EMPLOYMENT TRIBUNALS

Claimant: Miss M Hutson

Respondent: Manchester Foundation NHS Trust

Heard at: Manchester **On:** 24 and 25 May 2021

Before: Employment Judge Whittaker
(sitting alone)

REPRESENTATION:

Claimant In Person
Respondent: Mrs Skeaping Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal fails and is dismissed.

REASONS

1. This is a claim by Melanie Hutson. She complained initially of a number of issues including a variety of financial claims, including a redundancy payment. At the beginning of the hearing we were able to clarify that those had either been withdrawn or had been resolved. The Tribunal therefore sat to consider a single claim of unfair dismissal.

2. The Tribunal had three issues to resolve:

   (1) to ascertain the reason for dismissal;

   (2) to ascertain whether or not in reaching the decision to dismiss the claimant the employer had followed the reasonable process of a reasonable employer; and

   (3) the Tribunal then had to decide whether the decision to dismiss the claimant for gross misconduct, and it was a dismissal without notice, fell

within the band of reasonable responses available to a reasonable employer.

3. The issue of conduct was not in issue. The claimant accepted from the outset that she had quite wrongly, and in breach of several of the procedures of the respondent, accessed the private confidential medical records of a child who went to the same nursery as the claimant's son. The person in question, a child, was not a patient at the hospital where the claimant worked, and the claimant accessed these records on 17 September 2019. She then discussed what she found in connection with those records with her mother. She printed off certain of the records from the computer system of the respondent, and having considered the content she then shredded them privately. This was reported to a manager of the respondent, who considered suspending the claimant but alternative employment was found for her temporarily whilst the matters were investigated.

4. The respondent produced an investigation report at page 32 which consisted of some ten pages. It was dated 6 December 2019. The employer wrote an invitation letter to the claimant (page 238). Again, this was dated 10 December 2019. There was a disciplinary hearing on 19 December 2019. The notes of that were at pages 238 and ran to some 13 pages. There was then a letter sent to the claimant on 19 December by Mrs Stirrup who conducted the disciplinary hearing to summarise the reason why the claimant was being dismissed summarily for gross misconduct.

5. The claimant appealed. She sent in a substantial letter of letter (pages 268-281). There was a detailed appeal hearing and Mr Pearson who conducted that appeal sent an appeal outcome letter (pages 340-343).

6. There was no dispute, therefore, that the claimant was responsible for an act of gross misconduct. The two issues which were to be actively considered by the Tribunal were whether or not a fair procedure had been followed, and whether the decision to dismiss was a reasonable one.

7. The procedure has been considered by the Tribunal against the background of the relevant principles of the Code of Practice. That requires a thorough investigation of all the relevant facts, and there should be no delay. There was no complaint about any delay on the part of the respondent here. Clearly the claimant had been told details of the allegations of misconduct. There was a requirement under the Code to hold a meeting. That had been held, as I have just said. The claimant was allowed every opportunity to be accompanied. She was sent an outcome letter. There was an appeal process and she was sent an appeal outcome letter. On the face of it, therefore, the respondent followed and complied with the requirements of the Code of Practice.

8. The claimant alleged that she had been treated differently, but that is partly to do with the process and partly to do with the decision making. In effect what the claimant was saying was that the respondent should have investigated the circumstances surrounding an alleged breach of these procedures relating to confidential information by another named employee, but that was never reported to the respondent. They were never given the opportunity to investigate it at the time, and even if the respondent carried out a cursory examination of the facts when they were raised by the claimant, I cannot see that that is any grounds for complaint on the part of the claimant. The facts of one case have to be almost identical to the facts of

another, and in my opinion insufficient facts were provided to the respondent to enable them to carry out that investigation and in any event, it was a historical issue. In my opinion managers are entitled to come to different opinions as after all they have different personalities and different views of the seriousness of the issues concerned. I do not find, therefore that there was any procedural irregularity and that the overall process followed by the respondent met the requirement to be a reasonable enquiry and reasonable process of a reasonable employer.

9. We then come to the third of the issues concerned, which is whether or not the decision to dismiss the claimant fell within the band of reasonable responses available to a reasonable employer.

10. I was troubled, indeed significantly troubled, by some of the language which was used by the respondent witnesses in their witness statements but also in some of their correspondence. There was a repeated reference to lack of apologies and lack of remorse, and yet there were a number of obvious references in the disciplinary process and the appeal process where the claimant had very clearly indicated that she knew what she was doing was wrong, that she sincerely regretted her actions and that she had immediately realised the seriousness of what she had done. She had also apologised and her remorse was noted as being sincere.

11. In the dismissal letter which was at pages 256 onwards, and in particular page 258, Mrs Stirrup indicated that although she had considered alternatives to dismissal, but she felt that there had been “a complete lack of trust and confidence as a result of your actions”. What that letter did not do was to go on to explain what she meant by “a complete lack of trust and confidence” as opposed to simply using a phrase which employment lawyers are used to, without providing any explanation as to how or why there was now a complete lack of trust and confidence in the claimant on the part of the respondent.

