



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103168/2018**

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**Held in Aberdeen on 11, 12 & 13 March 2019**

**Employment Judge: Mel Sangster**

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**Miss L Stoneman**

**Claimant  
Represented by:  
Mr F Lefevre -  
Solicitor**

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**Grampian Health Board**

**Respondent  
Represented by:  
Mr K McGuire -  
Advocate**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the claims of unfair dismissal and wrongful dismissal do not succeed and are dismissed.

### **REASONS**

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#### **Introduction**

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1. The claimant presented complaints of unfair dismissal and wrongful dismissal. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was gross misconduct, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating misconduct as sufficient reason for dismissal and had acted within the band of reasonable responses.
2. The respondent led evidence from Mandy Young (**MY**), Nurse Manager, Julie Fletcher (**JF**), Transitions General Manager, Cameron Matthew (**CM**), Divisional General Manager and Gary Mortimer (**GM**), Director of Operational

Delivery. The claimant gave evidence on her own behalf. A joint set of productions was lodged.

**Issues to be determined**

3. Was the reason for the claimant's dismissal a potentially fair reason, within the  
5 meaning of s98(1) or (2) of the Employment Rights Act 1996 (the **ERA**)?
4. Was the claimant's dismissal for that reason fair in all the circumstances, in terms of s98(4) ERA?
5. If the dismissal was unfair, what, if any, compensation should be awarded taking into account:
- 10 a. whether, if procedurally unfair, the claimant would have been dismissed in any event (*Polkey v AE Dayton Services Limited [1987] 3 All ER 974*); and
- b. whether, by her conduct, the claimant had contributed to her dismissal.
6. Was the claimant wrongfully dismissed?

15 **Findings in Fact**

7. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
8. The claimant was employed by the respondent as a staff nurse. She started nurse training in 1988 and qualified in 1991. She was employed by the  
20 respondent from the time she qualified and latterly worked at Cornhill Hospital in Aberdeen.
9. On 28 February 2017 the respondent commenced an investigation into an allegation that the claimant had been charged with and convicted of a criminal offence outside work, which may have impacted on her ability to perform her  
25 contract of employment, and which she had not informed the respondent of. The investigation was conducted by Senior Charge Nurse Alistair Crouch (**AC**), who managed Fraser Ward, where the claimant worked. The claimant subsequently received a final written warning in relation to this.

10. On 23 May 2017, at around 10am, Shona Sinkins (**SS**), Directorate Nurse Manager for Specialisms Directorate, received a telephone call from AC. He alleged that, at around 9am, the claimant had tripped him up resulting in him falling to the floor and injuring his back, causing severe back pain. AC required to leave the workplace as a result. He remained absence from work as a result of his injury for eight days. He was then on annual leave for one week, but would not have been in a position to return to work had that not been scheduled. He was prescribed medication for his symptoms.
11. AC informed SS that a patient (**PT**) had seen the what happened and had reported to AC that the claimant had deliberately tripped him. At around 12.30pm SS interviewed PT. He explained where he was standing when the incident occurred and that he had a good view of what happened as a result. PT indicated that the claimant had deliberately tripped AC up, by stepping into his way and tripping him with her right foot. He indicated that *'I felt it was quite deliberate.'* He participated in a role play to demonstrate to SS what happened. Notes were prepared of the meeting which PT signed.
12. SS met with the claimant immediately thereafter. The claimant indicated that AC had caught her right foot and tripped as a result, but she stated that it was an accident. When asked what happened after AC tripped the claimant stated *'I was shocked. I asked are you alright. I tried to help him up.'*
13. SS asked MY, Iain Cowie, Liaison Nurse and Angharad Thatcher, HR Officer to conduct a formal investigation into the incident. The claimant was informed, by letter dated 8 June 2017, of the intention to commence a formal investigation into an allegation that she *'purposefully tripped up SCN Alistair Crouch in Fraser Ward'*.
14. The investigation team took the following steps in investigating the allegation
- On 16 June 2017 they met with Cara Skene (**CS**), Deputy Charge Nurse. She stated that, at the time of the incident, she had been in a room next to the area where AC fell, giving a patient medication. She heard an *'almighty thud'* and went to the door of the room. She saw AC lying on the floor outside the door. She quickly secured the drugs trolley and

