Appeal No. UKEATS/0005/16/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 21 April 2017

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

NHS 24	APPELLANT
MRS PATRICIA FRIEL PILLAR	RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Mr Jeremy Lewis (of Counsel) Instructed by : NHS Scotland Central Legal Office Anderson House Breadalbane Street Bonnington Road Edinburgh EH6 5JR
For the Respondent	Mr Stephen Smith (Solicitor) Archibald Sharp, Solicitors 270 Dumbarton Road Glasgow G11 6TX

SUMMARY

UNFAIR DISMISSAL: Reasonableness of Investigation

Procedural Unfairness

Polkey deduction

The claimant, a nurse practitioner, was dismissed by reason of gross misconduct after a third serious Patient Safety Incident (PSI). The first two such incidents had not been treated as disciplinary matters and the Tribunal decided that inclusion of details about them in an investigative report prepared for use by the dismissing officer fell foul of the " reasonable investigation" requirement in *British Home Stores v Burchell 1980 ICR 303.* The Tribunal also found that a lack of transparency in the respondent's dealings with the claimant at an early stage following the last PSI, together with the inclusion of the previous PSIs in the investigative report separately rendered the dismissal unfair.

The Tribunal's decision on these matters was inconsistent with its own findings that the fact of the previous PSIs was relevant and that dismissal had been a reasonable outcome on the basis of the material before the dismissing officer and was also perverse. It was novel to complain that an investigation was too thorough; *Burchell* is directed primarily at the inadequacy of an investigation. The claimant had been given no expectation either way on whether any previous PSIs would be taken into account should there be a repeat. In the absence of a cross appeal on the fairness of the dismissal taking account of relevant previous incidents, the Tribunal's decision that it was unfair to include information about those incidents was irrational.

On procedural unfairness, the Tribunal had found a single procedural defect (in addition to the inclusion of previous PSIs in the investigation report) at an early stage after the incident and had erred in moving straight from that finding to a conclusion that it also rendered the dismissal unfair, without taking account of the whole context, including its own findings on the fairness of the dismissal. No attempt had been made to assess the seriousness or otherwise of the procedural defect identified. This was a further error that had led the Tribunal to reach a perverse decision on the issue.

A third ground of appeal in relation to the Tribunal's failure to assess the likelihood that the claimant would have been dismissed in any event was academic as a result of the decision reached on the first two grounds.

Appeal granted and a finding that the dismissal had been fair substituted.

THE HONOURABLE LADY WISE

1. The claimant, Mrs Pillar, was employed by the respondent, NHS 24, as a Nurse Practitioner between 29 July 2002 and 18 September 2014 when she was dismissed by reason of gross misconduct. She succeeded in a claim of unfair dismissal against the respondent, although the compensation award was reduced by 70% to take account of her contribution to the dismissal by her own actions. The Employment Tribunal (Employment Judge Claire McManus) heard evidence and submissions over several days between June and September 2015 and issued a lengthy judgment on 5 October 2015. The respondent appeals against that decision. Before the Tribunal the claimant was represented by Mr M Cameron, solicitor and at the appeal by Mr Stephen Smith, solicitor. The respondent was represented at the tribunal by Ms k Henderson, solicitor and before me by Mr Jeremy Lewis of Counsel. I will for convenience refer to the parties as claimant and respondent as they were in the Tribunal below.

2. The respondent is part of NHS Scotland and delivers telephone and online care services to people across the country, 24 hours a day, every day. The claimant was at the material time a band 6 graded Nurse Practitioner. Her work involved taking telephone calls from members of the public and triaging them, which involved taking a decision on the most appropriate clinical outcome for the relevant patient in terms of location and time for next step care. The outcome of the decisions taken by a Nurse Practitioner such as the claimant can range from simply giving advice over the telephone through to making a 999 emergency call for an ambulance. The remit of such a practitioner is not to diagnose or ascertain the cause or origin of the presenting symptoms, but to evaluate the symptoms as described and decide on the appropriate level of outcome.

The Tribunal's Analysis

3. The Tribunal made findings in fact about the scope of the claimant's responsibilities and the process initiated where a concern is raised about the care given to a member of the public (referred to as service user) by the service. These are contained at paragraph 7(e), (f) and (g) if the judgment. The claimant's dismissal arose out of an incident in December 2013, regarded by the respondent as a Patient Safety Incident (" PSI"). The circumstances are narrated in the judgment as follows ;-

" 7(h)……..the claimant had been contacted by a man who had described symptoms consistent with him having a heart attack. The claimant had directed him to a Primary Care Emergency Centre ("PCEC"). This is an out of hours GP service where a patient can be examined by a GP. The patient had a heart attack (myocardial infarction). A 999 call was made for this patient from the PCEC. The Management Case noted the circumstances of the December 2013 PSI …as follows :-

> **'Details : 50 year old Gentleman presenting with chest pain who following Clinical Assessment by PP was referred to PCEC. Gentleman experienced a Myocardial infarction.**
> **Preliminary Issues re. above incident :**
> **Red Flags not taken into account by PP when decision making.**
> **PP failed to take action on the following 12 Chest pain Red Flags :**
> **50-year-old male**
> **Chest Pain**
> **Arms Sore**
> **Arms Weak**
> **Breathing Worse**
> **Pain in the Breast bone, central, right in middle**
> **Tingling in Arms**
> **Pain in Jaw**
> **Sudden onset of pain**
> **Cold**
> **Sweaty**
> **Short of Breath**
>
> **Record Keeping not in line with NMC Code of Conduct or NHS24 Best Practice**

(i) The term 'Red Flag' is common terminology for Nurse Practitioners for a described symptom which may be important. Nurse Practitioners should be aware of the importance of a 'red flag' and ask careful questions around it. The claimant does not dispute the fact of the patient call in December 2013, the content of the call, that the triage outcome of the call ought to have been a 999 call and that her call record does not properly document the algorithm during the call. The claimant admits that she committed a clinical error by not directing this patient to a 999 outcome. The claimant had previously demonstrated that she was a competent and experienced Nurse Practitioner, familiar with the respondent's processes and procedures, who knew how to appropriately and safely manage calls."