12. We then moved on to the appeal process, but before I do that I just want to comment on some of the other evidence which was given by Mrs Stirrup. She said at paragraph 18 of her statement that she was satisfied that the claimant had said that she would do the same thing again, but actually when I asked her about that she clarified that what she actually meant was that the claimant had only indicated that during the appeal, and so that clearly cannot have played any part in her decision making to come to the conclusion that there was a complete lack of trust and confidence in the claimant. However, Mrs Stirrup was then asked to clarify what she meant and why she believed that there was a complete lack of trust and confidence, and she was able to do that freely and without reference and without hesitation to the documents. She was very clear in indicating that it was because the claimant appeared to be unable to acknowledge that this had never been a genuine safeguarding issue. It was not something in which she ought to have become involved as a safeguarding issue, In the opinion of Mrs Stirrup, the claimant failed or refused to accept responsibility for the fact that safeguarding was not engaged here. Tthat that was what Mrs Stirrup was very clear in telling the Tribunal was the reason for the loss of trust and confidence.

13. Moving on to the appeal, again Mr Pearson had used that same phrase, namely “a lack of trust and confidence”, and again he had failed in the decision letter to explain what he meant by that, in other words why had the respondent lost trust and confidence in the claimant? Again I was impressed by his oral evidence when he was

able, without reference to documents or witness statements to explain, just as Mrs Stirrup had done, that the issue for the respondent was the ongoing risk that if the claimant did not recognise that this had absolutely nothing to do with safeguarding and realised just how serious the issue was, that for the respondent there was a potential risk of this happening again.

14. In my experience it is always the case that when someone does something which is serious that they will nearly always say that it would not happen again, because obviously if they were not going to provide that reassurance then the decision making for the employer would be very straightforward. I believe, therefore, that reasonable employers are entitled to look at such indications with at least a small element of scepticism.

15. What the respondents were doing when they decided to dismiss the claimant, in my opinion, was looking at how they could manage that risk. Was it a risk which they believed that they were able to manage, or was it a risk which they believed was a step too far and that in those circumstances the claimant had to be dismissed?

16. Whilst I have recognised that throughout the documentation the claimant has said that she realises that the conduct is serious, I think that the employer was justified in thinking that that does not actually go far enough. What the claimant did here was very, very serious. It was at the top end of any breach of confidentiality. It involved medical records. It involved a child. It involved a patient who was not even a patient of the hospital where the claimant was engaged. I think therefore that it was incumbent upon the claimant to impress on the employer that she realised with the benefit of hindsight that this was an extremely serious incident, and I remain troubled by the fact that at the conclusion of the appeal hearing the claimant seemed to suggest that what she had done was not as serious as drink or drugs, when actually I believe that any reasonable employer would recognise that it was at least as serious as drink or drugs, and potentially more serious, and so the concern then on the part of the respondent was that there was an ongoing risk.

17. The claimant also has repeatedly indicated that the reasoning behind her accessing this medical information was safeguarding. I am absolutely satisfied that it was a mix of safeguarding what she saw as the best interests of her own son whilst at the same time equally being concerned for the safeguarding of the child at the nursery who had allegedly been injured whilst in the custody of the nursery. I do not believe it is possible or reasonable for the claimant to be asked to differentiate between those, because, clearly, she a mix of different thoughts and was very emotional at the time, and I believe that it was a combination which cannot be divided into percentages of safeguarding issues for her own son and safeguarding issues for the child in question.

18. Unless the claimant was able to persuade Mr Pearson and Mrs Stirrup that those safeguarding issues had been recognised, and that the claimant realised just how serious the misconduct was, I believe that it was reasonable for the employer to believe that there was some risk – it may only have been a small risk, but there was a risk. They are a prominent Health Authority. They are the custodian of very sensitive medical information about thousands and thousands of people. Patients who have their medical records put at risk in this way will be appalled, in my opinion, and it was therefore a very significant breach and was a very serious matter indeed. I believe that the respondent had reasonable grounds for indicating that they were not prepared to take that risk, because the claimant did not appear to be able to recognise just how

serious her behaviour was and neither was she able to persuade the respondent that the safeguarding issue was something which she then recognised as not being a reason for accessing these records. It is, however, only fair and proper to point out that the use by the respondent of the three words "trust and confidence" did not in any way in the documentation, in my opinion, explain to the claimant exactly what they meant by that, and I believe it is incumbent on employers to make that clear rather than simply using a phrase which is often used in connection with employment issues.

19. In summary, therefore, the claimant was guilty of gross misconduct. I am satisfied that the respondent followed a fair and reasonable procedure, and at the end of the day I am satisfied that on balance the decision to terminate the employment of the claimant fell within the range of reasonable responses available to a reasonable employer.

20. My decision therefore is that the claim of the claimant is dismissed.

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Employment Judge Whittaker

Date: 28th May 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

1 June 2021

FOR THE TRIBUNAL OFFICE