certainty that the disadvantage would be removed or alleviated by the adjustment. A real prospect that it would have that effect would be sufficient (Romec-v-Rudham

UKEAT/0067/07 and Leeds Teaching Hospital NHS Trust-v-Foster [2011] EqLR 1075).

Knowledge

160. Para 20(1) of Sch. 1 says that the employer will only come under the duty to make reasonable adjustments if it knows not just that the relevant person is disabled but also that his or her disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). In view of this, the EAT has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

(i) first, did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?

(ii) if not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? (Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT)

It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

161. Ignorance itself is not a defence under this section. We have had to ask whether the Respondent knew or ought reasonably to have known that the Claimant was disabled. In relation to the second part of that test, we have had to consider whether, in light of Gallop-v-Newport City Council [2014] IRLR 211 and Donelien-v-Liberata UK Ltd [2018] IRLR 535, the employer could reasonably have been expected to have known of the disability. In that regard, we had to consider whether the Respondent ought reasonably to have asked more questions on the basis of what it already knew and we have had in mind Lady Smith's Judgment in the case of Alam-v-Department for Work and Pensions [2009] UKEAT/0242/09, paragraphs 15 – 20.

162. We also had regard to the EHRC Code of practice on employment paragraph 6, relating to the duty to make reasonable adjustments (2011), in particular paragraphs 6.19 and 6.21.

163. Further, in terms of the adjustments themselves, it is necessary for them to have been both reasonable and to operate so as to avoid the disadvantage. There does not have to have be a certainty that the disadvantage would be removed or alleviated by the adjustment. A real prospect that it would have that effect would be sufficient (Romec-v-Rudham UKEAT/0067/07 and Leeds Teaching Hospital NHS Trust-v-Foster [2011] EqLR 1075).

Harassment

164. Not only did the conduct have to have been 'unwanted,' but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (Bakkali-v-Greater Manchester Buses [2018] UKEAT/0176/17).

165. As to causation, we reminded ourselves of the test set out in the case of Pemberton-v-Inwood [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

166. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 it was held that an employer cannot be held liable simply because the conduct has had the prescribed effect, it has to be reasonable that the consequence occurred. Further that it is important not to encourage a culture of hypersensitivity or create liability for every unfortunate phrase.

167. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in Grant-v-HM Land Registry [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in Betsi Cadwaladr Health Board-v-Hughes UKEAT/0179/13/JOJ.

Burden of Proof

168. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

169. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

170. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

171. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

172. The function of the Tribunal is to find the primary facts and then look at the totality of those facts to see if it is legitimate to infer that the acts or decisions were done/made on prohibited grounds (Qureshi v Victoria University of Manchester [2001] ICR 863). In terms of drawing inferences, in Efobi v Royal Mail Group Ltd [2021] ICR 1263 Lord Leggatt, after referring to Wisniewski v Central Manchester Health Authority [1998] PIQR 324, said that, "Tribunals should, as far as possible be free to draw, or decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books before doing so."

173. In every case the tribunal has to determine the reason why the Claimant was treated as she was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and

Ors v Wong), i.e., that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

174. "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

175. The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (Network Rail-v-Griffiths-Henry [2006] IRLR 856, EAT).

176. Where the Claimant has proven facts from which conclusions may be drawn that the respondent has discriminated/harassed them, then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

Time

177. Under section 123 of the Equality Act 2010 a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period

is to be treated as done at the end of the period (s. 123 (3)(a)) and this provision covers the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

178. It is generally regarded that there are 3 types of claim that fall to be analysed through the prism of s. 123;

(i) Claims involving one off acts of discrimination, in which, even if there have been continuing effects, time starts to run at the date of the act itself;

(ii) Claims involving a discriminatory rule or policy which cause certain decisions to be made from time to time. In such a case, there is generally a sufficient link between the decisions to enable them to be joined as a course of conduct (e.g. *Barclays Bank-v-Kapur* [1991] IRLR 136);

(iii) A series of discriminatory acts. It is not always easy to discern the line between a continuing policy and a discriminatory act which caused continuing effects. In *Hendricks-v-Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. One relevant feature, but not conclusive feature was whether or not the acts were said to have been perpetrated by the same person (*Aziz-v-FDA* [2010] EWCA Civ 304 and *CLFIS (UK) Ltd-v-Reynolds* [2015] IRLR 562 (CA)).

Unfair dismissal

179. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 (“the Act”).

180. We have considered section 98 (4) of the Act which provides “…. 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”.

181. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 (“the ACAS Code”).

182. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was

with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

183. The compensatory award is dealt with in section 123. Under section 123(1) "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

184. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

185. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

186. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

187. In cases involving dismissals for reasons relating to an employee's conduct, the tribunal has to consider the three stage test in BHS-v-Burchell [1980] ICR 303 (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer genuinely believed that the employee was guilty of the misconduct alleged; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

188. Crucially, it is not for the tribunal to decide whether the employee actually committed the act complained of.

189. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd. A sufficiently thorough re-hearing on appeal can cure earlier shortcomings, see Adeshina v St George's University Hospitals NHS Foundation Trust and Ors.

190. We have been asked to consider the fairness of the sanction imposed in this case. we were not permitted to impose our own view of the appropriate sanction. Rather, We had to ask whether it fell somewhere within the band of responses available to a reasonable employer in the circumstances (Foley-v-Post Office, HSBC-v-Madden [2000] ICR 1283).