4. One of the most important issues in the case was the extent, if any, to which it was proper to take into account previous PSIs involving the claimant but which had not been the

subject of disciplinary action. There had been two previous PSIs involving the claimant's triage decisions, together with one formal complaint and a second informal complaint. The first of those PSIs had occurred in August 2010 and had also involved a patient presenting with cardiac symptoms and had an inappropriate outcome in that the claimant had referred the patient to a PCEC, where the patient had then suffered a cardiac arrest. On that incident and the way it was dealt with by the respondent the Tribunal made the following findings ;-

> **"(j)……….The circumstances of the August 2010 PSI are also that the claimant ought to have triaged the call to a 999 outcome. The primary issues identified in the August 2010 PSI were that the claimant had failed to thoroughly explore red flags which were cardiac symptoms and had failed to utilise the algorithm appropriately, including the documentation in the algorithm. These failures were regarded by the respondent as being 'very similar' failures to those displayed by the claimant in the December 2013 PSI. No disciplinary proceedings had been initiated against the claimant following the August 2010 PSI. The claimant had been placed on an eight week Development Plan following the August 2010 PSI. Her identified development needs included improving her clinical knowledge of cardiac care to ensure safe and efficient outcomes and efficient use of algorithms to challenge and support decision making. She successfully completed that Development Plan and was put back on line. At no time prior to her dismissal was the claimant made aware by the respondent that a repeat by her of similar conduct would be regarded by the respondent as lack of clinical competence and/or misconduct. ……The responsibilities on the claimant as set out in the NMC Code of Conduct do not detract from the fact that the claimant did not know and could not reasonably have been aware that a repeat of similar circumstances to those which had occurred in the August 2010 PSI would be likely to be regarded by the respondent as gross misconduct. The claimant had a clean disciplinary record prior to the instigation of the disciplinary proceedings which led to her dismissal."**

5. The second PSI involving the claimant was in July 2012. The circumstances were quite different to the PSI of August 2010 and the subsequent incident of December 2013, but there were again concerns about the claimant's decision making and she was again taken off line and undertook a development plan. As the Tribunal found, neither of the previous PSIs had been treated as disciplinary matters.

6. The inclusion of the previous incidents in a Management Report sent to the disciplinary hearing was found by the Tribunal to have been significant. Its reasoning in relation to this issue, which is central to the appeal, is expressed as follows at paragraphs 81 – 82 of the judgment ;-

> **"The Tribunal considered the reasonableness of the investigation carried out by the respondent. The Tribunal considered this question with regard to the range or band of reasonableness. This question of reasonableness is more usually considered in the context of an argument that the investigation carried out by the employer prior to dismissal was too narrow. In this case the Tribunal considered the reasonableness of the investigation having included**

matters other than the claimant's conduct in the December 2013 PSI. The tribunal considered whether it was within the band of reasonableness for the respondent to have included in the investigation (as set out in Caroline Spence's Management Case) detail of the previous PSIs and other incidents in which the claimant had been involved. As part of her investigation, Caroline Spence had listened to the calls of all PSIs which the claimant had been involved in. The Tribunal did not accept that the details of those previous incidents required to be included in the Management Case. The Tribunal accepted the claimant's' representative's submission that it was not appropriate to include these previous matters in the Management case, where those matters had not themselves been the subject of disciplinary proceedings. The information on training, coaching and support provided to the claimant following those previous incidents is relevant to the investigation into her conduct in the December 2013 PSI. Information on the training and coaching

provided to the claimant could have been set out in the Management Case without reference to the details of the previous incidents. That would have been reasonable and would have served the purpose of providing the relevant information to the decision maker. It was not reasonable to include in the Management Case the information on the claimant's conduct in the other incidents. The inclusion of the detail of the previous incidents in the Management case was material to the decision to dismiss. The Tribunal concluded that the investigation was not within the band of reasonableness. A reasonable investigation onto the claimant's conduct in the December 2013 PSI would not have included investigation of the claimant's conduct in previous incidents which had not themselves been the subject of disciplinary proceedings. Following *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23, applying the objective standard of the reasonable employer, it was plainly reasonable to make material reference to incidents in the past which had not been the subject of disciplinary procedure. It could not be said that the investigation was reasonable in all the circumstances.

7. The Tribunal went on to consider the reasonableness of the decision to dismiss on the basis of the available material. It expressed the following view ;-

82. The Tribunal noted the distinction made in *BHS v Burchell* between the two tasks of (1) investigating whether the conclusion of management was a reasonable one on the basis of information which they had before them and (2) whether in assembling that material management had carried out a reasonable investigation. Donna O'Boyle's decision was within the band of reasonableness based on the material before her, but the inclusion of the detail of the previous PSIs and other incidents in the Management case was not reasonable and was material to the outcome, being the decision to dismiss. The Tribunal considered whether the decision to dismiss was within the band of reasonable responses. The Tribunal had some difficulty with this. The Tribunal took into account the guidance in *Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09* at paragraph 113 that gross misconduct involves either deliberate wrongdoing or gross negligence. It was not the respondent's position that the claimant had engaged in deliberate wrongdoing. The Tribunal considered whether it was reasonable of the respondent to regard the claimant's conduct as having the character of gross misconduct on the facts before it. The Tribunal was mindful not to fall into the error of substitution of its own view for the view of the employer. The Tribunal's difficulty was that the respondent had relied on the claimant having done 'very similar conduct' in the August 2010 PSI but that that 'very similar conduct' had not led to any disciplinary proceedings, far less been considered to be gross negligence. The claimant had not been told that a repetition of similar behaviour would be regarded as gross misconduct. The Tribunal noted the Respondent's position that had the December 2013 PSI been an isolated incident it may not have been reasonable for the respondent to treat that matter as a disciplinary matter. The Tribunal also had regard to the professional views on oath of the respondent's witnesses, including the view of Gill Stillie at the appeal. The clear evidcne from the respondent's witnesses was that the conduct put patients at risk. The Tribunal considered the question of what may be misconduct in accordance with *Hamilton v Argyll and Clyde Health Board* [1993] IRLR 99. The Tribunal concluded that it was reasonable for the respondent to consider the claimant's conduct to be gross misconduct. Applying *Tayeh v Barchester Healthcare Ltd* [2013] EWCA Civ 29, 06 February 2013, on the material before her, which included the information on the previous incidents, given the potential risk to patient safety, Donna O'Boyle's decision to dismiss was within the band of reasonable responses.

