EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Nkwanyuo	**v**	**Chelsea and Westminster NHS Foundation Trust**

Heard at: London Central
On: 30 April to 3 May 2019

Before: Employment Judge Hodgson
Mr J Carroll
Mr P Secher

Representation

For the Claimant: Mr N Aghayere
For the Respondent: Miss T O'Halloran, counsel

JUDGMENT

1. **The claim of unfair dismissal succeeds.**
2. **The claim of automatic unfair dismissal for making a protected disclosure fails and is dismissed.**
3. **The claim of detriment for making a protected disclosure fails and is dismissed.**

REASONS

Introduction

1.1 By a claim form presented to the London Central Employment Tribunal on 10 December 2017, the claimant alleged unfair dismissal. It was unclear if the claim form contained any other claims.

The Issues

2.1 The issues in this claim were initially identified by Employment Judge Goodman on 26 March 2013. During that hearing, she refused an application to bring a claim of race discrimination, but added claims of "dismissal for public interest disclosure" and "detriment for public interest disclosure."

2.2 The issues were further identified at the commencement of the hearing. It was noted that there was a failure to identify the alleged information disclosed, or why it was protected. The claimant was invited to apply to amend. A written application was made. Following oral submissions, the application to amend was rejected; it failed to set out any specific examples of disclosure of information which could be protected. Nevertheless, the whistleblowing claims were not withdrawn.

2.3 It follows that the claims before the tribunal are as follows:

2.4 Was the claimant unfairly dismissed. The respondent relied on a reason related conduct.

2.5 Was the sole or principal reason for dismissal the making of protected disclosures.

2.5.1 Were any of the alleged detriments set out below done on the ground of the claimant having made a protected disclosure. The specific allegations of detriment are as follows:

2.5.1.1 allegation 1: by suspending the claimant in March 2017; and
2.5.1.2 allegation 2: by the provision of a reference post dismissal.

Evidence

3.1 The claimant gave evidence.

3.2 The respondent called evidence from the following: Ms Lisa Macey; Mr Geraldine Cochrane; and Mr Nathan Askew.

3.3 We received a bundle of documents, which we will refer to as R1.

3.4 Both parties gave written submissions and thereafter each comment on the other's submissions.

3.5 We requested further submissions and we received further written submissions from both sides.

Concessions/Applications

4.1 At the commencement of the hearing, we attempted to clarify the issues in this case.

4.2 It was agreed that there were claims of unfair dismissal and both detriment and dismissal for whistleblowing.

4.3 There were difficulties with the unfair dismissal case. The claimant alleged that she resigned prior to the disciplinary hearing. It was the respondent's case that the resignation had not been accepted, and thereafter she was dismissed.

4.4 The claimant was asked to clarify whether it was alleged that she resigned as a result of a breach by the respondent, and if so whether the resignations were with or without notice.

4.5 On the afternoon of day one, Mr Aghayere confirmed that it was the claimant's case that her resignation was with 12 weeks' notice. Further, it was specifically conceded that the claimant did not resign in relation to any alleged breach of contract by the respondent. It was specifically conceded that there was no claim of constructive unfair dismissal.

4.6 On the first morning, we clarified that there had been amendments allowed by Employment Judge Goodman on 26 March. It was unclear whether the application to amend was oral or in writing. There had been further and better particulars filed on 16 March 2018. It was agreed at the hearing that an oral application to amend was made on 26 March 2018, at the preliminary hearing. The further and better particulars 16 March 2018 were not part of the application to amend, they were not specifically referred to by Employment Judge Goodman, they formed no part of the amendment. It follows that those further and better particulars did not form part of the claim.

4.7 Amendments were allowed by Employment Judge Goodman. The claimant was allowed to proceed with whistleblowing claims in relation to both dismissal and the two specific detriments (as identified in the issues above).

4.8 The application to include a claim of race discrimination was specifically refused.

4.9 Unfortunately, the claimant did not, on 26 March 2018, identify the protected disclosures. She identified neither the information, nor the basis on which it was protected. The notes of Employment Judge Goodman make it plain that the disclosures of information had not been identified. Her order goes on to say that there should be further and better particulars provided, although there is no direction as to the status of those further and better particulars. She envisaged it may be necessary to apply to amend. Further information was filed, but there was no application to amend. We agreed, therefore, that in order to proceed with the claim, it was necessary to identify the relevant information, which is said to be protected, but it was neither in the original claim form, nor in the amendment as allowed by Employment Judge Goodman.

4.10 It was conceded that the original claim form did not contain details of the disclosed information said to be protected. It was conceded that the information was not set out in any further and better particulars. It follows that the pleaded claim was inadequate. Whilst alleged detriments were identified, the basis on which the whistleblowing claim was put was wholly unparticularised. There was a total failure to set out the details of the information on the basis on which was protected.

4.11 Mr Aghayere indicated he would wish to apply to amend. We adjourned at 11 o'clock in order to read the statements and to give him an opportunity to set out the specific information said to be protected, and to put it in an application to amend. Mr Aghayere confirmed he would make a written application.

4.12 That written application was filed that just after 14:00. We considered the application to amend. Following discussion, it was agreed that the application still failed to set out the specific information said to be protected.

4.13 Mr Aghayere's application identified three broad themes as follows:

a. Staff shortage on shifts.
b. Wrong mix of skilled staff on shifts.
c. Borrowing of equipment from other service areas.

4.14 However, the application failed to set out the information disclosed, to whom it was disclosed, when it was disclosed, the circumstances of its disclosure, or why it was said to be protected. Employment Judge Goodman's order had identified the need to specify these matters. This tribunal had confirmed the failure to identify the specific disclosures of information, and hence the need for the application. The application, unfortunately, did nothing to address the deficiencies.

4.15 We refused the application to amend and gave full oral reasons at the time. We have not been asked to set out those full reasons, but we should summarise the position.

4.16 The whistleblowing claims had already been allowed by amendment. However, the pleading was deficient in that there was a total failure to set out any alleged disclosure of information, or the reason why each disclosure was protected. What was required was the addition of the relevant facts. This is not a case of relabelling facts, or adding a new claim. It was necessary to clarify an existing claim, by setting out the essential factual detail, to give it any meaning.

4.17 It was necessary to identify the specific information disclosed. That required the claimant to identify the alleged information: what information was disclosed, when it was disclosed, in what manner it was disclosed, and why it was protected. We considered the application carefully; we discussed the application with Mr Aghayere. It was clear that the relevant information was not set out. We considered the balance of hardship. There is no hardship to the claimant in refusing an amendment which is irrelevant and simply fails to address the basis of her case. To the extent there is hardship to the claimant it lies in the fact that she has failed to identify the information disclosed, but that is no reason to allow an amendment which introduces yet further irrelevant information and does nothing to clarify the claim.