5 treatment room and went to help AC. By that point he was already getting up himself, but it was clear that he was in a lot of pain. CS stated that there were only two other people present: PT and the claimant. CS stated that when she came out of the treatment room the claimant was  
10 *'leaning on the desk with her arms folded and that she was looking at the corridor and then looking back to Alistair.'* CS stated that the claimant did not try to help AC and that she had said nothing to him following in the incident. She stated that the claimant looked *'unfazed'*. She stated that PT was standing in his usual place with his back against the wall  
15 opposite the treatment room door. CS described PT as *'hyper-vigilant, if somebody is stationary he'll ignore them but if there is any movement he'll be watching, watching, watching, making sure they are not going to come near him or invade his personal space...any movement he would have witnessed it; I stood where he was afterwards and he would have had a clear viewpoint of the area.'* CS stated that immediately following the incident, AC stated to her that he felt that the claimant had tripped him up on purpose. CS was present during SS's interview with PT later that day and stated that *'He was clear, there was no hesitation in his account, it was documented in his statement. He was 100% certain of what he was saying and he was very direct with what he said...He's an ex-Carstairs patient where you don't clipe on anyone, so for him to say anything is a big deal and he was completely doubtless about what he said.'* CS stated that, later that day the claimant said to her *'God, I hope nobody thought I did that on purpose'*, which CS thought was an odd  
20 thing to say.  
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- 30 b. On 23 June 2017, they met with AC. He stated that he was walking to get something from the patient kitchen and *'the next thing I knew something had caught my leg and I was on the ground...I felt a huge spasm in my back while I was on the ground. I turned myself round and Lyn was standing there, she didn't say or do anything, she was just standing...I stared at her for some time but Lyn didn't say anything or try to help.'* He stated that he then spoke to CS and explained to her that he *'thought it was deliberate, that Lyn had tripped me'*. He stated that

around 10-15 minutes later the claimant asked him if he was alright and that was the first thing she had said to him since he had fallen. As he was leaving to go home she stated to him *'I hope you don't think I've done that deliberately'*. AC thought that it was very strange for her to say that and stated that it was only the second thing she'd said to him since he fell. AC stated that PT had stated to him *'She did that deliberate pal, I saw it, I'll be your witness in court pal.'* AC thought it was strange that PT volunteered this, as he didn't normally say much at all.

c. On 23 June 2017, they met with the claimant. The claimant's trade union representative, Michael Forbes (**MF**) was also present. The claimant stated that AC had been walking at speed, that she felt him touching her shoes and that he ended up on the floor. She stated that *'there was no way I had tripped him'*. She stated that, after AC had fallen she *'said "sorry, are you alright?" I said "sorry" not because I did it on purpose, but because that's what you would say if someone bumps into you'*. She stated that she didn't help him up as she *'didn't think that he required any help, he said "I'm alright, I'm alright" so I thought he was alright and didn't need help'*. She stated that he looked alright and didn't look like he was in pain, but later accepted that he did look like he was in discomfort. She then said that she hadn't helped him up as *'he probably wouldn't have wanted me to'*. The claimant stated that she felt she had been bullied by AC prior to this incident.

d. On 5 July 2017, they met with Sharlene Cheyne (**SC**), Health Care Support Worker. She stated that she was quite far away from the incident, on a two man observation of a patient, half way up the corridor past the double doors. She stated that the incident was not in her line of vision, but she did hear something happening and then heard the claimant saying *'oh my goodness are you ok'*.