The Tribunal concluded (at paragraph 83) that the claimant's dismissal was an unfair dismissal because **" ..the investigation was not within the band of reasonableness."**

8. The Tribunal concluded also that the procedure adopted by the respondent was unreasonable and expressed its view on that as follows ;-

"84. Following the approach of the Court of Appeal in *Whitbread v Hall* [2001] IRLR 275, the Tribunal's consideration of reasonableness under section 98 (4) of the ERA included consideration of the reasonableness of the procedure used in reaching that decision to dismiss. The Tribunal found that procedure not to be reasonable because of the lack of transparency to the claimant. It was not reasonable for the claimant to be given the clear impression by the respondent that the outcome of the December 2013 PSI in terms of personal consequences of her were set out in the Development Plan. Given the size and administrative resources of the respondent, it was not reasonable for the respondent to give no indication to the claimant that her conduct in the December 2013 PSI may be regarded as gross misconduct until after her successful completion of the Development Plan aims. A relevant factor in this consideration was the acknowledged seniority and experience of the individuals in the PSI Review Team appointed to investigate the December 2013 PSI. The Tribunal therefore found that in addition to failing on the reasonableness of the investigation, on the application of section 98(4) the dismissal was separately an unfair dismissal because of the lack of transparency to the claimant in the process applied. As mentioned in *Whitbread* at paragraph 21, the Tribunal cannot ask itself whether the outcome of a fair procedure would have been the same. The Tribunal did not do this."

9. The third aspect of the Tribunal's decision relevant to this appeal relates to the extent of the reduction of the award made. The Tribunal's decision on this is contained in paragraph 89 in the following terms ;-

"Having found that the claimant's dismissal was an unfair dismissal, the Tribunal considered whether any compensation awarded to the claimant should be reduced under sections 121 - 123 of the ERA. The Tribunal applied *Royal Society for Prevention of Cruelty to Animals RSPCA v Cruden* [1986] IRLR 83. There were no submissions that there was justification for differentiation in any deduction between that applied to the basic and to the compensatory award. The Tribunal considered that it was appropriate to apply the same level of deduction to both the basic and the compensatory award. The Tribunal considered whether the claimant had contributed to her dismissal by her blameworthy conduct. The Tribunal found that the claimant did contribute to her dismissal by her actions in diverting from the algorithms without properly recording her reasons for doing so. That behaviour had led to her dismissal. In the circumstances of the case, the Tribunal considered that it was just and equitable to apply a reduction of 70% to both the basic award and the compensatory award. "

Arguments for the respondent on appeal

10. In presenting the appeal for the respondent, Mr Lewis advanced three separate grounds. First, he argued that the conclusion that the previous incidents should have been omitted from the investigation and management report represented an error in law on the part of the Tribunal. Secondly, the Tribunal had erred further in finding that the respondent did not follow a fair procedure. Thirdly, the Tribunal had failed to consider or assess whether, and to what extent, a reduction to the compensatory award was to be made under section 123(1) ERA 1996 for the chance that the claimant would have been dismissed in any event even if a fair procedure had been followed.

11. On the first ground, Mr Lewis emphasised that the argument had to be understood against a background of the Tribunal having accepted that the decision to dismiss fell within the range of reasonable responses open to the respondent given the potential risk to patient safety. This was unsurprising given that the claimant's conduct had put service users at risk. Accordingly, if the first ground relating to the investigation was to succeed, the dismissal would have been inevitable. It was submitted that section 98(4) ERA is plainly wide enough to permit consideration of an employee's earlier misconduct as a relevant circumstance giving context to a later decision to dismiss, even where a prior warning has expired. Support for that proposition could be found in **Airbus (UK) Ltd v Webb [2008] IRLR 309,** a decision of the Court of Appeal. It was acknowledged (in response to the issue being raised from the bench) that the Inner House of the Court of Session in **Diosynth Ltd v Thomson 2006 SLT 323** had found that a dismissal that took into account an expired warning was unfair. However, as the Court of Appeal had clarified in **Airbus,** the decision in **Diosynth** was not authority for the proposition that the misconduct, in respect of which a final warning was given but has expired, can never be taken into account as a relevant circumstance. It would be wrong to re-write section 98(4) as if it set down a rule of law as to what

can and cannot be taken into account. In any event, there was a difference between giving an employee an assurance that something would not be taken into account after a certain date and going back on that and being silent, as in the present case. It was harsher to retract or seek to extend an expired warning, as the employer had done in **Diosynth** and **Airbus**, as something analogous to a "spent conviction", if wrongly included as a consideration, should be disregarded. Mr Lewis submitted further that it would be wrong and even dangerous if decisions bearing on public safety had to be made without reference to all the relevant facts, or excluding consideration of matters which experienced professionals assess as relevant to whether a safe service can be assured.