4.18 It was noted, during the course of the submissions in support of the application to amend, that the claimant alleged there was a failure to provide documentation. In particular, she alleged there was a material failure to supply emails. Part of her case was that there was disclosure of information in emails. We considered this. We should summarise the position here. There had been an application for specific disclosure. That application had been dealt with at length by Employment Judge Segal. There had been an order for disclosure by the end of August 2017. Disclosure had taken place. Since then, the claimant had made no further application and given no indication there was a failure to disclose documents. It was the respondent's case that all the relevant reports and emails had been disclosed. It was the respondent's case that, if the claimant found difficulty identifying disclosures of information in those emails, it was because there were no protected disclosures, as she had made none. However, the claimant had all the relevant documents, and it was a matter for her to identify any alleged disclosures of information.

4.19 There was no basis for believing that the respondent had failed in its duty of disclosure. All the relevant emails had been disclosed. It follows that there should be no further order for disclosure, as the duty to disclose had been complied with

4.20 The claimant allegations proceeded on a bare assertion. She did not identify the information she believed was in emails. She did not identify when those emails were sent. In short, she established no prima facie

case of non-compliance. We therefore refused the application for further disclosure.

The Facts

5.1 The claimant, at all material times, was employed by the respondent as a band 7 neonatal intensive care unit coordinator. She was employed from 1 May 2006 until her dismissal on 21 July 2017. She was contracted to work for 37.5 hours per week. The respondent knew that the claimant was also engaged by Capital Staffing Agency as an agency worker.

5.2 Pursuant to her contract, she was required to notify her manager of any hours worked in excess of 37.5 hours, which included those worked for another organisation. She worked a shift pattern. The longest shift which could be rostered was 12.5 hours which included a 60-minute break. At all material times she understood that it was dangerous and inappropriate to work consecutive long shifts.

5.3 The unit in which the claimant worked was responsible for caring for babies. It catered for a variety of babies with critical needs, including severely premature babies and those who were in need of or who had had operations. Regular observations, and distribution of appropriate care and medicine was critical to the safety of the babies. Any failure of care could have catastrophic consequences.

5.4 The claimant had managerial duties. Her job description is at R1/257. Part of her role was to coordinate the day-to-day provision of total nursing care for intensive, high dependency, and special care infants and their families. This involved leading and coordinating clinical activities of the unit and overseeing supervision of the work of qualified and unqualified staff. It required her to take responsibility for, and provide specialist programmes for care for infants and their families.

5.5 Part of the claimant’s duties revolved around ensuring that sufficient staff were rostered. This involved active discussions with her own manager. Difficulties were common. Available staff were rostered. Gaps and needs were identified. Action was taken to ensure provision of sufficient staff and other resources. If necessary, agency staff would be contacted, or other provision could be made. It follows that it was an essential part of the claimant's role to identify potential difficulties, particularly with staffing, and to take specific action to remedy the situation. This would include specific discussions with her line manager.

5.6 In March 2017, Ms Geraldine Cochrane was the claimant's line manager. On 14 March 2017, Ms Cochrane received an email from Ms Jacki Dopran (R1/231). Ms Dopran was a senior nurse at the Homerton University Hospital NHS Foundation Trust. She referred to the claimant, who was working in the NICU, as an agency worker. Her specific concern was the claimant appeared to be asking members of staff to make money transfers

to an unnamed account with values up to £2,500. The email indicated the claimant had stated that she was not employed by the NHS, but only worked for an agency. Ms Dopran's email stated there was reason to disbelieve the claimant and hence that is why she contacted Ms Cochrane. The claimant had been working many hours and Ms Dopran attached a summary.

5.7 Ms Cochrane was concerned and asked for a list of the dates the claimant had been working. The information was sent. Ms Cochrane compared the dates the claimant had been working as agency staff and the dates she had been working for the NHS. She was concerned the claimant appeared to be, on occasions, working consecutive shifts, which meant she was working more than 24 hours at a time. She identified four separate occasions when the claimant finished work at Homerton and immediately started work for the respondent. Ms Cochrane raised the matter with the divisional director of nursing, Mr Nathan Askew, who authorised her to commence an investigation.

5.8 The claimant had taken holiday from 22 April and did not return until 3 April 2017. She wished to fly to Cameroon to attend her father-in-law's funeral. The investigation commenced in her absence.

5.9 The investigation focused on four matters. First, unsafely working in excess of 24 hours on four occasions. Second, potential dishonesty for the reasons given for her request for extended annual leave. Third, failing to conduct herself in a manner upholding the nursing profession and trust. Fourth, her actions breached the NMC (the Nursing and Midwifery Council) code of conduct and trust values. Ms Cochrane undertook the investigation rather than the matron, which would have been the normal position, because the matron at that time as acting up to a senior role.

5.10 When the claimant returned on 3 April 2017, Ms Cochrane held a meeting and suspended her (R1/266). Ms Cochrane explained her concerns, particularly about working the back to back shifts. The claimant was given a brief adjournment to check the position with the nursing agency.

5.11 On 6 April 2017, Ms Cochrane sent the claimant an invitation to an investigation meeting to take place on 13 April 2017. It detailed the four matters referred to above. The purpose of the meeting was to discuss the allegations. The claimant was given the right to have a representative. She was told she could submit a statement and she was asked to confirm her attendance.

5.12 The claimant declined to attend the meeting, as she was off sick. A further invitation was sent on 25 May for a hearing on 1 June 2017 (R1/247). The investigation hearing went ahead on 1 June 2017; the notes of the meeting at R1/248 were not sent to the claimant. The outcome of the investigation meeting was sent on 2 June 2017 (R1/309); the letter was lengthy and gives a clear account of the investigation meeting, in particular it details the discussions and the claimant's

responses to the various allegations. The claimant was invited to sign a copy of the letter, and return it, confirming it was an accurate account. At no time did the claimant dispute the account.

5.13 On 2 June 2017, Ms Cochrane confirmed by letter that it was no longer alleged the claimant worked more than 24 hours on 25 December 2016. The letter made it clear the allegations remained in relation to 15 June 2015, 22 May 2016, and 26 June 2016. During the investigation, it was concluded that the trust was not pursuing an allegation the claimant had dishonestly requested extended holiday.