e. On 24 July 2017, they met with the patient, PT. PT was terminally ill and, by that point, he was very frail. The investigation team sought permission from PT's Consultant Psychiatrist before interviewing PT and followed the guidance provided by the Consultant Psychiatrist when doing so. He

stated *'I saw Alistair being tripped up by Lynda Stoneman. She put her foot out and tripped him up...He was in agony, he told us all he was sore and in agony. He then picked himself up off the floor.'* When asked if the claimant said anything to him when he was lying on the floor he stated  
5 *'No she never said anything.'* When asked whether he felt it was a deliberate act, he stated *'I'm not sure.'*

15. On 30 August 2017, the claimant was invited to a disciplinary hearing on 11 October 2017, to discuss an allegation of gross misconduct, namely *'wilful recklessness - intentionally tripping up SCN Crouch causing injury'*. She was  
10 informed that she would receive the management statement at least seven days prior to the disciplinary hearing. The disciplinary hearing was subsequently rescheduled to 13 November 2017.

16. The management statement of case was provided to the claimant in advance of the disciplinary hearing. This consisted of a summary of the investigation  
15 findings. Notes of each of the interviews held, including those conducted informally by SS on the day of the incident itself, were appended to the report as well as the internal incident reporting form, which had been completed by the claimant.

17. The disciplinary hearing took place on 13 November 2017. The panel consisted  
20 of JF, Shirley Porter, Directorate Nurse Manager and Tracey McDonald, Assistant HR Manager. The claimant was accompanied by her trade union representative, MF.

18. The management case, which was effectively the investigation report, was read  
25 by MY and witnesses were then called. The management side called AC and CS as witnesses. PT was not called as a witness, as he had passed away. The claimant had prepared a written statement and this was read out by MF. No further witnesses were called by the claimant.

19. The claimant stated during the hearing that she had not felt supported by AC  
30 following her return to work the previous year, following a lengthy period of absence, and that she felt bullied and intimidated by AC. AC stated that he had been unaware that the claimant felt this way.

20. CS stated that she felt that the claimant looked unconcerned immediately following the incident. When asked by JF whether she believed the incident happened on purpose, she stated that she did believe, after sitting in on the informal discussion with PT immediately after the incident, that his account was accurate. She also stated that she felt it was strange that the claimant had not tried to help AC immediately after he fell.
21. The claimant reiterated in her written statement, and during the disciplinary hearing itself, that AC had tripped by accident and she did not deliberately trip him up. She stated that she had *'immediately asked of his well-being, apologising and asking if he was alright.'* She stated that AC and CS were lying when they said that she had not expressed concern for AC immediately following the incident. She referred to the fact that SC had heard her express concern. She accepted however that *'her failure to act in a more pro-active manner in assisting SCN Crouch back to his feet was an omission on her part...she could have, and should have done more to assist him once he had fallen to the floor. That she didn't is something that she regrets and Lynda offers a genuine apology for her omission at that point.'*
22. The panel adjourned to consider the evidence and their conclusions. They reached the conclusion that they did not believe the claimant's version of events. They felt that she was lying.
23. The panel considered the claimant's assertion that she had expressed concern for AC when he fell, but did not accept this. They noted there were inconsistencies in what the claimant said she had said. For example, she initially stated that she had tried to help AC up when he fell, but later acknowledged that she hadn't. They noted that AC, CS and PT stated that the claimant had not said anything to AC immediately after he fell. They considered the fact that the only person who appeared to corroborate the claimant's position, SC, was furthest away from the incident, dealing with a patient on a two man observation. They felt that, given where she was and what she was doing, she would not have been able to hear the claimant make any comments. As SC was not called as a witness to the disciplinary hearing, they had not been able to question her on this.

24. The panel also considered the fact that the claimant accepted that she did not seek to assist AC when he fell. They accepted the evidence of CS that the claimant was leaning against the nurses station when CS came out of the treatment room and appeared unconcerned. They felt that it was natural human instinct to reach out to someone in these circumstances and also took into account the fact that the claimant was a nurse. They felt that, if it genuinely had been an accident, she would have instinctively sought to assist AC.