12. The Tribunal's conclusions at paragraph 82 were said to be key to the challenge to the conclusion on unreasonable investigation. Having found that it was reasonable of the respondent to dismiss the claimant on the basis of the material before it, it was inconsistent or perverse or both inconsistent and perverse to go on to conclude that the dismissal was unfair. The context was that there was a final serious incident where patient safety was put at risk. It was clear that a warning would not be sufficient and that further training was not a viable alternative to dismissal. Central to the Tribunal's reasoning (at paragraph 81) was the idea that details of the training provided after the past incidents could have been given to the panel. However, that would have withheld from the panel that the training had been provided following an issue that now formed part of a repeated pattern. The fact that previous incidents had taken place was relevant material as part of the background information required by the respondent in deciding how to deal with the December 2013 PSI. The principal reason for the dismissal was the December 2013 conduct which was found to be a lack of clinical competence (paragraph 79). There was no "totting up" exercise. Further, the

previous incidents provided relevant background context and any suggestion that decisions bearing on service user safety should be made without reference to the full context was unsound and dangerous. For the disciplinary panel only to be told that the claimant had previously received training in relation to cardiac symptoms without seeing that this had occurred following a previous PSI that could be regarded as very similar would give a wholly inadequate and misleading picture against which to assess the risk of a recurrence of a failure to provide a safe service. The Tribunal had failed to explain adequately why matters that could properly be taken into account by the dismissing officer as bearing on patient safety could not be regarded as proper matters to include at the investigatory stage. It seemed that the tribunal was concerned with the fact that the previous incidents had not been subject to disciplinary action, but had failed to balance that fact against the importance of all matters that could have a bearing on the assessment of patient safety being put before the disciplinary hearing. Despite directing itself as to the range of reasonable responses, the Tribunal had slipped into substituting its assessment of what the investigation should exclude, rather than assessing whether the respondent could have reasonably concluded that previous incidents were relevant material to put before the disciplinary hearing in the light of the concern as to patient safety.

13. The decision of the Tribunal in this case was a novel one, the usual complaint being of inadequate investigation. Here the Tribunal concluded that too much information had been gathered and included. The Tribunal had failed to have regard to the differing roles of the investigating officer and the dismissing officer within an organisation such as that of the respondent. The role of the dismissing officer was to consider the material before her and as already pointed out, on that material dismissal was within the range of reasonable responses. She would have been unable to reach a

proper view without having all of the relevant material. The problem with the Tribunal's approach was that it treated the investigation as a separate hermetically sealed entity. The reasonableness of an investigation was relevant only where it resulted in an absence of proper information being put forward to the disciplinary stage. As the Court of Appeal had found in **Orr v Milton Keynes Council [2011] ICR 704** where an employer delegates the functions of investigation and decision on dismissal the person whose knowledge or state of mind is for the purpose of section 98(4) the state of mind of the employer will be the dismissing officer. Where the functions were split the investigating officer or officers simply had to do all that could reasonably be expected. In the present case that involved the provision of all relevant material to the disciplinary hearing.

14. On the second ground that the tribunal had erred in finding that the respondent did not follow a fair procedure by reason of lack of transparency to the claimant, Mr Lewis submitted that two errors had been made. First, that in its focus on the chronology of events, (ie that prior to the disciplinary process the claimant was given the impression that the personal consequences for her were as set out in the development plan) the tribunal had failed to consider, or at least give reasons for rejecting, the respondent's explanation for the timing of the claimant being informed that the PSI might be regarded as gross misconduct. Secondly, paragraph 84 of the judgment illustrated that the Tribunal had moved directly from procedural unfairness to overall unfairness. On the first point, the Tribunal had accepted that in instructing a PSI report followed by a development plan the respondent had been following its usual practice and that the purpose was to facilitate learning not apportion blame (paras 7 and 11). The trigger for the disciplinary investigation had been a concern raised by the claimant's line manager about the risk to patient safety in her going back on line. A review of the

evidence took place and a decision to escalate the matter to senior personnel resulted, which explained why the disciplinary process had not started earlier. The facts found did not support a conclusion that Mr Watson (who did not give evidence) had not been candid with the claimant. There was no finding about when he developed concerns about her returning on line and in any event, once he had those concerns he had to take them seriously in the interests of patient safety. In any event Watson was neither the investigating nor dismissing officer and therefore not strictly relevant on the issue of procedural unfairness The finding as to not specifically explaining to the claimant the nature of the fit and proper purpose test was on the Tribunal's own account a "minor factor" to which it was not apparent the claimant had had any regard.

15. The second and fundamental point was that the Tribunal had erred in assuming that procedural defect was sufficient to create an unfair dismissal The Tribunal had misunderstood the approach required by **Taylor v OCS Group Limited [2006] IRLR 613** in terms of the relationship between procedure and substance. In that case the Court of Appeal had made clear (at paragraph 48) that the Tribunal should consider the procedural issues together with the reason for dismissal as they have found it to be, because the two issues impact one each other. Only after considering both issues can the Tribunal decide, in a case where they have found a procedural defect, whether that defect is sufficiently serious to render an otherwise reasonable dismissal unfair. The respondent's submissions to the Tribunal on this point had had reflected the correct test (at paragraph 36 of the judgement). The case of **Sharkey v Lloyds Bank plc UKEAT/0005/15/SM** provided a recent reiteration of the correct approach by Langstaff P. Instead of following the correct approach the Tribunal in this case had moved directly from finding that there was a procedural failing (limited

to the lack of transparency already dealt with) to the conclusion that the dismissal was unfair, rather than considering whether, taking all other factors into account, the delay in informing the claimant of how her actions were being treated rendered the whole process unfair. The Tribunal ought to have noted what it found to be a procedural defect and then considered, amongst other matters, (i) that it had not resulted in prejudice to the claimant in terms of being able to address the allegations, (ii) that there had been a thorough investigation and a fair hearing and no lack of transparency during that process, (iii) that the serious nature of the concerns for patient safety was such that the only alternative to putting the claimant back on line was to investigate and act on those concerns, (iv) that there was a clear finding that there would be a risk to service users if the claimant was to return to her role and (v) that the respondent had provided an explanation for the timing in relation to commencing the disciplinary process. Once those factors were considered it was clear that the only procedural defect identified could have no bearing on the substantive decision about the fairness of the dismissal. It was so clear that this single defect could not alone result in an unfair dismissal that no reasonable Tribunal could have reached the same decision and so it was perverse.

