



## EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Cahill  
**Respondent:** Abertawe Bro Morgannwg University Local Health Board  
**Heard at:** Cardiff **On:** 2, 3 and 4 August 2017  
**Before:** Employment Judge S Davies

**Representation:**  
**Claimant:** Mr Nick Cahill (Husband)  
**Respondent:** Mr Jonathan Walters (Counsel)

## JUDGMENT

It is the judgment of the Employment Judge sitting alone that the claim of unfair dismissal is dismissed.

## REASONS

1. Oral judgment with reasons was given at the hearing. These written reasons are provided at the request of the claimant.
2. The claim was for unfair dismissal and the issues determined were:
  - a. whether the Respondent had established a potentially fair reason for dismissal - they asserted conduct;
  - b. whether the 3-stage test in *BHS –v- Burchell* was satisfied, in particular whether the Respondent had reasonable grounds for belief in the Claimant's misconduct, particularly in light of the unreliability of the Respondent's computerised data (Pweb);

- c. whether the decision to dismiss was based on a misinterpretation of what the Claimant said when explaining her position;
- d. whether there was inconsistency of treatment between the Claimant and other nurses who were suspended around the same time for similar matters;
- e. whether alleged bias by Joanne Thomas, the Claimant's Ward Sister, and the manner of Ms Thomas giving evidence to the disciplinary hearing had rendered the dismissal unfair;
- f. whether there was a breach of process due to Mr Lee Joseph's involvement at the disciplinary stage as a Technical Adviser to the Investigating Officer; and
- g. whether the dismissal was in the range of reasonable responses.

### **Hearing**

- 3. At the outset of the hearing I ascertained and confirmed the issues between the parties.
- 4. The parties presented two bundles, a main bundle and a supplementary one, in total in excess of 600 pages. In light of the length of the bundles, I confirmed with the parties the essential reading that I needed to complete prior to hearing evidence.
- 5. I heard evidence from the Claimant herself and on behalf of the Respondent from Mr Joseph, Lead Serious Incident Investigator, Ms Williams, acting Senior Matron for Medicine, Ms Dowling, interim Deputy Director of Nursing and Patient Experience, Mr Holt, Associate Head of HR and Ms Warner, Unit Nurse Director Primary Community Services.
- 6. The Claimant also submitted a written witness statement from Professor Harold Thimbleby, as well as a supplementary statement on day 1 and then a further supplementary statement on day 2 of the hearing. Professor Thimbleby provided expert evidence as to the unreliability of the Respondent's computerised data. The Professor did not attend the Tribunal to give live evidence, following an indication from Mr Walters that there would likely be no questions for him. The Respondent's position in submissions was that the Professor's expertise was not required in respect of the evidence they relied upon when dismissing the Claimant.
- 7. At the conclusion of the live evidence I heard short oral submissions from both sides; the Respondent gave their submissions first, giving the Claimant the opportunity to respond.

## Factual background

8. The Claimant worked as a nurse at the Princess of Wales Hospital in Bridgend from 2009 until her dismissal in July 2016. By the time of her dismissal the Claimant had been on paid suspension for more than 3 years whilst a criminal investigation and prosecution against her and another nurse had been underway.
9. The Claimant was acquitted of criminal charges at Cardiff Crown Court in October 2015; the trial collapsed due to the unreliability of prosecution evidence in the form of the computerised data. Professor Thimbleby was an expert witness to the criminal trial.
10. The criminal investigation was initiated following POVA investigations sparked by concerns raised about a nurse's glucose monitoring of a patient during the night shift. The nurse in question was not the Claimant. The concerns led to a POVA investigation jointly commissioned by the Respondent, South Wales Police and the Local Authority. Mr Joseph was commissioned to carry out an investigation in 2013. The scope of the investigation was to determine if and when the other nurse had made entries in patient notes that were not supported by recorded test results within the electronic database and further whether any patient had suffered harm. The findings of this investigation were shared with the POVA partners.
11. A second POVA investigation was commissioned subsequently with regard to the Claimant. The scope was the same as the first POVA investigation, as was the time frame it covered (January 2012 to February 2013).
12. Following South Wales Police's identification of other test results not being supported by data, the Respondent commissioned a governance assurance review (GAR) to re-examine the POVA investigation results. The review looked at all documented blood and glucose results.
13. Mr Joseph managed the GAR; he sets out his methodology for doing so at paragraph 13 of his witness statement. In the process, Mr Joseph completed spread sheets to record data collected relating to each nurse identifying omissions and incidences of bad practice. A total of 73 nurses were identified. Nicola Williams, Assistant Head of Nursing for Quality and Safety determined that any nurse with 6 or more omissions should be suspended. This resulted in 16 nurses being suspended including the Claimant.