25. The panel also noted and considered the slight difference in PT's position in relation to whether the act was deliberate. They felt that this was due to the fact that more time had elapsed and, by the time of the second interview, PT was very ill and taking a great deal of medication which may impact on his strength of feeling. They felt that the first interview with PT, on the day of the incident itself, was more reliable and noted that it was very unusual for a patient to come forward in these circumstances, which also added weight to his statement.

26. Following the adjournment, the panel indicated that they had unanimously found that, on the balance of probability, the claimant did intentionally trip up AC. They confirmed that she would be summarily dismissed as a result.

27. A letter confirming the panel's decision and rationale was prepared and sent to the claimant on 15 November 2017. The letter stated that:

*'The panel's decision has not been made lightly. The incident was clearly very serious and in terms of identifying the appropriate disciplinary sanction in the circumstances, full consideration was given to a number of options. However, having heard and considered all of the evidence, the panel based its decision on the following:*

*The panel were presented with conflicting versions of the incident which occurred on 23 May 2017. Three statements (SCN Crouch, SSN Skene and the patient's) were similar in that they state you did not help or say anything to the SCN when he fell. The panel believe it is natural human instinct to reach out or say something when you collide with someone and they fall. Whilst the panel accept the patients statement changed slightly when he was interviewed two months after the incident, they accepted given the passage of time and his*



*illness (and additional medication) his memory of events may have weakened and his statement did not alter significantly*

*Whilst you agreed you made contact with SCN Crouch you stated it was an accident and did ask him if he was okay. One other witness statement stated you did ask him if he was okay but also states that were too far away to see what happened. You did not call this witness therefore the panel were unable to question their version of events.*

*The three other witness statements indicated they were in close proximity of the collision. The patient was the only eye witness to the incident and in both his statements he indicates you put your foot out and tripped up SCN Crouch.'*

28. The claimant was informed of her right to appeal. She exercised this right, appealing by letter dated 7 December 2017. Her grounds of appeal were that too much emphasis had been placed on the fact that she did not respond by assisting AC when he fell and that, in the absence of any substantiating and corroborating evidence to support the allegation, the sanction of summary dismissal was unduly harsh. An appeal hearing took place on 18 January 2018. The appeal panel comprised CM, Sue McFadyen, Service Manager/Lead Health Visitor and Gwynne Cromar, HR Manager. The claimant was again accompanied by MF.

29. At the appeal hearing, a statement which had been prepared by the claimant was read out by MF. The management case was presented by Shirley Porter and Tracey McDonald, who had both been on the disciplinary panel. This would normally have been done by JF, who chaired the disciplinary panel, but she was on holiday. AC and MY were called as management witnesses. No additional witnesses were called by the claimant.

30. The appeal panel adjourned to consider their conclusions. CM wrote to the claimant on 22 January 2018 to confirm her appeal had been unsuccessful. The letter stated that the appeal panel were unanimously of the view that the claimant had committed an act of gross misconduct as alleged, and that the sanction of summary dismissal was reasonable in the circumstances. Whilst the claimant had raised additional concerns regarding the probity of the

investigators during the appeal hearing, the appeal panel discounted this as the claimant was not able to provide any evidence to support her assertions.

31. The claimant exercised a further right of appeal, with that appeal hearing taking place on 29 March 2018. That appeal panel comprised GM, Amy Anderson, Non Executive Director, and Susan Coull, Head of HR. A statement which had been prepared by the claimant was read out by MF. CM presented the management case, explaining why the first appeal panel reached the conclusions they did. AC was called as a witness by management. No additional witnesses were called by the claimant.