16. On the third ground, Counsel submitted that it was common ground between the parties that the tribunal had not dealt with the argument on Polkey deduction. While the Reasons (at paragraph 89) referred to reduction under section 121 – 123 ERA 1996, in fact the Tribunal had focused only on reduction for contributory fault. There was no discussion at all of the likelihood of dismissal in any event or even whether there could have been a fair dismissal without reference to the previous incidents. While the Tribunal stated that it was applying **RSPCA v Cruden [1986] IRLR 83** that decision was concerned with reduction for contributory fault and in particular

whether there had been an error in not reducing the basic award to nil consistent with the contribution decision on the compensatory award. A **Polkey** deduction would not apply to the basic award. It was clear from the Tribunal's decision to apply the same reduction to both the basic and compensatory awards that it had given no consideration to **Polkey.** In the event that the respondent succeeded in the first ground of appeal, it would have followed that the claimant was fairly dismissed, thus no issue of compensation would arise. Even if the finding that it was procedurally unfair could stand, it was inevitable on the facts found that the claimant would have been dismissed and so the compensatory award would fall to be reduced by 100%.

The response on behalf of the claimant

17. As a preliminary matter Mr Smith for the claimant pointed out a rather unfortunate typing error towards the end of paragraph 81 of the Tribunal's judgment where the negative "not" was missing from the conclusion about making reference to past incidents. Clearly it should read *"…it was plainly unreasonable to make material reference to incidents in the past which had not been the subject of disciplinary procedure"*. Mr Lewis confirmed, helpfully, that he agreed that this was clearly an omission and that the sentence should read as suggested by Mr Smith.

18. The first focus of submissions on behalf of the claimant was that the EAT should always be slow to interfere with the detailed decision of an Employment Tribunal that had followed the requirement to identify the issues, make findings in fact, identify the relevant law and state how that law has been applied to those findings in order to decide the issues contained in Rule 62 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.** The judgement should be read as a

whole and where, as here, the respondent asks the EAT to find that the Tribunal's reasoning was perverse there is a very high hurdle to be overcome – **Salford Royal NHS Trust v Rolden [2010] ICR 1457**, per Elias LJ at para 51. Reference was made to some of the established authorities on the issue of the proper approach for an appellate Tribunal in cases of this type. In **Bowater v Northwest London Hospitals Trust [2011] EWCA Civ 63,** Longmore LJ had emphasised, in a conduct dismissal where the EAT had overturned the decision of the Tribunal as perverse and the Court of Appeal had reinstated the first instance decision, that it was important that the EAT pays proper respect to the decision of the Employment Tribunal to whom Parliament had entrusted the responsibility of making decisions in relation to the fairness of dismissal. Further, in **Brent London Borough Council v Fuller [2011] ICR 806** the Court of Appeal reiterated that an appellate body must be **"… on its guard against making the very same legal error as the tribunal stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the tribunal without committing error of law or reaching a perverse decision on that point."** The decision also supported the proposition that the judgement must be looked at in the round and that an overcritical analysis of specific passages would not necessarily result in success for an appellant. Appeals of fact should not be dressed up as legal points. Reference was made also to the EAT decision in **Arriva Trains Wales v Conant** UKEAT/0043/11/LA and the opinion of the Inner House in **Sneddon v Carr-Gomm Scotland Limited** [2012] IRLR 820. In the latter case, the court had emphasised (at para 18) that the question (in a conduct dismissal) whether in all the circumstances the reasonable employer would regard the investigations carried out as adequate is essentially one for the ET as a specialist first instance tribunal. Support could be found for the proposition that a generous interpretation ought to be given to a tribunal's reasoning rather than taking too technical a view of its decision in the UK Supreme Court decision in **Hewage v Grampian Health Board** [2013] SC (UKSC) 54 at para 26. Finally, in **BS v Dundee City Council** [2013] SC 254 the Inner House had reiterated that it was well established that an investigation may be relevant to fairness and that the opinion on such matters of an ET as a specialist first instance tribunal should be respected.

19. Responding specifically to the first ground of appeal, Mr Smith submitted that when the ET judgment was considered as a whole, it was clear that the tribunal had set out the relevant law (paras 8-17), and made appropriate reference to the relevant authorities at paras 80 – 84 as part of its discussion of the evidence and submissions on this issue. There are detailed findings in fact in the issue of the investigation and a record of the competing submissions on whether the investigation had been reasonable. It was clear from paragraph 66 that the tribunal was well aware that the inclusion of the previous incidents in the Management Report had been material to the outcome. Paragraph 82 set out the different stages of investigation and decision on dismissal and the Tribunal had not failed to distinguish between those different stages. The case of **Burchell** made clear that the reasonableness of the investigation and the issue of dismissal being within the range of reasonable responses were separate aspects of deciding whether a dismissal was unfair. There could be no doubt that an unreasonable investigation was sufficient to render a dismissal unfair. While it was accepted that there was on the face of it a logical difficulty between saying on the one hand that the information shouldn't have been before the decision maker but on the other that a dismissal based on that information was not unfair, the Tribunal had explained why it considered it unfair for the information in question to be before the decision maker and that was enough. It was the respondent who was being inconsistent in trying to support a decision not to discipline for similar misconduct in

the past while trying to argue that repetition of that conduct should be treated as gross misconduct.

20. The issue on this first ground was the restriction on information that should form part of an investigation. The Tribunal had considered both perspectives of employer and employee. While the previous PSIs were, Mr Smith conceded, relevant to the issue of how to approach the December 2013 incident, it could not be ignored that when those earlier incidents had occurred and training subsequently given, the claimant had not been told of any possible consequences for her of being involved in the same conduct again. Mr Smith agreed with Mr Lewis that the case of **Diosynth Ltd v Thomson** 2006 SLT 323 was not directly in point on the facts because in that case the employee had actually received a warning that had expired. However, he contended that the claimant in this case was in a stronger position than the claimant in **Diosynth.** If an expired warning cannot be a determining factor in a decision to dismiss then surely conduct not treated as a disciplinary matter at all could never be such a factor. If it is clear that the pattern is important, then the employer cannot rely on something never treated as misconduct. It was further submitted that the Court of Appeal decision in **Airbus (UK) Ltd v Webb** [2008] IRLR 309 could not be regarded as authority that the employer can take any and all information into account, there must be limits to that. While the respondent had emphasised their legitimate need to ensure public safety, they had found themselves in the current situation through their own processes. Had they included the earlier PSIs as disciplinary matters at the time, the Tribunal would have had no basis for regarding the investigation of this PSI as unfair. With something as complex as treatment of someone with a suspected heart attack, an employer had to give the employee fair notice of how any alleged misconduct would be dealt with. Mr Smith submitted that the Tribunal's conclusion on the

unreasonableness of the investigation was one it was entitled to reach on the evidence and that the reasons given were proportionate to the significance of the issue.