191. An employer should consider any mitigating features which might justify a lesser sanction and the ACAS Guidance is also useful in this respect; factors such as the employer's disciplinary rules, the penalty imposed in similar previous cases, the employee's disciplinary record, experience and length of service are all relevant. An employer is entitled to take into account both the actual impact and/or the potential impact of the conduct alleged upon its business.

192. Section 98 (4)(b) of the Act required us to approach the question in relation to sanction "*in accordance with equity and the substantial merits of the case*". A Tribunal is entitled to find that a sanction *is* outside the band of reasonable responses without being accused of having taken the decision again; the "*band is not infinitely wide*" (Newbound-v-Thames Water [2015] EWCA Civ 677).

193. The decision in Polkey-v-AE Dayton Services [1988] ICR 142 introduced an approach which requires a tribunal to reduce compensation if it finds that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation can be reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might conclude that a fair of procedure would have delayed the dismissal, in which case compensation can be tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (Singh-v-Glass Express Midlands Ltd UKEAT/0071/18/DM).

194. It is for the employer to adduce relevant evidence on this issue, although a tribunal should have regards to any relevant evidence when making the assessment. A degree of uncertainty is inevitable, but there may well be circumstances when the nature of the evidence is such as to make a prediction so unreliable that it is unsafe to attempt to reconstruct what

might have happened had a fair procedure been used. However, a tribunal should not be reluctant to undertake an examination of a *Polkey* issue simply because it involves some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

195. In Software 2000 Ltd v Andrews [2007] IRLR 568, the EAT reviewed the authorities and gave the following guidance regarding the correct approach to 'Polkey' and in particular the difficulties inherent in what is a predictive exercise:

> '(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
>
> (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)
>
> (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
>
> (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."

196. We were invited to consider whether the Claimant's dismissal was caused by or contributed to by her own conduct within the meaning of s 123 (6) of the Act. In order for a deduction to have been made under these sections the conduct needs to have been culpable or blameworthy in the

sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract or tortious (Nelson-v-BBC [1980] ICR 110).

197. We have applied the test recommended in Steen-v-ASP Packaging Ltd [2014] ICR 56; I have had to;

(i) Identify the conduct;
(ii) Consider whether it was blameworthy;
(iii) Consider whether it caused or contributed to the dismissal;
(iv) Determined whether it was just and equitable to reduce compensation;
(v) Determined by what level such a reduction was just and equitable.

198. We have also considered the slightly different test under s. 122 (2); whether any of the Claimant's conduct prior to his dismissal made it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

Conclusions

199. This was a difficult case. The Claimant was clearly unwell at the time of the hearing and, as previously said, her evidence was often confused. It was necessary consider carefully the varying accounts she gave over time and that her health started deteriorating during the disciplinary process and has continued to do so, to the extent that the DWP has said she is not fit to work. We did not find that the Claimant has been dishonest and we accepted that she has found the process distressing and difficult.

Discrimination arising from disability

200. The Respondent did not accept that the matters alleged as arising from the Claimant's disability existed. We accepted that at the material times the Claimant had a history of suffering from panic attacks and that if she did, she had difficulty breathing and could have pain in her chest and shake. There was also a history of screaming out or removing herself from a person or situation and feelings of claustrophobia. The Claimant also alleged that she was unable to think clearly when exposed to confrontation or aggression. There was not any medical evidence to support what mental effects there were on the Claimant and we therefore were reliant on the Claimant's accounts and the evidence of incidents before the Tribunal. The Claimant's disability impact statement did not give any examples. For the reasons set out in our findings of fact we were not satisfied that in December 2022 the Claimant had an inability to think clearly when exposed to confrontation or aggression. Further we were not satisfied that this was the case on 12 December 2022 when the Claimant was interacting with the patient. The Claimant did not suggest that she had a panic attack on 12 December 2022.

The unfavourable treatment

201. The Claimant relied upon the following allegations of unfavourable treatment, which the Respondent accepted were unfavourable:
    a. The Respondent's decision to suspend her
    b. The decision to initiate disciplinary action
    c. The decision to dismiss the Claimant and not impose a sanction short of dismissal
    d. The decision to dismiss the appeal
    e. The decision to refer the Claimant to the NMC and that it was misleading.

202. The Claimant's case was that she was not thinking clearly at the time of the incident on 12 December 2022, which arose from her disability, for the reasons set out above we did not accept that. We also found that at the time she was not experiencing a panic attack. In the circumstances the decisions to suspend the Claimant, initiate disciplinary proceedings, the decision to dismiss and the dismissal of the appeal could not have been significantly caused by something arising from her disability.

203. In relation to the referral to the NMC, the referral was on the basis of the findings in the disciplinary hearing. At that time the Claimant had not suggested in her accounts that her decisions were caused by effects of her anxiety. The Claimant suggested the answers to the questions in the referral were misleading, we rejected that submission. The questions related to whether there was a disability or mental health impairment that may have impacted performance, not simply whether there was such a condition. We did not accept that the something arising, relied upon by the Claimant, existed at the time of the allegation and she did not suggest that anxiety was a reason for what she did at the disciplinary hearing. Accordingly the referral to the NMC could not have been significantly caused by something arising from her disability.