32. The appeal panel adjourned to consider their conclusions. GM wrote to the claimant on 5 April 2018 to confirm her appeal had been unsuccessful. He stated in the letter that the appeal panel were unanimously of the view that the claimant had committed an act of gross misconduct as alleged, and that the sanction of summary dismissal was reasonable in the circumstances. The letter confirmed as follows

*'Your behaviour immediately after the incident is inconsistent to an accident.*

*Your statement that the investigation and actions of management were carried out in order to 'get rid of' you, was not substantiated with any evidence, only your belief that SCN Crouch, Ms Young and Ms Fletcher do not like you.*

*The minor inconsistency in the statements obtained by the patient witness does not alter the evidence gathered from this witness.'*

33. The letter confirmed that there was no further right of appeal.

34. On 12 April 2018 the claimant was informed that the Nursing & Midwifery Council had considered the referral made by the respondent on the dismissal of the claimant, in accordance with their obligations. They concluded that *'there is no realistic prospect that the Fitness to Practise Committee would find the facts proved, particularly as the only direct witness to the incident who was unable to say whether they thought the trip was deliberate, has since died.'* They stated therefore that the matter would not be taken further.

35. The claimant received job seekers allowance from 23 November 2017 to 22 March 2018, when she secured alternative, full time, employment. She remained in that role until 16 October 2018, when the company went into liquidation. She subsequently secured another full time role, commencing 25 November 2018. She resigned from that role on 15 February 2019, when she started to receive pension payments.

## Relevant Law

### Unfair Dismissal

36. S94 ERA provides that an employee has the right not to be unfairly dismissed.

10 37. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) ERA.

15 38. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the employer):-

20 *“(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.”*

25 39. Where an employee has been dismissed for misconduct, ***British Home Stores v Burchell [1978] IRLR 379***, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

- i. whether the respondent genuinely believed the individual to be guilty of misconduct;

ii. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and

iii. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

5 40. In determining whether the employer acted reasonably, it is not for the Tribunal  
to decide whether it would have dismissed for that reason. That would be an  
error of law as the Tribunal would have 'substituted its own view' for that of the  
employer. Rather, the Tribunal must consider the objective standards of a  
reasonable employer and bear in mind that there is a range of responses to any  
10 given situation available to a reasonable employer. It is only if, applying that  
objective standard, the decision to dismiss (and the procedure adopted) is  
found to be outside that range of reasonable responses, that the dismissal  
should be found to be unfair (*Iceland Frozen Foods Limited v Jones [1982]*  
*IRLR 439*).

15 Wrongful dismissal

41. Wrongful dismissal is a claim for breach of contract – specifically for failure to  
provide the proper notice provided for by statute or the contract (if more). An  
employer does not however have to give notice if the employee is in  
fundamental breach of contract. This is a breach of contract that goes to the  
20 heart of the contract so that the employer should not be bound by its obligations  
under the contract (including the requirement for notice).

Submissions

Respondent's submissions

42. Mr McGuire, for the respondent, highlighted inconsistencies what the claimant  
25 had said in response to the allegation and in her evidence and stated that the  
evidence of the respondent's witnesses should be preferred.

43. He referred to the Burchell tests. He stated that there had been a thorough  
investigation and that there were reasonable grounds for the respondent to  
believe, which they genuinely did, that the claimant deliberately tripped up her

colleague. The sanction of dismissal was within the band of reasonable responses open to the respondent in the circumstances.

44. In the event that the dismissal was found to be unfair, compensation should be restricted to the period up to 22 March 2018, when the claimant obtained full time employment. There should be reductions to compensation on the basis of Polkey and contribution. Reductions of 100% are appropriate.

45. The wrongful dismissal claim should be dismissed.

#### Claimant's submissions

46. Mr Lefevre for the claimant stated that the claimant had not deliberately tripped her colleague, it was simply an accident. The reliability of the patient's evidence was an unknown quantity and too much weight was placed on his evidence, particularly given that, during the formal interview, when asked whether he thought it was a deliberate act, he stated that he wasn't sure. It was wholly inappropriate for the respondent to ignore this fact and use PT's previous evidence to justify dismissal.