5.14 By letter of 3 July 2017, the claimant was invited to attend a disciplinary hearing. The claimant was asked to confirm, by no later than 6 July 2017, she would attend. The hearing was to take place on Monday, 10 July 2017 at 11:15 a.m. The allegations were as follows (R1/323):

> **Allegation 1: you practice unsafely as you undertook shifts at Chelsea and Westminster Healthcare NHS Foundation Trust on 15th June 2015, 22nd May 2016 and 26th June 2016 after working a long shift at the Homerton Hospital beforehand without an appropriate rest break.**
> **Allegation 2: you failed to conduct yourself in a manner upholding the nursing profession and Chelsea and Westminster healthcare NHS Foundation Trust.**
> **Allegation 3: your actions breach the NMC code of conduct and Trust values.**

5.15 The claimant did not confirm her attendance.

5.16 At 09:11 on 10 July 2017, the claimant sent a letter of resignation by email it read as follows:

> **Dear Geraldine,**
>
> **Good morning.**
>
> **Hope this meets you in good health.**
>
> **Please take this email as a formal resignation from me commencing today 10th July 2017.**
>
> **Thank you for all the opportunities that the unit and the organisation afforded me.**
>
> **Sincerely…**

5.17 Mr Nathan Askew, the divisional director of nursing, was due to chair the hearing panel with Viktoria Burley, head of employee relations. The management's case was presented by Ms Cochrane. Miss Caroline Wood attended as HR business partner.

5.18 Ms Cochrane brought the claimant's email to the panel approximately 15 minutes before the hearing was due to start. Mr Askew took advice from HR, although he cannot remember the content of it. He elected to

proceed. There was no attempt to contact the claimant. Mr Askew considered whether the hearing should be adjourned but elected to proceed. We will consider his reasons for proceeding in detail when we come to our conclusions. The panel decided to dismiss, and we will consider the reasons in more detail in due course.

5.19 The claimant was dismissed by letter of 21 July 2017. The letter recorded the allegations. Mr Askew set out, in some detail, his reason for dismissal. The letter gave the claimant the right to appeal. Any appeal was to be sent to Mr Keith Loveridge, director of human resources, whose email address was given.

5.20 There is dispute as to whether the claimant did appeal the decision. She has referred us to two letters. The first is dated 2 August 2017 and its content is a clear request to proceed with an appeal (R1/334). The second letter is dated 13 September 2017 (R1/335); this indicates she had been expecting to hear from Mr Loveridge, but had not heard from him; she requested to be told what was going on.

5.21 The respondent's position is those letters were never sent. It is agreed that no appeal was scheduled or took place. We must resolve whether the letter of appeal and the subsequent enquiry was sent.

5.22 We have reached the conclusion that the letters were not sent. There is no reason to believe the Mr Loveridge would have ignored a letter of appeal sent to him. There is no reason to believe that the letters would have been deliberately hidden. It is possible that the letters were sent, but did not come to the respondent's attention. However, we have unconvincing evidence as to the manner in which the letters were sent. The claimant appeared to suggest that the letters were sent by post, but she was unclear about this point. The claimant had sent previous correspondence by email. She accepted the letters were not sent by email. She could offer no explanation for why she had not sent the letters by email initially. She could offer no explanation as to why, when her appeal was ignored, she had not pursued the matter by email either with Mr Loveridge, or anyone else. This is particularly surprising given that it was her appeal against dismissal, and one might expect her to be anxious to progress the appeal. Moreover, Employment Judge Goodman identified, at the hearing on 26 March 2018, that the authenticity of the appeal letter was in dispute. The claimant was directed to identify the computer on which the letters were produced. She failed to cooperate with that request. We find, on the balance of probability, that, had the appeal letter been sent, it would have been sent by email. Even if it had not been sent initially by email, there would have been an email referring to it – requesting that the respondent respond and explain the failure to proceed with the appeal hearing. No such email exists. We conclude, on the balance of probability, the claimant did not appeal the dismissal. If she had, there would have been a clear document trail, and there is not.

5.23 Mr Askew made a report to the NMC. The report (R1/330c) was dated 13 July 2017, prior to the letter of dismissal. It recorded the claimant was a lead nurse of NICU. It referred to the investigation, and in particular the occasions when the claimant had worked for over 24 hours. It confirmed the investigation identified no harm to patients or staff, and called into question the claimant's ability "to provide safe and effective nursing care." It stated the claimant "demonstrated little insight into the seriousness of risk patients had been exposed to during the investigation process." It recorded that, in her absence, it has been found that she had "little insight" into the risks. It stated, "The case is being referred to the NMC because of the risk posed to the patients and the public by this nurse, the lack of insight demonstrated and no evidence that pattern of behaviour would not continue."

5.24 The pro-forma report contains a question about previous concerns. The report specifically says that there were no concerns or complaints of a similar nature. However, Mr Askew stated the following, "Not of a similar nature but [the claimant] was due to commence informal performance management in relation to her attitude and behaviours, supportiveness of colleagues and students in the area." No detail of this is given. It is unclear where this comes from, or why it was referred to. It was not a matter raised with the claimant during the disciplinary.

5.25 The NMC did investigate. The matter was considered by a case-examiner. It recorded the referral was received on 21 July 2017 from Mr Askew. It is apparent there was a report from external solicitors and that there were three responses received from the claimant. It referred specifically to the test under article 26(2)(d)(i) of the Nursing and Midwifery Order 2001 as to whether, in their opinion, there is a case to answer. It set out the background and noted the investigation undertaken by Ms Cochrane. It noted the claimant had accepted that she had worked three back to back 12.5 hours shifts on three occasions, the last being 26 June 2016. It noted her responsibilities, as a band 7 nurse.

5.26 The report noted this was the first time the claimant's conduct had been brought to the attention of the regulating body in a long career as a nurse, whilst there were three episodes, there was no associated concern with her clinical practice. The case examiner concluded that the episodes "amount to minor breaches of the code." It was noted the claimant "fully accepts the regulatory concerns." It goes on to say that the claimant had "remediated the concerns raised and therefore the risk of repetition, and consequently any associated risk to patients, could be said to be low." The allegations were not considered to be "sufficiently serious to engage the public interest." It concluded "the case examiners are satisfied that there is not a realistic prospect of a finding of current impairment of fitness to practice." The letter notes that there is a power to review pursuant to rule 7A of the 2004 Fitness to Practice Rules where there are grounds, these include that the reviewable decision may be materially flawed.

5.27 On 1 March 2018, Mr Askew wrote to the regulator. It is unclear why, as there was no requirement, or request, for him to do so. He stated, "I would like my objection to the outcome noted and would urge you as the regulator to reconsider the outcome" (R1 341A.) His letter expresses concern about the decision there was no case to answer. He stated, "I would consider that 3 separate occasions should be viewed as a repeated pattern of behaviour." He goes on to say, "The reasoning given by the case examiner is that there was a feeling SN had reflected on the incident and it was unlikely to happen again. I as the chair of the disciplinary hearing was given no such assurance and the referral was made in the interest of public safety." His letter fails to make it clear that the claimant did not attend that meeting, and he elected to go ahead in her absence. Mr Askew's intervention was neither invited nor necessary.