204. As such the Claimant failed to prove primary facts tending to show that the unfavourable treatment was significantly caused by something arising from her disability and the claims of discrimination arising from disability were dismissed. It was unnecessary to consider whether the Respondent discharged its burden of proof.

205. For completeness if there had been discrimination we would have been satisfied that it was justified. The Claimant accepted it was a legitimate aim to ensure safe and proper patient care.

206. The allegations against the Claimant were serious. They involved the administration of an IV product. There were clear policy requirements that

there was a prescription by a registered prescriber and that IV products were administered by 2 registered practitioners. We accepted that the provision of such products is dangerous. The Claimant did not inform her colleague what she was doing, on the basis that she knew Ms Castro would disapprove, and she did not record what she had done in the patient's notes.

207. At the time of her suspension the Claimant had given a brief explanation to Ms Finney, however she made no suggestion that she had lacked judgement or was unable to think clearly.

208. The Claimant relied upon Mr Pearson changing his mind about whether the incident was suspendable, however it was difficult to understand how that would have been influenced by something arising from the Claimant's disability. Mr Pearson was a new matron and sought advice from Mr Bull, who also sought advice from the Chief Nurse. The Respondent needed to consider the seriousness of the allegations and whether there was risk to patients, this was done in accordance with the suspension policy.

209. Suspension was not a sanction. It enabled the Respondent to investigate the allegations. We accepted that the Respondent proved that the administration of medication, including IV medication, was a fundamental part of the Claimant's role and the dangers involved if it was not done properly. Until the investigation was completed it was not possible to determine whether the Claimant was safe to work with patients. We accepted that the Respondent had to not only consider the Claimant but its own circumstances. It was important that the Respondent had confidence in its practitioners but also that patients had confidence in them. The Claimant suggested that she could have been put under supervision as an alternative. This would have entailed moving the Claimant to a different ward. At night, Daisy Ward was staffed by 2 nurses and an HCA. It would therefore not be possible to supervise the Claimant with those staffing arrangements. If the Claimant was moved to a different ward the Respondent proved that the administration of medication was fundamental to the Claimant's role and it would mean that there would be doubling up of those tasks. We were satisfied that the Respondent would have proved that there was not a less discriminatory measure which could have been used. Further given that suspension was a protective measure and not a punishment, we would have been satisfied that it was a proportionate means of achieving a legitimate aim.

210. Given the nature of the allegations against the Claimant, in that they were serious and therefore not minor, the same reasoning would have applied to the decision to start a disciplinary investigation. The Respondent proved that the administration of medication was a fundamental part of the Claimant's role and what happened on 12 December 2022 needed to be investigated properly. The consequences of incorrectly administering IV

medication are potentially very serious. Informal action is only appropriate for minor misconduct. The Respondent needed to be satisfied that the Claimant was safe to work with patients and we accepted the Respondent proved that informal action was not appropriate in the circumstances. We would not have been satisfied something less discriminatory could have been done. We would have been satisfied that the Respondent established it was a proportionate means of achieving a legitimate aim.

211. In relation to the decision to dismiss, the dismissal of the appeal and the referral to the NMC, the Respondent concluded that the Claimant had committed the allegations made against her. It was further concluded that her actions may have had a serious impact on her ability to work independently and to have a trusting relationship with colleagues and senior leaders across the trust. The Respondent proved that it was very concerned that the Claimant did not have insight into what she had done or had appreciated the seriousness of it. The comments she had made about the patient were significant in the decision makers beliefs that the Claimant had not shown significant remorse. We accepted that the Respondent proved that it needed to be satisfied that the Claimant had shown some form or learning and be assured that a similar incident would not happen again for there to be a lesser sanction. The Claimant did not provide that assurance. The Claimant suggested that she could have been moved to another ward and been supervised, potentially for 6 years. A registered nurse needs to be able to work independently and the provision of medication is fundamental to that role. The Respondent needed to be satisfied that the Claimant was safe to work with patients and that there would not be a similar incident. To supervise the Claimant would have meant that work was doubled up. We accepted that in the light of what happened and the lack of insight shown and the staff shortages in the hospital, we were satisfied that the Respondent would have proved that a sanction short of dismissal would not have been reasonable. In relation to the referral, as soon as the Respondent had concluded that there was an impact on her ability to work independently and maintain trust, in the light of serious incidents involving the provision of IV substances and not informing the patient of what had been done, the Respondent had a choice of informing the NMC or not. Such matters are very serious and fall within the remit of the NMC. It is not a matter for the Respondent to decide whether the Claimant should retain her PIN, but that of the NMC. If the Respondent did nothing and the Claimant was involved in a similar incident, with a different employer, there would be a risk to patient safety. In the light of the findings made, we accepted that not referring the Claimant was not reasonable option. We would have been satisfied that the Respondent would have proved the decisions were a proportionate means of achieving a legitimate aim.

Reasonable Adjustments

212. The Claimant relied upon the following PCPs and our findings in relation to her claims in relation to them are as follows:

Imposing a policy or practice that the investigation be completed, and findings submitted, within a specified deadline and the nature of the deadline.

213. The written policy of the Respondent was that the investigation was completed without unreasonable delay. The disciplinary policy did not specify any particular time. After being prompted by the Tribunal, the Claimant's representative submitted that Ms Bristow was told to complete the investigation by a specified date. We rejected that submission. At most Ms Bristow was given a suggested date, however it was not expressed as it must be completed by that date. She was asked to keep Ms Edwards informed if there was any delay and reminded it needed to be completed without unreasonable delay.