47. It was clear that the claimant had expressed concern immediately when her colleague tripped and her position was supported by SC. The claimant accepts that she did not assist the AC, but it would have been unsafe to do so.

48. The fact that the Nursing and Midwifery Council decided that there was no case to answer should be taken into account.

49. In the circumstances, no reasonable employer could have come to the conclusion that dismissal was appropriate. The claimant was blameless and reductions should not be made to compensation for either Polkey or contribution.

#### Discussion & Decision

50. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had

to consider whether the respondent had established a potentially fair reason for dismissal. The Tribunal accepted that the reason for dismissal was the claimant's conduct – a potentially fair reason under s98(2)(b). No other reason has been asserted.

5 51. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason is shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking) the respondent acted reasonably in treating the reason as a  
10 sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness  
15 within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

20 52. The Tribunal referred to the case of ***British Home Stores v Burchell***. The Tribunal was mindful that it should not consider whether the claimant had in fact committed the conduct in question, as alleged, but rather whether the respondent genuinely believed she had and whether the respondent had reasonable grounds for that belief, having carried out a reasonable investigation.

25 Did the disciplinary panel have a genuine belief?

30 53. The Tribunal concluded that the disciplinary panel did have a genuine belief that the claimant had intentionally tripped up her colleague causing him injury. JF's evidence was clear on this point and this was consistent with the letter confirming dismissal and the documentary evidence of the management side case, as presented at the appeal hearing.

Did the disciplinary panel have reasonable grounds for their belief?

54. JF set out the rationale for the disciplinary panel's findings in her letter to the claimant dated 15 November 2017. Further detail was provided by SP & TM when presenting the management case at the appeal hearing on 18 January 2018. The grounds for the disciplinary panel's belief were as follows:

a. Having considered all the evidence and listened to MY, AC, CS and the claimant, the panel did not believe the claimant's version of events. They felt that she was lying. They noted that there were inconsistencies in her statements. For example, the claimant initially stated that she had tried to help AC up after he fell, but later changed her position, acknowledging that she had not tried to assist him at all.

b. In particular, the panel did not believe that the claimant had expressed concern for AC when he fell. They noted that AC, CS and PT stated that the claimant had not said anything to AC immediately after he fell. They considered the fact that the only person who appeared to corroborate the claimant's position, SC, was furthest away from the incident, dealing with a patient on a two man observation. They felt that, given where she was and what she was doing, she would not have been able to hear the claimant make any comments. Whilst the claimant was clear that she had expressed concern, there were inconsistencies in what she said she had said. The panel concluded, as a result, that nothing was said by the claimant to AC when he fell. The panel felt that, if AC had genuinely tripped by accident, the claimant would have expressed concern.

c. They took into account the fact that the claimant accepted that she did not seek to assist AC when he fell. They accepted the evidence of CS that the claimant was leaning against the nurses station when CS came out of the treatment room and appeared unconcerned. They felt that it was natural human instinct to reach out to and assist someone in these circumstances. As a registered nurse, they expected the claimant to show more compassion and seek to assist AC. They felt that, if it genuinely had been an accident, the claimant would have instinctively sought to assist AC.

d. The panel also relied upon the eye witness account of PT, who was very clear that the claimant's actions were deliberate when interviewed immediately after the incident. His account of what had happened remained consistent when he was interviewed two months later, albeit that his strength of feeling on whether the actions were deliberate had diminished. The panel felt that this was due to the fact that more time had elapsed and, by the time of the second interview, PT was very ill and taking a great deal of medication. The noted however that in both statements PT was clear that the claimant had put her foot out and tripped up AC.

55. The Tribunal accepted that these were the grounds for the disciplinary panel's belief and find that these amounted to reasonable grounds for the disciplinary panel to conclude that the claimant had intentionally tripped up her colleague causing him injury. This finding, and the finding that the claimant's conduct amounted to gross misconduct, was open to the disciplinary panel in the circumstances and fell within the band of reasonable responses.