5.28 We should deal with one final matter. The respondent prepared a reference for the claimant. The claimant has not disclosed full details of the reason for the request, nor has the respondent. However, we have received evidence that a reference was prepared. It was prepared on the standard format. It used information contained on the claimant's file. The claimant accepts it was entirely factually accurate. It records, accurately, that the claimant was dismissed, but it gives no detail of the reasons.

The law

6.1 Section 98 Employment Rights Act 1996 provides, in so far as it is applicable:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
>
> > **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> > **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it--**
> > **…**
> > **(b) relates to the conduct of the employee,**
> > **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> > **(b) shall be determined in accordance with equity and the substantial merits of the case.**

6.2 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason)

for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

6.3 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell [1980] ICR 303**, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal, as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09**.

6.4 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones [1982] IRLR 439** and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, 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 reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case 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 that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.5 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

6.6 Section 207 Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> **(1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.**

> **(2) In any proceedings before an employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.**

6.7 The relevant code that applies is The ACAS Code of Practice 1 on disciplinary and grievance procedures 2015 (the Code). Paragraph 25 of the 2015 Code provides:

> **Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available.**

6.8 The code is supplemented by the ACAS Guide:Discipline and Grievance at Work (2017) (the Guidance). Paragraph 4.14 of the guidance states:

> **…What if an employee repeatedly fails to attend a meeting?**
>
> **There may be occasions when an employee is repeatedly unable or unwilling to attend a meeting. This may be for various reasons, including genuine illness or a refusal to face up to the issue. Employers will need to consider all the facts and come to a reasonable decision on how to proceed. Considerations may include:**
> - **any rules the organisation has for dealing with failure to attend disciplinary meetings**
> - **the seriousness of the disciplinary issue under consideration**
> - **the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service**
> - **medical opinion on whether the employee is fit to attend the meeting**
> - **how similar cases in the past have been dealt with.**
>
> **Where an employee continues to be unavailable to attend a meeting the employer may conclude that a decision will be made on the evidence available. The employee should be informed where this is to be the case. See also Appendix 4 'Dealing with absence'.**

6.9 The Guidance has no specific statutory force under 207 Trade Union and Labour Relations (Consolidation) Act 1992. It is ACAS's guidance on good practice, and as such it assists an employer in approaching the appropriate interpretation of the Code.

6.10 Under section 43A Employment Rights Act 1996, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. Qualifying disclosures are identified in section 43B Employment Rights Act 1996:

> **(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—**

> **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
> **(e) that the environment has been, is being or is likely to be damaged, or**
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.**
>
> **…**
>
> **(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).**

6.11 Section 47B Employment Rights Act 1996 provides.

> **(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure**

6.12 Section 103A Employment Rights Act 1996 provides:

> **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.**

6.13 The following questions must be addressed: first, is there a disclosure of information; second, does the disclosure of that information tend to show one of the matters referred to in section 43B(1)(a)-(f); third, what was the belief of the employer making the disclosure; and forth, was the belief that there was a public interest reasonably held. All of these elements must be satisfied if the claim is to succeed.

6.14 Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. Mere allegations may not be a 'disclosure' for these purposes (see **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38. It should be recognised that the distinction between allegation and information may not be clear-cut. Any argument based on this alleged distinction should be viewed with caution. It is possible an allegation may contain information, whether expressly or impliedly. (see **Kilraine v Wandsworth LBC** [2018] EWCA Civ1 1436). Each case will turn on its own facts. It will be necessary to consider the full context.

6.15 It may be possible to aggregate disclosures, but the scope is not unlimited and is a question of fact for the tribunal.

6.16 It may be necessary to indicate the legal obligation on which the claimant is relying, but there may be cases when the legal obligation is obvious to all and need not be spelled out (see **Bolton School v Evans** [2006] IRLR 500 EAT). However, where the breach is not obvious, the claimant may be called upon to identify the breach of obligation that was contemplated when the disclosure was made. It may be necessary to identify a legal obligation (even if mistaken), as opposed to a moral or lesser obligation (see **Eiger Securities LLP v Korshunova** [2017] IRLR 115, EAT.)

6.17 The reasonable belief of the worker must be considered. The test is whether the claimant reasonably believed that the information 'tended to show' that one of (a) to (f) existed; the truth of disclosure may reflect on the reasonableness of the belief.

6.18 'Reasonable belief' is to be considered by reference to the personal circumstances of the individual. It may be that an individual with specialist or professional knowledge of the matters being disclosed may not have a reasonable to belief whereas a less informed, but mistaken individual might. Each case must be considered on its facts.

6.19 The public interest element was added in 2013 in order to reverse the decision in **Parkins v Sodexho Ltd** [2002] IRLR 109, EAT. This has been considered by the CA in **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ979. The present case is not one that turns on a consideration of whether the disclosure satisfies the public interest test. However, the decision does remind us of the importance of analysing what was the actual disclosure and what was the reason for the disclosure at the time it was made.

6.20 Underhill LJ gave some general guidance. Starting at paragraph 26, he dealt with some "preliminaries." He reiterated that the tribunal must first ask whether the worker believed, at the time he was making the disclosure that it was in the public interest and if so, whether that belief was reasonably held. At paragraph 27 he stated:

> **First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in *Babula* (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.**

6.21 Underhill LJ reiterated the need to consider what was actually believed at the time of the disclosure. He says at paragraph 29

> **… a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all…**

Conclusions

7.1 We deal first with the allegations that there were protected disclosures. As we have noted, we spent considerable time seeking to clarify the nature of the claimant's case. It is necessary for the claimant to identify information disclosed, and the basis on which she says that information is protected. As to the basis for it being protected, we need to consider what was in her mind at the date of the disclosure.

7.2 No detail of the relevant information is contained in the claim form, it was not identified during the original application to amend, it was contained in no further and better particulars, it was not identified in the application to amend made before the tribunal, it was not put to anyone during cross examination, and it is not in the submissions (despite the tribunal's specific direction that the matter should be addressed in the written submissions).

7.3 The closest the claimant comes to identifying the alleged disclosure of information is contained in the three broad assertions referred to in the application to amend, as presented on day one of the hearing. She refers to the following: staff shortage on shift; wrong mix of skilled staff on shift; and the borrowing of equipment from other service areas. The application to amend refers, generally, to "danger to the health and safety of staff and patients."