21. Turning to the second ground, again Mr Smith submitted that the judgment had to be read as a whole. The Tribunal had not only discussed the procedure adopted at paragraph 84. Reference was made to it in the findings in fact from pages 10 -16 and 20 – 27 (both part of para 7). The competing submissions on this issue had also been properly recorded and (at para 40) there was a specific record of the respondent's submission that any procedural defect in this case was not such as to make the dismissal unfair. The finding behind the statement about a lack of candour on the part of Mr Watson was at para 7(u) where the tribunal found that when the claimant had asked Joe Watson on 27 February (2014) when she would be going back on line, Mr Watson had said he would make enquiries. This was in the context of the respondent having given the claimant the impression that the consequences for her of the PSI were undertaking a development plan. The lack of transparency found by the tribunal was prevalent throughout the early period of the investigation. Mr Smith submitted that this was a case where the procedural defects had tainted the whole process of dismissal. The Tribunal had referred to the case of **Fuller v Lloyds Bank [**1991] IRLR 336 relied on by the respondent. Detailed reasons were given as to why it considered that the respondent's actions were not reasonable. Specific comment is made on the seniority and experience of those involved in the decision-making process. It was acknowledged that the Tribunal had not analysed the substance of the decision to dismiss as well as the procedure in deciding whether the procedural defect had resulted in an unfair dismissal but the case of **Fuller** was before them and the respondent had not really disputed that a serious procedural defect was enough to render the dismissal unfair. Account had to be taken of the conclusions expressed at

paras 85 – 87 of the judgment, which also related to the overall procedure, rather than the more limited focus of the respondent's argument on paragraph 84. The lack of transparency coupled with the unreasonable investigation taken together amounted to such a serious procedural breach that the tribunal was entitled to find the dismissal unfair as a result.

22. On the third ground, Mr Smith pointed out that if the respondent's arguments on the first two grounds were rejected, then there could never have been a fair dismissal of the claimant. It was therefore implicit in the judgment and reasonable to assume that, but for the unfairness of the investigation and the procedure there was no prospect that the claimant would have been dismissed. It was accepted that the tribunal had not explicitly addressed the **Polkey** deduction issue and that a reduction had been made under section 123. If it was considered necessary for **Polkey** to be mentioned specifically, a remit should be made back to the same Tribunal.

Discussion

23. This was a difficult case for the Tribunal. The stakes were high for both sides; the claimant's established career as a nurse was in jeopardy and the respondent has onerous responsibilities to operate a service that ensures, to the best of its ability, the safety of its users. There was no dispute between those who appeared before me that, as a specialist first instance finder of fact, the Tribunal is entitled to considerable respect. I acknowledge the tract of authorities relied on by Mr Smith and bear in mind that a generous interpretation of the Tribunal's reasoning is more appropriate than a technical or over critical analysis. However, this is not a case in which there is a general attack on the way the tribunal approached matters. There are three discrete

points taken by the respondent that must be considered against the backdrop of the other unchallenged material findings of the Tribunal. I will deal with each in turn.

24. The focus of the first ground of appeal involves consideration of the long established approach to misconduct dismissals set out in **British Homes Stores v Burchell 1980 ICR 303.** In that case the Tribunal was found to have fallen into error by becoming confused by failing to understand the two distinct tasks of **"….investigating whether the conclusion of the employers was a reasonable conclusion on the basis of the material which they had before them and whether, in assembling that material, the employers had carried out the sort of investigation which a reasonable employer could have regarded as sufficient"** (page 308, per Arnold J). It is noteworthy in my view that the focus of the investigation stage in **Burchell** and in the relevant subsequent authorities, has been on the **sufficiency** of the investigation. There are numerous examples of cases where it is alleged that an employer failed to conduct an adequate investigation and so caused unfairness such that a dismissal had to be regarded as unfair. A good recent example can be found in the case of **Sneddon v Carr-Gomm Scotland Ltd [2012] IRLR 820** where a limited investigation of the employee's alleged misconduct was found to be unreasonable by the Tribunal, which found that a reasonable employer would have taken time to go back to a potential witness and explore matters more fully. In allowing an appeal against the EAT decision to the contrary, the Inner House specifically referred to this branch of the **Burchell** as a test of " *sufficiency of investigation*", the exercise being to examine whether that investigation had been adequate when judged by the standards of the reasonable employer (para 15, per Lord Eassie giving the opinion of the court). Against that background it is noteworthy that in the present case the Tribunal characterised this stage of the **Burchell** test as being whether in assembling the material in question management had carried out "*…a reasonable investigation*"

(ET para 82) as opposed to an investigation that could be regarded as sufficient, although it had recognised (at para 81) that the context of an argument about investigation is usually that it is too narrow. Mr Lewis submitted that in fact it was novel to find that an investigation was unreasonable on the basis that it gathered too much information rather than too little and I am unaware of any examples where including too much information in an investigation has been said to fall foul of the **Burchell** test and none was put before me at the hearing. While I do not rule out that there may be cases where an overzealous or otherwise unfair investigative process could fall foul of the test, the starting point is that the **Burchell** test insofar as it relates to the investigative stage is directed at the sufficiency of that investigation. In this case there is no suggestion that the investigation was not comprehensive and thorough; the complaint is that the report produced at the end of it contained too much detail of previous incidents for which the claimant had not been disciplined.