14. Following the conclusion of the GAR, towards the end of 2014, the police initiated their own investigation analysing the Pweb data. Police action resulted in 5 nurses being prosecuted for wilful neglect, 3 pleaded guilty and subsequently resigned from the Respondent and 2, including the Claimant, pleaded not guilty.
15. At the request of the police the Respondent suspended their internal disciplinary proceedings which recommenced once the criminal trial against the Claimant collapsed. The Respondent informed the Claimant that her disciplinary investigation would proceed in October 2015 (the letter is at page 70). By letter of 23 November 2015, page 71, the Claimant was informed of the allegations against her:
  - 1) on a number of occasions, you may have documented blood glucose tests that had not been undertaken by yourself;
  - 2) as a result of the above you failed to check and maintain contemporaneous records to the standard expected of a qualified nurse;
  - 3) as a consequence of the above you could have exposed patients to a risk of harm and their care may have been adversely affected.
16. At the same time the Claimant was informed that Ms Williams had been appointed as Investigation Officer. Ms Williams sets out the methodology for her investigation at paragraphs 9 and 10 of her witness statement. In evidence, she confirmed that she used the GAR findings to identify patients about whose care, concerns were raised. Ms Williams was provided with 5 sets of patient records with blood glucose discrepancies attributed to the Claimant; the records provided were of medical, nursing and other health care professionals.
17. Ms Williams met with the Claimant and her Trade Union Representative on 17 March 2016. As is evident from the notes of the meeting, as well as the Claimant's own evidence, the Claimant always accepted that she had acted in the way that was alleged against her. The Claimant never sought to deny the allegations. Ms Williams interviewed numerous other staff members during March and April, including individuals suggested by the Claimant. Her report of 9 May 2016 starts at page 74 of the bundle.
18. Ms Dowling presided over the Disciplinary Appeal Panel in respect of 13 disciplinary hearings for nurses who had been suspended and remained in employment. The Claimant's hearing was held on 16 June 2016 and she was accompanied by her Trade Union Representative. The Claimant accepted she carried out the acts alleged and explained her actions as being due to the culture prevalent on the ward and staffing ratios. The Claimant referred to her raising issues with her Ward Sister in hand written

- notes, at page 123 and 124, in which she raises concerns about night shifts where she was the only IV trained nurse.
19. There was an issue with regard to the Ward Sister, Joanne Thomas's involvement in the investigation. She was reluctant to be a witness at the Claimant's disciplinary due to her (undisclosed) health condition and a wish to avoid stress. There were delays in Ms Williams being able to interview Ms Thomas and she was finally able to do so on 14 June 2016, only 2 days prior to the Claimant's disciplinary hearing. Notes were provided of this meeting to the Claimant shortly before the disciplinary hearing took place.
  20. Ms Dowling, in consultation with the Claimant's Trade Union Representative and on the basis of Occupational Health advice, made special arrangements for Ms Thomas's attendance and participation at the disciplinary. The Claimant was absent during Ms Thomas's questioning but was permitted time to formulate questions for the Trade Union Representative to put to her. After questioning took place, the Claimant and her Representative were given time for a de-brief.
  21. Following conclusion of the disciplinary hearing Ms Dowling went on to make enquiries about the ward culture and level of staffing on the ward but concluded that this was not sufficient explanation for the Claimant's actions; this is noted at page 291 to 292.
  22. The Claimant's dismissal letter dated 20 July 2016 is at page 271 to 274. It sets out the reasons for dismissal and the finding of gross misconduct. All 3 allegations were upheld. The first, on the basis the Claimant accepted she had documented tests that had been undertaken by others. The second, on the basis that the evidence showed there were omissions in record keeping, the Claimant had not recorded monitoring results on a number of vulnerable patients, she had a responsibility to monitor patients in question and there was no documented evidence that this had occurred to required standards. As to the third, the Claimant had failed to demonstrate she had adequately monitored the effect of high risk medication on patients identified as vulnerable over many hours. Ms Dowling found also that the Claimant demonstrated that she had the relevant experience, knowledge and skills to perform the monitoring tasks and was clear about her accountability and responsibility for patients.
  23. Ms Dowling considered the Claimant's mitigation, she noted the effect of the police investigation and the suspension on the Claimant, she also noted that colleagues had referred to her as a caring and capable nurse. Ms Dowling was however concerned that the Claimant did not appear to have fully reflected on the risk of harm and could not demonstrate she had accessed appropriate CPD learning opportunities during her suspension.