7.4 We should consider each of those headings. First, staff shortages. We have noted that it was part of the claimant's job to identify staffing needs, and deal with the shift roster. Gaps were to be identified and discussed, and action taken. There is no doubt that there were frequently difficulties with staffing. That is inevitable. The inevitability was well recognised by the respondent, it was part of the claimant's role to ensure that there was appropriate staffing. That involved her discussing needs, as necessary, with her manager. There can be no doubt that, on occasions, the claimant identified that there were potential staff shortages. Issues were raised; action was taken. In that sense, although no specific occasion is cited, there can be no doubt that information was disclosed on numerous occasions. However, in order for it to be protected, there would have to be some indication of a danger to someone’s health and safety or some form of actual or potential failure of legal obligation. The application to amend puts it is on the basis of danger to health and safety of staff and patients. There is no evidence that the claimant disclosed information about potential staffing shortages because she was concerned that there would be a failure in relation to the respondent's health and safety obligations. It was disclosed in order to ensure that there was no danger, and in the expectation that there would be no failure of duty. The information was communicated as part of a system designed to prevent any failure of duty. That was part of her job. Therefore, the disclosures were not taking place because of any specific concern which led the claimant to raise matters in the public interest. The disclosure of information occurred because it was a necessary part of the claimant's role and in the full expectation that there would be no breach of legal

obligation, or health and safety. We conclude that there were no protected disclosures in relation to staff shortages.

7.5 Second, the reference to the wrong mix of skilled staff on shifts takes the matter no further. There is no evidence of any specific disclosure at any specific time which we could analyse. This is a bare assertion, without any adequate evidence. There is no basis for finding that there was a disclosure of information, or that the information was protected. There is no basis on we could find that any alleged disclosure of information was disclosed in the public interest, or that the claimant believed that there was any likelihood of any failure of legal obligation or health and safety or otherwise.

7.6 Third, as to borrowing equipment from other service areas, there is a total failure to set out what the claimant's concerns were. What was said to be the disclosure of information is unexplained; why there was any form of actual or potential failure which may lead to the disclosure being protected is unexplained, and how it was made in the public interest is unexplained. This is not a protected disclosure.

7.7 We should add that the claimant has referred, generally, to these matters being disclosed in emails. She has pointed to no such emails. We have seen numerous emails disclosed by the respondent which simply demonstrate routine communications which one may expect concerning the functioning of the unit. We do not accept the claimant's contention that there is a failure to disclose emails that somehow contain protected information.

7.8 It follows that none of the whistleblowing claims can succeed as there is no protected disclosures. As there is no protected disclosure, there is no possibility of establishing any causational link between the disclosures and any action of the respondent.

7.9 We next turn to the unfair dismissal claim.

7.10 The respondent accepts that it dismissed the claimant by letter of 21 July 2018. The respondent has not alleged, or sought to argue in this case, that the employment was ended by the resignation of 10 July 2018. There are two possible interpretation of the relevant facts consistent with the respondent's position. The first is that the resignation was with notice. This was not Mr Askew's view and we find that it was not the claimant's intent. The second is that the respondent interpreted the immediate resignation as a breach of contract but chose not to accept the breach. Thus, the contract continued.

7.11 It is necessary for us to determine the reason for the termination of employment. A reason is a matrix of fact. There are a number of elements to the respondent's reason. This is a case where there is no clear distinction to be drawn between the allegation of misconduct, the claimant's response to those allegations, the procedure adopted by the

respondent, and the conclusions reached. Those conclusions incorporate the nature of the alleged misconduct, the claimant's response, her engagement with the process, and the assumptions about her continuing behaviour. All that is part of the reason for dismissal.

7.12 We should consider each aspect.

7.13 The misconduct revolves around the claimant undertaking work for an agency. It was accepted that she worked back-to-back 12.5 hours shifts on three occasions. The claimant initially denied working back-to-back shifts at the investigation, but when the information was clearly put to her, she accepted it. The respondent did not pursue an allegation that she dishonestly requested holiday. As to the other allegations, they appear to add little, if anything, to the first allegation. Allegation two is about her professional conduct. The conduct in question was her working 24 hours without a break on three occasions. No other conduct was relied on. Although during the investigation, there is some general criticism of the claimant in relation to the way she arranged shifts. That criticism was never clearly set out. The third allegation concerned whether her actions breach the NMC code of conduct and Trust values. The investigation did identify four specific sections of the NMC code: 13.4 - take account of your own personal safety as well as the safety of people in your care; 19.1 - take measures to reduce as far as possible, the likelihood of mistakes, near misses, harm and the effect of harm if it takes place., 20.8 - act as a model of professional behaviour for students and newly qualified nurses and midwives to aspire to; and 20.9 - maintain the level of health you need to carry out your professional role (R1/313).

7.14 The letter of dismissal states the allegation was partly upheld. It states that there was no evidence that on the three shifts in question she was responsible for students, but asserts, "The other aspects of the code in which it was alleged to have breached is upheld by the panel" (R1/333). It is therefore apparent that the underlying conduct is a reference to the three occasions the claimant worked more than 24-hours. In his statement Mr Askew puts it as follows her "trustworthiness and honesty was certainly in question because she worked back-to-back shifts, which put the safety and well-being of some of the sickest babies at the Trust at risk." He says that was not reflecting the Trust's values.

7.15 In his letter he referred to other aspects of the claimant's behaviour, which were not specifically allegations of misconduct. They included admitting to arriving late for shifts, admitting she may have fallen asleep during a shift (no specific occasion was identified). There were two other occasions it is said she admitted to working at Homerton and then immediately for the respondent.

7.16 Mr Askew was concerned by the claimant's response. He considered if there was mitigation. It was common ground that the claimant accepted

the allegation of working three 24-hour shifts. It is apparent from his letter of dismissal that he reached a number of conclusions about her responses. His conclusions were based entirely on the representations of, and the investigation report of, Ms Cochrane.

7.17 He noted the claimant had been under financial pressure, hence the need for additional shifts. He recorded "You informed Geraldine that you would not do it again; however Geraldine was not reassured by this." He noted there were no clinical concerns. He accepted Ms Cochrane's assertion that the claimant was "habitually late" although there had been no formal management of lateness and no specific evidence presented, and it did not form part of the allegations. As to any insight shown, he states he spoke to Ms Cochrane who "stated that she felt it had taken [the claimant] a long time to work out why what [she] had done was unsafe"

7.18 He established there was no reason why the claimant could not take holiday and work additional shifts, although the purpose of this enquiry remains unclear. He stated he received no mitigation from the claimant, despite a request prior to the hearing. This letter identifies that he wished to consider whether the claimant had shown remorse for her actions and any reflection, but he does not appear to reach any conclusion. His written evidence does accept that the claimant showed some reflections in her statement, but he denies that she gave any meaningful reassurances. He states, "I was not convinced because it was not just a one-off act; it had occurred on three separate occasions." He therefore concluded that there was a pattern of behaviour and this reduced his confidence that there would be no repetition. He was unimpressed by her mitigation that no baby had come to harm. He believed the risk increased "exponentially" because of the 24-hour working. Her assertion that her competency was not affected, "coupled with the lack of assurance that it would not re-occur," led him to believe the mitigation carried little weight. It is apparent that he continued to question "her ability to make safe decisions in the future."