25. Separately, it is in my view appropriate to distinguish between including information in an investigation report on the one hand and relying on past conduct in determining a dismissal on the other. It is the latter issue that gave rise to the argument in both **Diosynth Ltd v Thomson 2006 SLT 323** and **Airbus (UK) Ltd v Webb [2008] IRLR 309.** In **Diosynth,** an expired written warning had been critical in the employer's decision to dismiss the employee. It is clear from the opinion of the Inner House that it was the false expectation created by the expiry of the time limit that rendered it unfair. The court expressed matters (at para 24) as follows ;-

> **"…it was a contravention of the principle of fairness for an employer to put a time limit on a warning and then take it into account as a determining factor in a dismissal of an employee for a misdemeanour after the expiry date. An employee had a reasonable expectation that the employer meant what he said."**

In **Airbus,** the Court of Appeal distinguished **Diosynth** on the basis that the expired written warning had been relied on as the principal reason for the dismissal. In **Airbus** the fact of the previous misconduct, the fact that a final warning had been given in respect of it and the fact that the final warning had expired at the date of the later misconduct were all held to be circumstances relevant to whether the employer acted reasonably or unreasonably in dismissing the employee. One of the ways in which Mummery LJ reconciled the perceived difference between the approach of the Inner House in Scotland and the English Court of Appeal was to point out that ;-

"… Diosynth is not authority for the general proposition of law that the misconduct, in respect of which a final warning was given, but has expired, can never be taken into account by the employer when deciding to dismiss an employee, or by a tribunal when deciding whether that employer has acted reasonably or unreasonably. It did not decide that the earlier misconduct and the expired warning are irrelevant circumstances of the case or are irrelevant to the equity and substantial merits of the case. It did not decide that the dismissal is necessarily unfair if account is taken of the expired warning. That would be difficult to reconcile with the flexible approach indicated by the broad terms of s.98(4)".

In the present case, the consequence of the previous PSIs having been dealt with in the way that they were was that the claimant had no expectation either way in terms of the details of them being relevant or irrelevant to any future investigation into her conduct.

26. The passages cited above illustrate that the issue of fairness to an employee in taking into account (either as a principal reason or otherwise) past misconduct **in the decision to dismiss** is a contentious area and that the specific facts of each case will require close examination to see whether the employer acted unreasonably. The crucial difference in this case is that the claimant does not contend that the Tribunal's decision that the dismissal was fair on the basis of the material before the dismissing officer was wrong or contained an error in reasoning. There is no cross appeal challenging the conclusion (at paragraph 82) that **"… on the material before her, which included the information on the previous incidents, given the potential risk to patient safety, Donna O'Boyle's decision to dismiss was within the band of reasonable responses".** Mr Smith clarified, for the avoidance of any doubt that it was conceded on behalf of the

claimant that the previous incidents were relevant to the issue of how to approach the December 2013 conduct and that the conclusion of the Tribunal that the dismissal was, on that relevant material, within the band of reasonable responses, not challenged. It remained the claimant's position that the Tribunal was correct to conclude that the dismissal was unfair because the detail of the previous incidents should not have been included in the report following the investigation. The emphasis was on the treatment of those earlier incidents at the time as matters that could be resolved by training and development, with the claimant not being put on notice that they could subsequently be treated as disciplinary issues.

27. Having considered matters carefully, I have reached the view that Mr Lewis is correct in contending that it was both inconsistent and perverse for the Tribunal to conclude that material acknowledged as relevant to the investigation should have either been excluded from the report sent to the dismissing officer or redacted such that the details of previous PSIs were removed, while at the same time finding that a dismissal based on that information was within the band of reasonable responses. Exclusion of the relevant material by the investigating officer would have been a serious omission given the background of risks to patient safety. It was for the dismissing officer to decide how to treat that background information and to decide whether it would be fair to rely on it, to any extent, in deciding whether to dismiss the claimant. Mr Smith argued that if it is clear that the pattern is important, then the employer cannot rely on something never treated as misconduct. That argument ignores the difference between the investigative stage and the decision to dismiss. The investigating officer was not relying on the previous incidents with a view to supporting a decision to dismiss. The purpose of the investigation was to gather all relevant material so that the officer making the decision to dismiss could decide all factors pertinent to the issue of

dismissal. Whether to rely to any extent on past conduct was a matter for the dismissing officer who required to make that decision based on the material before her. In the absence of any challenge to the reasonableness of her decision and the extent to which she relied on the information provided about past incidents, it is irrational to nonetheless find the dismissal to be unfair due to the comprehensive nature of the material with which she was provided. In other words, unless it could be said that the previous incidents should never have been a factor in the decision to dismiss, there was no rational basis to exclude details of them from the investigation report. As a subsidiary point, the Tribunal's reasoning on this first issue is a little unclear. While the decision illustrates obvious unease with the inclusion of previous incidents in the investigative report because the claimant had not been disciplined for them, such unease is in my view an insufficient basis on which to base a decision that an investigation was unfair in the **Burchell** sense. The Tribunal fails to articulate clearly why the details of previous incidents constituting relevant information for the dismissing office to deal with as she saw fit should have been withheld from her.

28. I conclude that, it having been conceded that the material was relevant to the investigation and there being no challenge to a decision to dismiss that placed reliance on that material, the Tribunal erred in concluding that the inclusion of that material in the report of itself rendered the dismissal unfair. That was not a conclusion it was entitled to reach on the unchallenged findings in fact. I will address the other two grounds of appeal before explaining the impact of my decision on disposal.