214. The Claimant suggested that the disadvantage to her meant that there would not be enough time to obtain an OH report. We accepted the Respondents submission that it an OH report was needed that would have been a reasonable delay. We did not accept that the Respondent had a policy of investigations being completed within a specified deadline. The length of an investigation would be determined on the basis of doing it without unreasonable delay. We were therefore satisfied that the PCP contended for did not exist and it therefore could not have been applied to the Claimant.

215. This claim was dismissed.

The practice of not obtaining OH advice prior to suspension or during the disciplinary process

216. We accepted the Respondent's case that it obtained OH evidence when it thought it was necessary, this was its practice and policy. There was no evidence adduced by the Claimant that other employees who were investigated for disciplinary matters and who were sufficiently unwell to need OH advice were not offered the opportunity of an appointment.

217. It was relevant that the Claimant did not seek a referral. In her various accounts she consistently did not say that anxiety was a factor until a suggestion was made in her written submission for the appeal. However at the final appeal hearing she did not say anxiety was the reason for what happened. We were satisfied that it was not apparent that a report was necessary to the Respondent. We did not accept that the Respondent had the practice contended for or that it was something which was the way in which things were generally done. We were satisfied the Respondent did not have the PCP contended for.

218. This claim was accordingly dismissed.

The policy that the Claimant could only be accompanied by a union representative or a colleague

219. The Respondent accepted that this was its written policy.

220. The Respondent applied the policy, as seen in its letters inviting the Claimant to meetings, however it did permit the Claimant to be accompanied by her partner at the final appeal meeting.

221. The substantial disadvantage relied upon was that she struggled to communicate effectively or think clearly, in situations which were likely to trigger anxiety and that the signs of anxiety might not be clear to others but would have been to her partner. The Claimant's oral evidence in relation to this issue was that the disadvantage was that she was not always able to get a colleague to accompany her. She was not a member of a union. The Claimant's oral evidence conflicted with the disadvantage contended for. As soon as the Claimant asked to be accompanied by someone else the Respondent granted the request. The Claimant was invited to make submissions in relation to the reasonable adjustments claims but only made submissions in relation to the first PCP. It was not suggested to the Respondent that it ought to have known the Claimant was put to the disadvantage contended for.

222. It was relevant that the Claimant attended the various hearings with colleagues, apart from the dismissal outcome. She did not inform the Respondent that colleagues would not be able to pick up on signs that her anxiety was affecting her ability to participate. The OH evidence the Respondent had obtained made no reference to her conditions causing her difficulties with thinking clearly or affecting her Judgment. The accounts the Claimant gave in the disciplinary process up to the written submission for the appeal did not refer to anxiety being a factor in what had happened and she did not suggest that her judgment was impaired generally or that she was unable to think clearly. There was no suggestion in any of the documentation provided by the Claimant or in what she told the Respondent that she was being disadvantaged in that way. The Claimant in the investigatory meeting and disciplinary hearings was upset, however she also was able to give detailed explanations as to what happened and why she had acted as she did. We did not accept that the Claimant proved she had the substantial disadvantage contended for at those times.

223. In any event we did not accept that the Respondent knew the Claimant was put to such a disadvantage. We considered whether it would have been reasonable for the Respondent to make further enquiries of the

Claimant in relation to her companion. There would need to be something which should have prompted the Respondent to ask questions about the disadvantage contended for. It was not apparent to Ms Edwards that the Claimant was having difficulties, in excess of which another employee in a similar situation might experience. We concluded that there was nothing sufficiently drawn to the Respondent's attention during the disciplinary hearings and up to and including the first appeal hearings which ought to have made it question whether there was such disadvantage.

224. At the final appeal hearing the Claimant was permitted to take her partner and it was at that hearing she provided the written response to the appeal and at which the PCP was not applied.

225. This claim was dismissed.

<u>The application/initiation of the Respondent's Conduct Management Policy with regard to the Claimant, and in particular the sanction imposed: the decision to dismiss her.</u>

226. Despite being prompted the Claimant did not make submissions in relation to this PCP. The focus of the Claimant's evidence and her cross-examination of the Respondent's witnesses was on the sanction applied, i.e. the decision to dismiss. We did not accept that there was a policy to dismiss. Dismissal was a possibility under the policy for cases of gross misconduct, however the practice established was that, after the finding of misconduct, consideration was given to level of sanction. This was demonstrated in the outcome letters and that the decision makers were looking for evidence of learning and remorse. We did not accept that there was a policy to dismiss for gross misconduct. Further no such policy was applied to the Claimant as evidenced by the consideration of sanctions short of dismissal.

227. This claim was dismissed

<u>The policy of the Respondent to make a referral to the applicable regulator (the NMC) following allegations of misconduct</u>

228. The Respondent's Conduct and Management Policy, provided that depending on the allegations a referral may be made to a professional body. The policy was not mandatory and under the policy each case was considered on its own facts. In the present case, advice was sought from the NMC before the investigation commenced as to whether a referral was necessary at that stage and the Respondent was informed it did not need to. The Claimant was not referred until after the conclusion of the disciplinary hearing, following findings that she had committed the misconduct alleged.