7.19 The fact the claimant did not attend meant that she gave no oral explanation for her actions. He therefore relied on representations of Ms Cochrane. It is necessary to consider why Mr Askew elected to proceed in the absence of the claimant. His evidence to us was to the effect that in the absence of a good reason from the claimant for postponement, the disciplinary hearing should proceed. He believed she had given no good reason for non-attendance; moreover, he believed that her non-attendance demonstrated a pattern of deliberate, persistent non-attendance and cooperation. An attitude he took into account when making his decision to dismiss.

7.20 We accept that Mr Askew has demonstrated that the panel dismissed for a reason connected with misconduct. His belief that there was misconduct was honest and that goes to establishing the reason. The relevant matrix of fact is extensive, as we have noted. Underpinning the reasoning for the dismissal is the claimant's conduct in working three back-to-back shifts,

the last one being on 26 June 2016. However, whilst he termed that action gross misconduct, it is also apparent that he took into account a number of factors which included the following: failure to show remorse; rejection of her plea of mitigation; the conclusion that she showed little insight; the belief that it was a repeated pattern; and the belief that the claimant had given no proper assurance which could be accepted that the behaviour would not be repeated. Mr Askew places such emphasis on the conclusion that there was no reassurance her behaviour would not be repeated that his conclusion must be seen as a fundamental part of the reason for dismissal., as well as being relevant to the reasonableness of the decision.

7.23 We should consider the nature of the investigation. The investigation was adequate to identify the three specific shifts in question. The claimant admitted her conduct, no further investigation was required into that aspect. In that sense, the investigation was one which was open to a reasonable employer. However, Mr Askew did reach a number of conclusions about the claimant's state of mind, insight, and likely future conduct which were significantly less well explored either during the investigation stage, or during the disciplinary. Those matters, as we have noted, were part of the reason for dismissal.

7.24 He considered the financial pressure experience by the claimant, but the investigation fell short of establishing whether that was a transitory or continuing problem. There was no specific allegation about falling asleep on duty, the information he had in relation to that was limited, but it was a factor he took into account.

7.25 Mr Askew specifically noted that the claimant had informed Ms Cochrane that she would not work back-to-back shifts again and whilst he notes that Ms Cochrane was not reassured by the claimant’s representation, there is no evidence that he explored it further. It would appear that he accepted Ms Cochrane's reservation, but why he did so remains unclear. There had been no repetition for about a year. Her future conduct is a matter which could have been explored with the claimant; Mr Askew could have sought to reassure himself. As regards the claimant having no insight into the Trust’s concerns, Mr Askew appears to accept what he described as Ms Cochrane's feeling that it had taken the claimant a long time to work out why what she had done was unsafe. Viewed one way, there is clear evidence that the claimant had accepted that the practice of working double shifts was unsafe, it is unclear what is meant by a long time, or why that was significant. This is a matter that could have been explored with the claimant. We find there are concerns about the nature of this investigation, the conclusions reached, and the reliance placed on them by Mr Askew.

7.26 It is apparent that he was, at best, extremely sceptical about the claimant's insight into the potential danger of her conduct, and her assertion that the behaviour would not be repeated. However, he placed heavy reliance on Ms Cochrane's feelings and his own view that three occasions constituted

a pattern which would continue. Moreover, there are aspects of his decision which are inadequately explained. There is reference to two further occasions which were not directly put to the claimant and not explained adequately in his reasoning. Further, it is unclear why he was considering whether she could have worked shifts when taking annual leave.

7.27 It is possible that hearing from the claimant would have, at the very least, reassured Mr Askew. It is apparent from all that he said that there was a possibility of the claimant providing relevant mitigation. Moreover, had the claimant convinced him that she would not have repeated the misconduct, there is a prospect, even on his own evidence, that this would have materially affected his decision. That is demonstrated by the reliance he places on his conclusion that there was a repeated pattern of behaviour, and that he had no confidence that the behaviour would not be repeated in the future. Therefore, the failure to hear from her was significant and important. There is a question as to whether it was fair to proceed with the hearing in her absence. We need to consider why he considered it appropriate to proceed without her.

7.28 Mr Askew confirmed in his oral evidence that he believed the Trust's policy was that the disciplinary hearing should proceed, unless the claimant presented a good reason. He relied on the disciplinary policy, and in particular sections 10.2.1 and 10.2.5. The first section says that the hearing will normally proceed in the absence of an individual after a 30-minute delay. The second section says, "Where the employee fails to attend the hearing without good reason the hearing may proceed in his or her absence." It envisages that the employee must notify the employer prior to the day of the hearing and failure to do this may result in the hearing proceeding in the person's absence. It is clear that his interpretation of the policy is flawed. There is no obligation to proceed in the absence of a good reason. His discretion is much wider.

7.29 It was clear the claimant had not attended because she had resigned. He believed it was intended as a resignation with immediate effect.

7.30 We should note that the claimant has argued before us that, in fact, she was giving notice. We reject that evidence. Her email and her action are not consistent with her giving notice. Had she given notice she would have sought to attend work or taken other action, such as submitting a sickness certificate. There is no evidence consistent with her giving notice. We have no doubt that her intention was to resign immediately, and that was clearly the way that Mr Askew understood it.

7.31 When he received the resignation letter, he understood that it may have been her intention to resign in order to avoid a dismissal. He took advice. He decided to reject the resignation and to proceed. However, despite his belief that the claimant intended to resign immediately, and despite his understanding that it may have been her intention to avoid a dismissal, he elected to proceed without her.

7.32 In reaching the decision to proceed, he formed the view that she would not attend any further meeting. It is unclear why he formed that view. In his letter he said he had no assurance that she would attend on any future date, but this is hard to reconcile with his assumption that the claimant was resigning immediately. It is fanciful to believe that an employee, resigning forthwith to avoid a dismissal, would make representations about attending any future hearing. We conclude, on the balance of probability, that Mr Askew was in no doubt that the claimant assumed her resignation brought her employment to an end and obviated the need for a disciplinary hearing.

7.33 Mr Askew believed there was a pattern of repeated refusal. It is difficult to understand how he reached that conclusion. Whilst it is fair to say that the investigation meeting had been postponed, the claimant had attended on the day agreed. She had not specifically agreed to attend on the date of the disciplinary, and this was the first date that had been listed. It is unclear why he should assume that she would not attend if he had elected to tell her he was not accepting her resignation and proposed to proceed. It is difficult to see what specific evidence he relied on, and we have concluded that his approach lacks rationality.