29. The second ground of appeal concerns the issue of whether procedural defects can be separated out from the substance of a decision to dismiss or whether both must be considered before deciding whether a procedural defect is sufficiently serious to

render an otherwise reasonable dismissal unfair. The respondent contends (i) that the Tribunal failed to consider properly the respondent's explanation for the timing of the claimant being told that the latest PSI might be regarded as gross misconduct and (ii) that the Tribunal leapt straight from finding a procedural irregularity to a conclusion that the dismissal was separately unfair on that basis (para 84). I consider that there is no real substance in the first of these points. The Tribunal had the respondent's explanation before it but was persuaded that more could have been done to convey earlier to the claimant how the later PSI was being regarded. While it is perhaps regrettable that the Tribunal went so far as to find someone who had not given evidence (Mr Watson) to have lacked candour when there was some dubiety about the precise chronology of events, I am unable to conclude that the view reached was not one that the Tribunal was entitled to reach on the evidence led. The second point is far more persuasive and I have concluded that the tribunal did err in law by failing to explore the context of the procedural defect found and to move straight from identifying a procedural defect to a finding of unfair dismissal. In fairness to the Tribunal it does not appear that the decision in **Taylor v OCS Group Limited [2006] IRLR 613** was cited to it. The EAT decision in **Fuller v Lloyds Bank plc [1991] IRLR 336** was before the Tribunal. But that case goes not further than to clarify that a procedural defect can give rise to an unfair dismissal where either the defect is of such seriousness that the procedure itself was unfair or where the results of the defect taken overall were unfair, Knox J making clear that **"…the actual defect has, however, to be analysed in the context of what has occurred…"** The subsequent decision in **Taylor** dealt with what was perceived to be a conflict in authority about the extent to which subsequent fair procedure could cure earlier defects. In addressing that the Court of Appeal clarified the relationship between procedural fairness and the substantive reason for the dismissal in the following way ;-

"…. It may appear that we are suggesting that ET's should consider procedural fairness separately from other issues arising. We are not:, indeed it is trite law that s.98(4) requires the ET to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal as they have found it to be. The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. "

It seems to me that the danger of treating procedural unfairness separately as the Tribunal sought to do in this case is that it can result in a failure to assess the gravity of the procedural defect. If there is no real relationship between an unfair step in the procedure and the ultimate outcome, the impact of that procedural defect may well be far less than where an absence of any proper procedure led to substantive unfairness. As Langstaff P put it in **Sharkey v Lloyds Bank plc UKEATS/0005/15** **"..procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.** The problem with the Tribunal's approach in this case is that it regarded the inclusion of relevant background material in the investigative report and the concern that the claimant had not been told early enough that the December 2013 PSI may be regarded as gross misconduct as sufficient to render the dismissal unfair without any analysis of the seriousness or otherwise of the perceived lack of transparency in terms of prejudice to the claimant. Separation of the procedural argument from the substantive reason for dismissal resulted in the Tribunal omitting to consider its own finding that the decision to dismiss was within the band of reasonable responses in deciding whether the identified procedural defects were sufficiently serious as to render the whole process unfair. The Tribunal correctly identified the potential risk to patient safety as a central issue that resulted in the decision to dismiss being reasonable having regard to the available material on the PSIs in which the claimant had been involved. This is not a case in which the consequence of a defective procedure denied a claimant of putting important mitigatory material before the dismissing officer or where an allegation of bias in the procedure has been made out. In failing to address the issue of procedural unfairness in the context of everything that occurred, the tribunal erred. Further, a conclusion that an isolated procedural flaw during a period prior to the investigation that led to dismissal was sufficient to render the dismissal unfair so ignored the Tribunal's own conclusions on other material issues that it was a perverse conclusion. Accordingly, the respondent's second ground of appeal also succeeds.

30. In light of the decision I have reached on the first two grounds, the third ground of appeal becomes academic. It is probably sufficient to record that, while not making any formal concession, Mr Smith acknowledged that the Tribunal had not addressed directly the issue of a **Polkey** deduction. In the event that I had not been with the respondent on the first two grounds of appeal, I would have remitted the issue of conducting the necessary exercise on the likelihood of dismissal back to the Tribunal for consideration. I accept Mr Lewis' submission that the Tribunal misled itself on this aspect of the case by reference to the position on reduction for contributory fault.

Disposal

31. The general conclusion that I have reached is that, while the Tribunal approached the difficult task it faced with great diligence and in a comprehensive manner, its failure to appreciate the significance of the now unchallenged finding that dismissal of the claimant was a reasonable outcome on the basis of the material available to the respondent, led to a perverse decision in the ways identified in the first two grounds of appeal such that its decision cannot stand. Both representatives addressed me on alternative disposals depending on which if any of the grounds of appeal succeeded. Mr Smith suggested that even if the respondent succeeded in the first two grounds of

appeal, I should remit the case to a freshly constituted Tribunal for a full re-hearing. His argument was essentially that a successful claimant should not lose out completely as a result of errors of law on the part of the Tribunal. Mr Lewis contended that if there was to be any remit, it would have to be restricted to the issues on which the appeal had succeeded, otherwise the claimant would have a second opportunity to challenge the fairness of the decision to dismiss, the issue on which she had litigated unsuccessfully and not sought to challenge by way of cross appeal. His primary submission was that no remit would be required if his first and second grounds of appeal succeeded, but that if the second ground did not succeed he could see that a remit might be required.

32. As I have decided that Tribunal's decision was inconsistent and perverse on the matters raised in the first two grounds of appeal, namely those relevant to the unfair dismissal outcome, the issue is whether there is more than one possible outcome that flows from my decision, in which case I must remit, or whether, on proper application of the law to the findings in fact there is only one conclusion possible, in which case I can substitute the decision with that inevitable outcome. In deciding this issue I must return again to the unchallenged finding that the decision to dismiss was a reasonable one on the basis of the available material. Having explained that the decision on unfairness of the investigation was inconsistent with that finding and also perverse, I agree with Mr Lewis that the inevitable outcome is to substitute the finding of unfair dismissal with a finding that it was fair and that Mrs Pillar's claim fails. No issue of a remit then arises given the decision I have reached on the second ground of appeal and the issue of whether the claimant would have been dismissed in any event (the third ground) becomes irrelevant.

33. I am grateful to both representatives for their helpful submissions at the appeal hearing in this sensitive case.