24. Ms Dowling said in evidence that the panel looked at the lack of a clear protocol for the frequency of glucose monitoring and the bed to nurse ratio on the ward at night, but details of how those factors were weighed is absent from the dismissal letter. However it is set out in the management case presented to the appeal.
25. Although complaints had been received from patients and families regarding standards of care, no patient had come to actual harm. The decision to dismiss was based on the risk of harm, considering that insulin was administered to the patients intravenously and that improper monitoring of the effects of that drug on blood glucose levels could have terminally serious implications.
26. The Claimant exercised her right to an appeal to Ms Warner and was accompanied by her Trade Union Representative at the Appeal Hearing on 30 August 2016. Ms Dowling was in attendance at the appeal and prepared a statement setting out the reasons for the disciplinary panel's decision to dismiss at page 287 to 293. Ms Dowling provided clarity on several points; as to the protocol for blood glucose monitoring, even if she accepted that this should occur every 2 hours rather than every hour, the gaps identified were significantly in excess of 2 hourly; she reviewed the staff ratios and mix and noted, at page 291, that this did not provide an adequate explanation for the Claimant's actions; as for the culture of the ward, the Respondent accepted that this was a factor in all of the disciplinary cases, but Ms Dowling concluded that this was not sufficient to mitigate the Claimant's actions and personal accountability. Ms Dowling explained that she considered alternative sanctions to dismissal including a final written warning, but determined that it was not appropriate because of the severity and number of omissions, the vulnerability of the patients, the degree of risk with regard to the drug administered and the lack of evidence of insight.
27. The appeal outcome letter dated 1 September 2016, page 321 to 326, upholds the decision to dismiss. Ms Warner expressed concerns about lack of insight shown by the Claimant, for example producing patient identifiable medical records during the course of the appeal. Further Ms Warner concluded that the CPD the Claimant carried out during her suspension did not have direct relevance to the situation, she found it surprising it did not demonstrate she had taken the opportunity for reflection on the particular circumstances that had led to suspension. Ms Warner was satisfied that the Claimant had not left patients without care for 6 to 10 hours, but rather there was no record of blood glucose monitoring during that period (page 324).

28. The Claimant sought to introduce the patient identifiable records of skin bundles and fluid balance charts to demonstrate that she had not neglected patients for extended periods of time. It appears she had not fully understood that the allegation related to record keeping and the conclusions that could be drawn from the failure to keep accurate contemporaneous records.
29. Ms Warner was satisfied that the issues regarding Ms Thomas's participation at the disciplinary stage had not prejudiced the Claimant's position.