7.34 It follows that his reason for proceeding involved two key points. First, he believed there had been a repeated, persistent failure to engage with the process and attend meetings. Second, he believes she would not attend any further meeting. In his oral evidence he suggested that it would have taken many weeks to relist the hearing; however, that does not appear to have been a consideration at the time and we do not accept that this respondent, given its resources, could not have coped with a brief adjournment.

7.35 We asked what advice Mr Askew had sought. He was unable to give us detail of either the advice sought or the advice given.

7.36 There is no suggestion that the ACAS Disciplinary or Grievance Code 2015 was considered at any time.

7.37 The conclusions Mr Askew reached about the claimant's mitigation and the potential for repetition of the misconduct were fundamental to the decision to dismiss. Put simply, it is implicit in Mr Askew's reasoning that if he had accepted the claimant had insight into the potential consequences of her actions and had committed to not repeating the behaviour, he may not have dismissed. The evidence he had on these points was unsatisfactory and was based largely on Ms Cochrane’s feelings. It was obvious to him that hearing from her would have been materially relevant.

7.38 It is also apparent that, at the time, he proposed to report the claimant's conduct to the NMC. He accepted in evidence that this report had the potential to end her career. However, he also accepted in evidence, that,

when making his decision not to postpone the hearing, he did not have clearly in mind the magnitude of that decision. He gave no specific consideration to the importance of hearing from her in the context of his intention to report her conduct, despite fully understanding that his report may end her career. He therefore proceeded knowing that his account may not be as accurate as practicable.

7.39 At the end of the hearing, during the parties' submissions, we identified our concern about the reasonableness of not adjourning the disciplinary hearing. We asked the respondent to make specific representations and to bring to our attention to any relevant case law. During the hearing, the ACAS Code of Conduct was not referred to. During our deliberations, as we are required to do, we considered the ACAS code. We noted paragraph 25 of the guidance. Before reaching our final conclusion, we wrote to the parties and required further submissions on the relevance of the code and of the ACAS Guide on Discipline and Grievance at Work (2017). We received written submissions from both sides. We do not need to consider the claimant's additional submissions in details. Suffice to say that the claimant says para 25 applies, and in not giving the claimant a chance to attend, the respondent breached the principal.

7.40 The respondent's position needs to be examined more closely. The relevant submissions are as follows:

> **5. The Respondent submits that paragraph 25 does not apply and has nothing in particular to say in respect of the unusual situation faced by the Respondent; that is, an employee who sought to terminate the contract with a view to subverting the disciplinary process.[1]**
>
> **6. Paragraph 25 is intended to apply to common frustrations to the disciplinary process such as employees who cannot attend hearings because of ill-health or lack of union representative availability, or, employees who persistently make excuses as to why they cannot attend. Paragraph 25 signals to the employer that in such circumstances there comes a point at which a decision should be made. This is distinct from an attempt by the employee to terminate the contract and put an end to the disciplinary process entirely.**
>
> **<u>Interpretation</u>**
>
> **7. Accordingly, paragraph 25 has nothing to say of relevance to the present circumstances, but if it did, it should not be read as having imposed any obligation on the Respondent to postpone the hearing. To read it in this way would be to distort the ordinary meaning of the provision and, had the Code intended such an interpretation – that an employer should or must postpone a hearing in certain circumstances – it would have said so: see for example paragraph 16 which provides that an employer must postpone a hearing where a chosen companion is unavailable.**

[1] We should note that this reference to subverting the process is new. It is not reflected in the evidence given by Mr Askew, although his reason for proceeding with the hearing was explored carefully.

> **8. To put it another way, there is nothing in paragraph 25 from which one could fairly or sensibly find a failure to comply on the part of the Respondent. Whereas it [is] entirely obvious that the Claimant has failed to comply with paragraph 12 which states that "employers and employees should make every effort to attend the hearing."**
>
> **9. On an allied but separate point, to read paragraph 25 as obliging the Respondent to postpone the hearing and any failure to do so as rendering the dismissal unfair would be a serious error: section 98(4) should never result in a tribunal applying a standard approach to a case, certainly without considering whether that case fully and properly justifies such an approach. It invites the Tribunal to consider the circumstances of each case, which inevitably differ.**
>
> **10. The Respondent did not in any event have confidence the Claimant would attend another hearing. That was an entirely proper inference in circumstances where she had been given ample notice of the hearing; repeatedly ignored requests to confirm her attendance; failed to arrange any statement, witness or representative to attend and where she had sought to terminate the contract so as to put an end to the process entirely. Whilst there may not have been express mention in the hearing of whether the Claimant might have presumed the resignation was 'accepted' or that the hearing would not go ahead, the Respondent was entitled to assume the Claimant had received no such assurance: she did not make any effort to check nor did she make any effort to turn up to the hearing, nor to communicate her resignation / non-attendance to the disciplinary officer in circumstances where she had been warned the hearing could proceed without her and the outcome could be dismissal.**
>
> **11. For the same reasons, the Respondent contends that the ACAS Guide does not apply but if it did, there was no evidence the Claimant was 'unavailable to attend' the meeting, she had previously been deemed fit to attend meetings by occupational health and, before making its decision, the Respondent considered its own disciplinary policy (which allowed it to proceed as it did) and made a reasoned decision. That another employer might have reasoned differently does not undermine the integrity of the Respondent's decision - it fell squarely within the band of reasonable responses. There was no obligation for the Respondent to take the Guide into account in any event.**
>
> **12. The Respondent repeats paragraphs 45-47 of its submissions dated 2 May 2019 and invites the Tribunal to dismiss the claim(s) against the Trust, which has already incurred significant costs and resources defending the claims.**

7.41 We do not accept that paragraph 25 has no relevance. Moreover, the assertion that the claimant was in some way subverting the process does not reflect any evidence given by Mr Askew. It does not reflect his reason. Perhaps the submissions invite us to draw an inference, but that is not clear.

7.42 Paragraph 25 provides that where an employee is persistently unable or unwilling to attend the disciplinary hearing without good cause the employer should make a decision on the evidence available. It follows that where the failure to attend is neither persistent nor demonstrates an unwillingness the hearing should not proceed. If there is good cause for not attending, the hearing should not proceed.

7.43 Mr Askew gave no evidence that he was aware of the code. However, part of his reasoning related to his findings there was a persistent unwillingness to attend and there was no good cause for not attending. We consider each of those aspects.

7.44 We cannot accept that the claimant persistently failed to attend the disciplinary. The disciplinary was listed only once, and whilst we accept that there may have been some rearrangement of previous investigation hearings, this falls far short of demonstrating a persistent failure to attend. Mr Askew had no reasonable grounds for concluding there was a persistent failure to attend any disciplinary hearing.