56. Having reached the conclusion that the claimant had committed gross misconduct by her actions, the disciplinary panel concluded that the claimant should be summarily dismissed. That conclusion fell within the band of reasonable responses open to the disciplinary panel in the circumstances.

57. The Tribunal noted the subsequent decision by the Nursing & Midwifery Council not to take any action. The Tribunal did not however feel this had any impact on whether the respondent had reasonable grounds for concluding that the claimant had committed gross misconduct, given that the Nursing & Midwifery Council's Fitness to Practice Committee consider issues by reference to different tests and standards.

Was there a reasonable investigation?

58. The respondent conducted a thorough investigation. They interviewed all the individuals who were in the vicinity. There were no further steps which should, reasonably, have been undertaken.



Procedure

59. The respondent investigated the allegations. The claimant was invited to a disciplinary hearing and provided with a copy of the investigation report completed by MY and all appendices. She was given the opportunity to respond to the allegations at the disciplinary hearing and provided with two levels of appeal. The respondent followed their internal Disciplinary Procedure in doing so.

60. The Tribunal find that the procedure adopted by the respondent was fair and reasonable in the circumstances.

Conclusions re s98(4)

61. For the reasons stated above the Tribunal conclude that the respondent acted reasonably in treating the claimant's conduct as a sufficient reason for dismissal.

62. For these reasons, the claim of unfair dismissal is dismissed.

Wrongful Dismissal

63. In considering the claim for wrongful dismissal, the Tribunal required to consider whether the claimant had actually committed gross misconduct during her employment, as opposed to whether the respondent reasonably believed that she had.

64. The Tribunal felt that, whilst the respondent's witnesses appeared to the Tribunal to be straightforward and credible, the same could not be said of the claimant. The Tribunal noted that there were many inconsistencies in the claimant's statements to her employer and in her evidence to the Tribunal. For example:

a. During her discussion with SS on 23 May 2017, immediately after the incident, the claimant stated '*I was shocked. I asked are you alright. I tried to help him up.*' She stated at the disciplinary hearing and before the Tribunal however that she had not in fact tried to help AC up.

b. At the initial investigation, the claimant that she had said *'are you alright'* to AC immediate after he fell. In the investigation meeting on 23 June 2017, she stated that she *said 'sorry, are you alright'*. Before the Tribunal, in evidence in chief the claimant stated that she said *'Oh my God, are you OK'*, and in cross examination she stated that she may have said *'Oh my goodness, are you OK'*

c. When asked what AC said to her immediately after he fell, the claimant stated to the Tribunal that AC had just looked at her and scowled and that he didn't say anything. In the initial informal investigation however the claimant stated to SS that AC stated to her *'I'm alright, I'm alright'*. She maintained that position at the disciplinary hearing.

d. In the meeting with SS, the claimant stated that she thought AC was alright and didn't need help. During the formal investigation meeting she stated that she hadn't helped him up as *'he probably wouldn't have wanted me to'*, referring to her perception that she had been bullied by AC prior to this incident. During first appeal hearing, she stated that she was afraid if she tried to help AC up he would have verbally or physically abused her as a result.

65. These points undermined the claimant's credibility in the Tribunal's eyes. Given this and the evidence which the respondent gathered in support of the allegation, the Tribunal find that the claimant did intentionally trip up AC and that this constituted a fundamental breach of her employment contract with the respondent.

66. As the claimant was in fundamental breach of contract, the respondent was not bound by its obligations under the employment contract. The claimant is accordingly not entitled to any further sums in respect of her notice period.

67. The claimant's claim for wrongful dismissal is accordingly dismissed.

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	<b>Date of Judgment:</b>	<b>22 March 2019</b>
	<b>Entered in register:</b>	<b>26 March 2019</b>
	<b>and copied to parties</b>	