## Law

30. Section 98 of the Employment Rights Act 1996 sets out the potentially fair reasons for dismissal, which include conduct.
31. In a conduct case I must consider the case of ***British Home Stores –v- Burchell*** which has a 3-stage test for the fairness of the conduct dismissal. Did the Respondent have a genuine belief the Claimant was guilty of misconduct at the time of the dismissal? Was that belief based on reasonable grounds at the time of dismissal? And at the time the Respondent formed that belief on the basis of those grounds, had it carried out as much investigation as was reasonable in the circumstances?
32. When considering the investigation there is a band of reasonable responses as to the approach taken. Similarly, when I consider the level of sanction there is also a band of reasonable responses. I need to be careful that I do not substitute my own view as to what action I think should have been taken. I am assessing the reasonableness of the Respondent's actions.

## Conclusion

33. Before I set out my conclusions, I wish to note that the last few years must have been an incredibly difficult time for the Claimant facing a criminal investigation, prosecution and adverse media attention. I also note that the Claimant was entirely direct when she was questioned and never sought to deny the allegations made against her.
34. The Claimant explained to me that she felt her approach was misunderstood; that her attempts to explain contributing factors to her actions have been interpreted as her seeking to pass the blame to others. She also expressed her concern that she has been viewed as not caring or adequately reflecting on her actions; she wished to impress on me that she had. I explained that my function was to assess the reasonableness of

what the Respondent had done. My function does not encompass reassessing the allegations made against the Claimant.

35. The Claimant referred me to a number of documents which I read, including the NMC outcome letter at page 375. I read this letter in full, but note that it relates to fitness to practice and so different tests apply from those that apply in a dismissal situation. I was also referred to the report by Angela Hopkins and I read the summary at the start of that report which highlighted lessons to be learnt relating to all investigations into the blood glucose testing at the Respondent.
36. I also took into account the 3 witness statements provided by Professor Thimbleby. His expert evidence was clearly of paramount importance when it came to the criminal trial. It demonstrated the unreliability of the computer records and without that evidence the criminal trial collapsed. The position however is different when it comes to dismissal and the internal disciplinary. Mr Cahill stressed on a number of occasions that without the data from the Pweb and the GAR that the Claimant would not have found herself in the situation of being investigated or dismissed. Ms Williams accepted in evidence that data from the spreadsheets created from Pweb was used to identify particular patients where further investigation was required, but I am satisfied that the evidence that formed the basis for the Claimant's dismissal was manual case records. The Respondent did not rely on computerised data / Pweb to form the evidential basis for dismissal. Since computerised data was not used, Professor Thimbleby's expertise and commentary in his 3 witness statements was not of direct relevance to my considerations.
37. The claimant referred to potential bias with regards to Ms Thomas. There was an unfortunate background to their relationship in two respects, the Claimant raised a successful grievance against Ms Thomas for refusal to permit time off around the time of her late father's passing. Further the Claimant had raised concerns about the levels of IV trained staff on the night shift on two occasions (page 123 and 124). It is understandable that in light of this background, the Claimant had reservations about Ms Thomas' refusal to provide evidence in her presence at the disciplinary. That scenario coupled with the background outlined above would likely raise suspicions or questions in somebody's mind. The situation may have been compounded by the late provision of the notes of Ms Williams' investigatory meeting with Ms Thomas. I am however satisfied that the arrangements made for Ms Thomas's participation in the disciplinary were agreed with the Claimant's Trade Union Representative. I acknowledge that the manner of her participation was not viewed positively by the Claimant, but she agreed to it and overall no unfairness was caused.