229. The Claimant, in written submissions said it was not clear from the documents how the decision changed from not informing the NMC before the investigation and to informing it after the disciplinary outcome. We accepted the evidence of Ms Owen that she believed that the Claimant's actions may have a serious impact on her ability to work independently and have a trusting relationship with peers and senior leaders. This was after considering the evidence in the investigation and what the Claimant had said. There was a difference between an allegation which was being made before an investigation and one which was found proven afterwards. The circumstances at the two points in time were different.

230. We did not accept that the Respondent had the policy or practice contended for, i.e. that a referral would be made following allegations of misconduct. The NMC is a regulatory body and Ms Owen's made the decision to refer the Claimant after reaching her conclusions at the disciplinary hearing. We accepted that the decision as to whether to refer a nurse was not on the basis that allegations had been made or proven, but on whether the effect of the proven allegations called into question fitness to practice. We accepted the Respondent's submission that the policy was to deal with each case on the basis of its own facts.

231. Accordingly this claim was dismissed.

Harassment

232. The Claimant alleged the following matters.

Ms Castro, in or around October 2022 stated *'where is my apology, we all work here just the same'* in regards to Ms Price apologising to the Claimant because an HCA was not available to support the Claimant.

233. Ms Castro accepted that she said words to this effect. The question was whether it related to the disability.

234. There was nothing in the words themselves which suggested a connection to disability, however it had been agreed with the Claimant that she would be supported by an HCA and Ms Price's apology related to that. We were satisfied that without an explanation from the Respondent, the Claimant had shown there was evidence sufficient to tend to suggest that it was related to disability.

235. We accepted Ms Castro's evidence that she had no knowledge that OH had recommended that the Claimant was assisted by an HCA or that it was an adjustment for her anxiety or that she had such a diagnosis. This was supported by Ms Edwards' evidence that she had only discussed the OH reports with people who were band 6 or above. Ms Castro's

understanding of staffing for Daisy Ward on night shifts was that there should be 2 trained nurses and one HCA. This also accorded with the Claimant's understanding. It was unfortunate that the Respondent had staffing problems at the time and the HCA could be moved to other wards to minimise risks to patients. Ms Castro's comment was in relation to her understanding that an HCA should have been rostered onto the ward in any event in order to assist the nursing staff. Without an HCA, the nurses could not take breaks in a 12 hour shift, due to the need to ensure a minimum staffing level. The Respondent proved that the comment was made in relation to Ms Castro's understanding of the staffing requirements for the ward and that it was in no way whatsoever related to the Claimant's disability.

236. This claim was therefore was dismissed.

237. For completeness we accepted that the Claimant would have felt some distress by this.

Ms Castro, in or around October 2022 stated to the Claimant 'I don't understand why you get this [the HCA] and we don't'.

238. We did not find that Ms Castro made this comment to the Claimant. Accordingly the factual basis of the allegation was not proved and therefore this claim was dismissed.

Ms Castro and Ms Sparkes in October 2022 referring to the Claimant as *'the special one'* and *'teacher's pet'*.

239. The Claimant's evidence was that the comments were not made to her but were reported to her at some point later. The evidence of Ms Johns, which was relied upon by the Claimant, did not refer to the comments alleged. Ms Castro denied making the comments. We did not accept that the factual basis for the allegation was proven and this claim was dismissed.

In or around October 2022, the Claimant's line manager making a false allegation that the Claimant was undertaking private work whilst on sick leave from the Respondent.

240. We accepted that the concern being raised with the Claimant was unwanted. During the Claimant's evidence she suggested that it was Ms Castro who made the allegation against her. The concern about whether the Claimant had been working whilst off sick was raised by two friends of hers, Ms Lawson and Ms Komisarek. It was not raised by Ms Castro. The Claimant's case was based on Ms Castro having a problem with the Claimant being provided with an HCA and that the complaint about her working whilst off sick was related to that.

241. For an allegation to be false, the person making it would need to know that it was not true. In the present case the Claimant had been off-sick for a gastric related matter and had posted on Facebook about a treatment that she had given. It was not apparent from the post when the treatment had been undertaken. This was against a background of staff shortages on the ward. We accepted the Respondent's submission that it would be reasonable for a concern to be raised by a staff member, if it appeared that someone was working whilst taking sick leave. The Claimant adduced no evidence that Ms Komisarek or Ms Lawson had raised issues with her about needing an HCA or that they had made any remarks or comments about her disability. Similarly the Claimant did not adduce evidence that Ms Edwards had made similar comments or remarks. The Claimant based her claim on a belief that it was disability related, however a belief in something is not the same as proving some evidence tending show it was disability related. We were not satisfied that the Claimant had proved primary facts tending to show that the concern being raised was related to disability.

242. The allegation was made against Ms Edwards. In any event we were satisfied that Ms Edwards proved her raising the concern with the Claimant was unrelated to disability. Ms Edwards discussed the concern with the Claimant, who said she had not been working whilst off sick, which was accepted by Ms Edwards at face value. No action was taken against the Claimant and she was asked to complete a self-certificate for her absence. Working whilst saying you are not fit to work is a potentially serious matter. We were satisfied that Ms Edwards wanted clarification that the Claimant had not been working whilst off sick and that the Claimant's disability had no influence on her wanting to seek it.

243. In any event a manager checking such a thing, without any suggestion of action being taken against a person, is not something of a particularly bad nature. As identified in Grant v HM Land Registry, it is something which could cause minor upset but not such that it should be caught by the concept of harassment.

244. This claim was therefore dismissed.

<u>In or around October 2022, an unknown colleague reporting to the Claimant's line manager that the Claimant was taking food items which were close to the expiry date.</u>

245. We accepted that the concern being raised with the Claimant was unwanted. The Claimant accepted that she had taken the food items, because they were out of date and she wanted to feed the bread to the swans. She knew who had raised the concerns about the items of food and did not suggest that it was Ms Castro or Ms Sparkes. The concern was

raised by Ms Komisarek and one other person, not identified to the Tribunal. It is not apparent on the face of reporting that a nurse had taken foodstuffs belonging to patients that it was related to disability. It is important that there is trust in people who work with vulnerable people and nurses are closely regulated in relation to how they interact with patients and their belongings. The Claimant's case was based on a belief. She did not assert that Ms Komisarek was motivated by something to do with her disability. The people against whom she raised concerns during the Tribunal process were not involved in reporting this matter. A belief that the reporting was related to disability is insufficient, the Claimant needed to point to some evidence which tended to show that it was so related. We were not satisfied that the Claimant had proved primary facts that the reporting of the concern was related to disability and she failed to discharge the initial burden of proof.

246. This claim was therefore dismissed.

Unfair dismissal

247. The reason for dismissal relied upon by the Respondent was conduct, which is a potentially fair reason for dismissal. The Claimant raised many matters which she said showed that the dismissal was unfair. Many authorities were referred to in the written submissions and although not all of them are referred to in these reasons we took into account the points raised on her behalf. The key points of law have been set out above and where necessary we have also referred to them below.

248. The Respondent had in place policies in respect of the provision of medication. Only authorised personnel could prescribe medication, which also included the provision of IV fluids. The Claimant was not an authorised prescriber. The policies also provided strict controls for the provision of IV products. The reason behind the requirement for 2 people to administer something intravenously was to ensure that mistakes were not made due to the inherent dangers of IV medication.

249. The following matters could have been reasonably understood to have been accepted by the Claimant. On 12 December 2022, the Claimant had not sought a prescription for an authorised prescriber to give IV fluids and she administered it to the patient on her own. She did not record it in the patient's notes. She had not provided cyclizine when the patient requested it, although she had a reason for that.

250. The Claimant said she had provided saline at the handover to the day shift on the morning of 13 December 2022. We did not accept that there was anything untoward in Ms Sparkes, a staff nurse, asking Ms Castro if she knew anything about it and to make a statement. The provision of an IV product, which was not in the patient's notes is something which should be

discussed and checked. We also accepted that it was entirely appropriate for the incident to be raised with Mr Pearson. We accepted that the Respondent considered potential failures to follow its policies and procedures in relation to the provision of IV medication were very serious and there were potentially very serious consequences if errors were made.

251. Ms Edwards was on leave at the time and Mr Pearson asked Ms Sparkes to ask Ms Castro to make a statement. We accepted that at this time the Respondent needed to understand what had happened. We accepted that a reasonable employer, on being informed that the incident had occurred, could ask a staff nurse to ask her colleague to make a statement. We accepted that Ms Castro was going to e-mail Ms Edwards in any event. The Claimant suggested that there could have been collusion between Ms Sparkes and Ms Castro, we did not accept that asking her to make a statement created any greater risk of collusion. It was also difficult to see what collusion there could be, in that Ms Sparkes was not on shift at the relevant time and that the Claimant accepted that she put a label on the bag with the word 'placebo' written on it. We did not accept that this undermined the subsequent investigation and note that both women were interviewed.

252. The Claimant suggested that the involvement of Mr Bull in the investigation rendered the process unfair. This related to the decision to suspend the Claimant. Mr Bull was the divisional director of nursing and as a matter of course would be informed of significant incidents on a ward. We accepted that not following the policies on the administration of medication was a potentially serious matter and it was reasonable for Mr Bull to be informed. The Claimant's case was based on Mr Pearson's initial assessment that it was unnecessary to suspend the Claimant. He was a newly appointed matron and therefore was lacking in experience. The Claimant relied on the cases of Gogay v Hertfordshire County Council [2000] EWCA civ 228 and Castorina v Chief Constable of Surrey (1998) 138 NLJ 180 and submitted that the Respondent should have considered whether alternatives were possible. We accepted that Mr Bull took advice from the Chief Nurse and also needed to have in mind whether there was risk to patients. The Claimant had provided IV fluids without prescription and had done so on her own. Those matters were something which could raise a serious concern. We accepted that suspension was not a punishment but a method by which an investigation could be carried out whilst minimising risk. The provision of medication was a fundamental part of the Claimant's role. We accepted that a superior in a reasonable employer could have acted as Mr Bull did and that in the light of the nature of the allegations decided to suspend the Claimant on the basis of protecting patient safety.

253. The Claimant suggested that the involvement of Ms Finney in the investigation rendered the dismissal unfair. On 4 January 2023, Mr Bull

wanted the Claimant to be informed about the investigation and to find out what the Claimant said had happened. Ms Edwards had gone home at the end of her shift. Ms Finney was a senior colleague and had an informal conversation with the Claimant. The discussion and associated e-mail did not form part of the subsequent investigation and it was not referred to in Ms Bristow's report and the decision makers were not informed of it. We accepted that a reasonable employer could have asked a senior colleague to informally speak to a person such as the Claimant. We also noted that Ms Finney told the Claimant to write a statement about what happened. We accepted that suggesting the Claimant wrote an account was something a reasonable employer could have done.

254. The Claimant suggested that consideration should have been given to dealing with the matter on an informal basis. We accepted the Respondent's evidence that the decision to move to the formal route was based on the serious nature of the allegation. Informal action is something which could be taken in relation to minor misconduct. We accepted that a reasonable employer could conclude that failing to following policies in relation to the prescription and administration of medication was something which was serious. A reasonable employer could have concluded that a full investigation was required.

255. Ms Edwards commissioned the investigation and provided the terms of reference to Ms Bristow. The Claimant submitted that Ms Edwards should have passed on the Claimant's occupational health records to Ms Bristow. The OH records did not make any suggestion that the Claimant had problems with a lack of clarity of thought or that her judgment was impaired. At the stage the investigation was commissioned, we accepted that a reasonable employer would not have provided OH records. Ms Edwards was not informed by the Claimant that she was experiencing such problems. We also accepted Ms Edwards evidence that if the Claimant believed that factors such as poor judgment and lack of clarity in thinking were present, that she could have raised them in the investigation.

256. Ms Bristow interviewed the Claimant and Ms Castro, who were the registered nurses on duty at the time. The Claimant accepted that she provided the IV fluids on her own and had not obtained a prescription. She also had accepted that she had not provided cyclizine. Therefore any evidence from an HCA would not have provided any further information, the HCA not having been involved in the provision of saline. Ms Sparkes was interviewed on the basis that she received the handover and Mr Pearson was the matron on duty. Interviewing Ms Snowdon, who did not work the night shift would not have assisted in ascertaining what had happened on 12 December and we accepted that a reasonable investigator could have concluded such an interview was unnecessary. The Claimant suggested Ms Snowden could have assisted in that she would support that she did not

mention placebo on handover; however the Claimant accepted that she had written it on the label of the saline bag. The Claimant also suggested that the HCA on duty on 4 December could have given evidence. The Claimant was not being investigated in relation to anything which occurred on that night. It was relevant that at the time of the investigation the Claimant had given her initial written accounts and had not suggested that she had been mentally impaired at the time. She had informed Ms Bristow about the events on 4 December 2022 and had not said that she was impaired by lack of clarity of thought and that it had been caused by the events of that night. We accepted that it would not have been reasonably apparent that further enquiry should have been made of an HCA on duty on 4 December 2023 and that a reasonable employer could have concluded sufficient witnesses were spoken to.

257. The Claimant did not suggest any examples in her witness statement which tended to show that Ms Bristow's questions showed a closed mind. Such examples were not drawn to our attention during closing submissions. We accepted that the Claimant was asked for an explanation as to what had happened in cross-examination. Ms Bristow's report summarised what the Claimant had said. The Claimant took issue with Ms Bristow saying that the patient had mental health issues and was addicted to cyclizine. The Claimant had referred to Cyclizine giving patients a buzz and that the patient did not need cyclizine and was making themself ill to get it. We considered that the reference came from those comments by the Claimant and was a conclusion a reasonable investigator could have reached. We were not satisfied that Ms Bristow had a closed mind when she questioned the Claimant.

258. The Claimant was sent the investigation report, to which there were appendices. She was not given a transcript of Ms Castro's interview with Ms Bristow. She was not provided with the audio recordings but was told that she could have them on request. The recording was something which Ms Owen had available to her. We noted that the Claimant was offered an opportunity to consider them at the disciplinary hearing, which she declined.

259. Ms Owen conducted the disciplinary hearing. The Claimant was given a reasonable opportunity to state her case and provide explanations. At that hearing the Claimant maintained that she had not given cyclizine because the patient did not need it and therefore she had not withheld it. She provided comments on Ms Sparkes and Ms Castro's statements. She was unable to explain why she had not sought advice from a doctor, when she had done this previously. She had made references to acting in accordance with her professional opinion. It was significant that she did not suggest that anxiety had been a factor or that her judgment had been impaired. Ms Owen was considering the allegations on the basis of what had happened at the time.

260. We were concerned that when Ms Owen adjourned the disciplinary hearing, she made enquiries as to whether the patient had been spoken to and then did not share the response with the Claimant before making her decision. That coupled with the failure to give the Claimant the transcripts meant that the Claimant did not have all of the information the Respondent had. This was a failure in natural justice and we concluded that a reasonable investigation ought to have disclosed those documents.

261. It was significant, however, that Ms Owen considered that the Claimant's accounts on their own were sufficient for her to make a finding of gross misconduct. She considered that the patient was the decision maker as to whether they needed cyclizine under the PRN prescription. The Claimant had said on a number of occasions that in her professional opinion it was not needed. A reasonable employer could have concluded in the circumstances that the drug had been withheld. The Claimant's own evidence was that she had not told the patient what the saline was. The Claimant had administered IV without prescription and without a second registered nurse present. The Claimant also said she did not tell the patient what it was and the patient did not ask. It was also relevant that the Claimant had said she had not read the policy documents at the time. We accepted that Ms Owen could have reasonably reached the conclusions that she did on the basis of what the Claimant had said. We were satisfied that Ms Owen held a reasonable belief that the Claimant had been guilty of gross misconduct in relation to each of the allegations.

262. The Claimant also suggested that a sanction short of dismissal should have been imposed and she could have been given training instead. We accepted that Ms Owen concluded there was a lack of compassion by the Claimant and that she was maintaining that she had acted within her professional judgment. The Claimant sought to justify her actions rather than accept what happened was wrong. A reasonable employer could have concluded that there was a lack of insight into the seriousness of what had occurred. The Respondent was entitled to taken into account what level of risk there was to patients and colleagues and whether there had been sufficient learning and contrition to mean that the risk was low. Ms Owen did not consider that was the case.

263. The Claimant suggested that the 4 December 2022 incident had not been taken into account. The Claimant had not suggested as an explanation for what she had done that she was so badly affected by that incident that her judgment was so impaired she was not thinking clearly. It was relevant that she had continued to treat the patient for 3 further nights after 4 December 2022 without incident. The Claimant had also suggested that the bullying had not been taken into account. The matters raised against her were legitimate concerns and she was not suggesting to Ms Owen that affected the way she was thinking on 12 December 2022. We accepted that

Ms Owen took into account what she believed was reasonable in the circumstances of the case she was presented with.

264. We concluded that a reasonable employer could have concluded that the Claimant was guilty of gross misconduct on the basis of the accounts she had given. We accepted that Ms Owen had that belief. Further she also believed that in the absence of sufficient assurances that there would not be a repeated incident that a sanction short of dismissal would not be appropriate. A reasonable employer could have reached that conclusion.

265. In terms of the appeal, the Claimant had received the audio recording of Ms Castro's evidence by that time, and she had listened to it. Mr Jenner adjourned so that the Claimant could consider all of the information in the investigation report.

266. The Claimant in her written document for the second appeal hearing made allusions to anxiety being a factor in her decision making on 12 December. However, when she answered questions by Mr Jenner she did not suggest that was a reason for acting as she did. The Claimant was able to state her case and explain why things had happened. We accepted that a reasonable employer could have conducted the hearing in the way in which Mr Jenner did.

267. After the hearing Mr Jenner sought information about what the patient had said, which was not shared with the Claimant. We had the same concern about not providing that information to the Claimant.

268. We accepted that a reasonable employer, based on the accounts given by the Claimant could have reached the same conclusion on appeal, namely that gross misconduct had occurred. We accepted that Mr Jenner was looking to see if a sanction short of dismissal was appropriate, however the Claimant had not assured him sufficiently that such an incident would not happen again. The comments the Claimant made about the patient gave Mr Jenner cause for concern and we were satisfied that a reasonable employer could have reached a similar conclusion to Mr Jenner. We were satisfied that Mr Jenner believed that the allegations of gross misconduct were well founded and dismissal was an appropriate sanction.

269. Although we were satisfied that a reasonable employer could have concluded that the Claimant was guilty of gross misconduct at the disciplinary hearing and on appeal and the appropriate sanction was dismissal, there was procedural unfairness. The Claimant was entitled to know what information the decision makers had and to have an opportunity to comment. A reasonable employer, carrying out a reasonable investigation, would have provided that information. Accordingly the dismissal was procedurally unfair and the Claimant was unfairly dismissed.

270. We then considered whether if the Respondent had conducted a fair procedure the decision to dismiss would have been different. It was highly significant that Ms Owen and Mr Jenner both considered that the Claimant's accounts alone were sufficient to make findings of gross misconduct. We were satisfied that even if the e-mails about what the patient had said and the missing transcripts had been provided to the Claimant, her accounts would have been the same. The Claimant's accounts, particularly the earlier ones, strongly suggested that she had decided cyclizine was unnecessary. She decided to provide saline and did not seek a prescription from an authorised prescriber and administered it on her own. The placing of a label with placebo written on it was something which could have given the patient the impression that she was giving medication. This would be particularly so when coupled with the Claimant stating that she did not tell the Claimant what it was and that the patient did not ask. We accepted that the strongest evidence against the Claimant was the evidence she gave to the Respondent. We were satisfied that the Respondent had proved that if a fair procedure had been followed the Claimant would have been dismissed in any event. We were satisfied that on the facts of this case that the chance of dismissal, if a fair procedure had been followed, was 100%.

271. We also considered whether the Claimant's actions had contributed to the dismissal. We were satisfied on the same basis that the Respondent had proved the Claimant's decisions to not provide IV cyclizine and to provide unprescribed IV saline was culpable conduct. We were not satisfied that the Claimant was suffering from a lack of clarity of thought at the time of the incident or that she was having a panic attack. She did not discuss the matter with Ms Castro and had acknowledged that Ms Castro would not have approved. It was highly significant that the administration of IV saline was not included in the patient's notes. The Claimant's actions on 12 December were culpable and blameworthy. There are potentially very serious consequences if mistakes are made with IV medication. The Claimant's actions on 12 December were the sole cause of her dismissal and we concluded that in such circumstances she had contributed to her dismissal by 100%. We further considered that in the circumstances that because the decision was based on the Claimant's accounts that, notwithstanding the procedural unfairness, it was just and equitable to apply the 100% reduction to both the basic and compensation awards.

272. Accordingly no compensation is due to the Claimant and a remedy hearing will not be listed.

_____

Employment Judge J Bax

Dated 17 October 2024

Judgment sent to Parties on

5 November 2024

Jade Lobb
For the Tribunal Office