7.45 It would be harsh to conclude that the claimant was unwilling to attend. She attended the investigation meeting when agreed. Any conclusion as to whether she was unwilling to attend the disciplinary must be considered in context of the resignation. An employee cannot be expected to have a fully detailed or developed understanding of contract law. It is arguable that as the claimant resigned without alleging a breach of contract by the respondent, that she herself was in breach of contract. It follows that the respondent was not obliged to accept the resignation. But no reasonable respondent would believe that an employee without detailed knowledge of contract law would understand that. An employee who resigns forthwith is likely to think that is the end of the employment. In no sense whatsoever does the letter of resignation suggest that she was giving notice. It follows that the only reasonable conclusion that could have been reach by Mr Askew was the claimant was resigning forthwith in order to avoid the potential dismissal. That fully explained why she did not attended the disciplinary hearing. He should have been aware that she was very unlikely to anticipate his refusal to accept the resignation.

7.46 It follows that we find that her failure to attend was neither persistent, nor did it reasonably demonstrate a material unwillingness. In any event it showed a good reason. No reasonable employer would have failed to have understood those points.

7.47 We also have regard to the guidance.[2] Even where an employee repeatedly is unable or unwilling to attend a meeting, an employer may consider the factors outlined in the guidance. First, the organisation's own rules should be considered. As we have noted, Mr Askew's interpretation of the rules was seriously flawed. He failed to appreciate the scope of his discretion. Second, the seriousness of the charges must be considered. These were the most serious charges. Mr Askew appreciated that not only was the claimant's employment at stake, but also her suitability to continue as a nurse. This is amply demonstrated by the fact that Mr Askew later made unsolicited representations for reconsideration of the NMC's decision not to proceed against the claimant. Third, he should

[2] Only the 2015 code is relevant for the purposes of 207 and 207a Trade Union and Labour Relations (Consolidation) Act 1992. The guidance may help to interpret the code.

consider her disciplinary record. There was no relevant disciplinary record, and this favoured adjourning to allow her to attend. The fact that she had a clean disciplinary record, would suggest an adjournment may be appropriate. The other factors (medical reasons, and similar cases) were not relevant.

7.48 We are concerned to note that he did appear to take into account unparticularised allegations about timekeeping. In his report to the MCN, he also refers to a potential performance improvement plan, although it is unclear why he does so, or what evidence he was given.

7.49 It follows that if there had been clear consideration of the guidance, Mr Askew should have identified strong reasons for allowing the adjournment. Moreover, the guidance simply identifies matters which it may be reasonable for any reasonable employer to identify, regardless of whether the guidance was considered specifically: the matters raised should be readily identified following even a brief reflection.

7.50 We have concluded that failure to allow an adjournment demonstrates a failure to take into account the principles outlined in the ACAS code. Breach of the code will not lead to a finding of unfair dismissal, but it is a matter we should take into consideration.

7.51 We have to consider fairness. In doing so, we must not substitute our view. We must recognize there is a band of reasonable responses. Different employers may take different views. Only decisions to dismiss that are outside the band of reasonable responses will be unfair.

7.52 Working back-to-back shifts could impair a nurse’s performance and could endanger patients. The respondent policies do not describe it as gross misconduct. Gross misconduct is described generally in appendix B of the disciplinary policy, but the generalized descriptions (e.g. disobedience or neglect of duty, and serious breach of the Trust’s values and behaviours) are vague and unclear; they offer little or no helpful guidance. Mr Askew termed the behaviour gross misconduct. However, whether it amounts to gross misconduct is not conclusive as to reasonableness. We have to consider whether the respondent acted reasonably in treating that reason as a sufficient reason to dismiss.

7.53 Undoubtedly, the initial conduct was serious. The claimant did understand that working back-to-back shifts was potentially dangerous in that her judgement and work could have been affected leading to unsafe practice and consequential risk. There were three occasions when it happened which were over a year or so prior to the discovery. No other occasions were identified. The claimant had indicated that she would not do it again, even if Ms Cochrane's had reservations about the claimant’s veracity. The claimant had offered mitigation and it was clear that the question of mitigation was relevant to the decision. Key to the decision to dismiss was the conclusion that the claimant could not be trusted to not repeat the conduct. Underpinning that conclusion was the belief that she had taken a

long time to understand the concern, and the belief that, as she had demonstrated a pattern of behaviour, that she could not be trusted to not repeat the conduct. Hearing from the claimant may have materially changed the view of any reasonable disciplinary panel approaching the matter with an open mind. The claimant was denied that opportunity despite giving a good reason for non-attendance. It is no answer to say that she had been given the opportunity to attend, but she lost that opportunity. Any reasonable disciplinary panel would recognise that the claimant did not attend because she believed she was bringing her own employment to an end, thus avoiding a potential finding of dismissal.

7.54 It was open to the panel to accept the resignation. It chose not to. Having elected not to accept the resignation, we find no reasonable panel would have failed to have adjourned and explained to the claimant that they were not accepting her resignation and that she should attend and explain herself. There was a real prospect of the claimant demonstrating that she had understood the significance of her own action and that she had insight. There was a real prospect that she could have convinced the panel that her action was isolated, came about as a result of financial pressure the time, and would not be repeated. In those circumstances there was a real prospect of the panel finding the dismissal was not an appropriate sanction.

7.55 For all the reasons we have given, we find that the disciplinary panel's approach and subsequent decision in this case was not one open to a reasonable employer; the dismissal is outside the band of reasonable responses.

7.56 We need to decide, in due course, the question of contributory fault. We indicated to the parties in the hearing that it is a matter for remedy. We also must consider whether the claimant's employment would have ended in any event, and if so when. Again, that is a matter which is reserved to the remedy hearing.

7.57 The whistleblowing claims fail as there were no protected disclosures. For the sake of completeness, we should address the whistleblowing claims further.

7.58 There were clear and appropriate reasons for suspending the claimant. There is no evidence on which we could conclude that any of the alleged disclosures were a material reason for suspending the claimant.

7.59 There is no basis for suggesting that the nature of the reference prepared was anything other than standard. The reference was prepared in accordance with the Trust’s standard policy and procedure. It had nothing to do with any disclosures. There is no evidential basis from which we could find that it did, whether by inference or directly. There is no evidence to suggest that whoever prepared it knew anything of the claimant, or her alleged disclosures, or anything about her work.

7.60 We have found the dismissal to be unfair, but there is no evidential basis on which we could find that any alleged protected disclosure was the sole or principal reason for dismissal. We have explored the reason for dismissal in detail above. Mr Askew dismissed because of his view of the claimant's conduct, her culpability, and the potential for repetition. It had nothing to do with any the alleged disclosures.

_____

Employment Judge Hodgson

Dated: 28 August 2019

Sent to the parties on:

28 August 2019

For the Tribunal Office