38. As for the fact that Ms Thomas was required to provide some initial information or records with regard to the Claimant at the initial stages of investigation, I do not consider this contributed to unfairness. Ms Thomas was not responsible for the investigation report itself and she did not make the decision at disciplinary or appeal outcome.
39. So, turning to my finding as to the reason for dismissal, the Claimant has not suggested an ulterior motive against her with regard to dismissal and she accepted she carried out the acts alleged. I conclude therefore that the Respondent has established dismissal for the potentially fair reason of conduct in respect of the 3 allegations set out above.
40. Turning now to the test in **BHS –v- Burchell** the Claimant did not dispute that Ms Dowling’s belief in the 3 allegations was genuine. I accept Ms Dowling’s evidence that she had a genuine belief in those 3 allegations being well founded and that this was a reasonably held belief, particularly in light of the Claimant’s acceptance of the factual allegations made against her. Ms Dowling’s perception of the Claimant’s lack of insight and reflection was a permissible view to reach based on the allegations upheld and the Claimant’s responses in the disciplinary. For example, when Ms Dowling asked the Claimant what she had learned and what she would change in her practice, her answer was to the effect ‘not to do what everybody else does’, which did not assure Ms Dowling that the Claimant would learn and/or change (page 290). It was not my understanding of the evidence that Ms Dowling viewed the Claimant as uncaring, rather that she viewed her as failing to appreciate the enormity of the potential risk to patients.
41. As for the investigation, the Claimant accepted throughout the hearing that the investigation performed by Ms Williams was thorough. I agree. Ms Williams report is detailed, sets out in appendices all the documents she took into account, which include documents presented on behalf of the Claimant such as her handwritten notes to Ms Thomas. There can be no question that the investigation was reasonable in all the circumstances.
42. The Claimant did not dispute the fairness of the procedure adopted by the Respondent overall.
43. A point was raised with regard to Mr Joseph’s involvement, the nature of this issue was not made fully clear although there appeared to be an assertion that there was unfairness because of his attendance at the disciplinary stage when he had been responsible for the initial investigations involving Pweb data. I am satisfied that Mr Joseph’s involvement as a Technical Adviser to Ms Williams and his input to the disciplinary process did not create unfairness or prejudice to the Claimant. Ms Williams was the Investigating Officer and the report she produced

was not based on Pweb data. Mr Joseph was questioned about differences between the witness statement he provided for the Tribunal hearing and the witness statement he provided the NMC fitness to practice process. Data provided varied between the two witness statements and Mr Joseph was unable to explain why. That said, any inconsistency or error in Mr Joseph's accounts does not affect the basis on which the Claimant was investigated and the allegations that were upheld in light of her admissions.

44. The Claimant suggested at appeal stage that the decision to dismiss her was too harsh; she felt she had been misunderstood and her mitigation had not properly been considered. She did not go so far as to say that dismissal was an inappropriate and/or unreasonable reaction to the allegations in question. The risk of harm identified by the disciplinary and appeal officers was exceptionally serious and in all the circumstances dismissal cannot be considered to be outside the range of reasonable responses.
45. As for whether an alternative sanction would have been appropriate Ms Dowling took into account the factors already mentioned above and set out at page 291 when considering that dismissal was the appropriate outcome.
46. I was referred to whether there was an inconsistency in treatment between the Claimant and the other nurses disciplined by the same disciplinary panel chaired by Ms Dowling. Of the 2 nurses who faced criminal charges and who were acquitted only the Claimant was dismissed. I accept the submission made on behalf of the Respondent that the composition of the disciplinary panel (the same throughout) supports the likelihood of consistency in approach. The fact that the full range of sanctions were applied to this group, supports the proposition that each case was looked at on the basis of its own particular circumstances and mitigation. The evidence of Ms Dowling and Mr Holt was not challenged, they found that the standard of care by the Claimant was particularly poor. I refer to paragraphs 13 to 16 of Mr Holt's statement where he considered the Claimant's case was very different to other cases in that there were big gaps in record keeping and the Claimant was unable to provide reasons, instead she made reference to the use of handover notes which were not part of the official patient records. Mr Holt's evidence was that she was the only nurse with gaps questioning whether care was given to this extent. He indicated that the culture and general practice within the ward featured heavily in all disciplinary cases but the panel felt that the Claimant in particular had lacked insight as to potential for harm.
47. Finally, the Claimant referred me to page 291 where Ms Dowling refers to the high level of external scrutiny of the Respondent about the

investigations. I was satisfied reading the whole of the document, that this was only one factor taken into account when dismissing the Claimant and does not indicate or demonstrate unfairness overall. The predominant reasons for dismissal are set out above. In summary, the claim is dismissed.

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Employment Judge S Davies  
Dated: 29 August 2017

JUDGMENT SENT TO THE PARTIES ON

11 September 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS