



# EMPLOYMENT TRIBUNALS

**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE FRANCES SPENCER

**MEMBERS** Ms T Bryant  
Ms S Khawaja

**BETWEEN:** Mr A Joseph CLAIMANT  
AND  
Pinnacle Housing Limited RESPONDENT

**ON:** 14, 15<sup>th</sup> and (in chambers) 19<sup>th</sup> June 2017

## **Appearances**

**For the Claimant:** Ms Lazaro, friend  
**For the Respondent:** Mr M Hopkins, solicitor

## **RESERVED JUDGMENT**

The Judgment of the Tribunal is that:

- (i) The Claimant's claim of disability discrimination is not well founded and is dismissed.
- (ii) The Claimant was unfairly dismissed.
- (iii) The Claimant contributed to his dismissal and the extent of that contribution and any consequent reduction to any monetary award will be assessed at the remedy hearing.
- (iv) The issue of remedy will be heard on 11<sup>th</sup> October 2017.

## REASONS

### Background and issues

1. This was a case of unfair dismissal and disability discrimination brought by Mr A Joseph. The Claimant was employed as a cleaning operative and had worked for the Respondent for some 4 years when he was summarily dismissed on 25<sup>th</sup> October 2016. It is the Respondent's case that he was fairly dismissed for gross misconduct.
2. The Respondent provides public service solutions in housing and facilities management and employs 2,300 employees in the UK. It is a significant operation.
3. The issues were set out in a case management order following a preliminary hearing on 7<sup>th</sup> March 2017 as follows.

“4. The claimant was employed as a Client Operative. He says that the respondent required Client Operatives to cover for absent colleagues. That is the PCP (provision, criterion or practice). The claimant says that the respondent had been advised by Occupational Health that he could not provide cover because of his disability and should not work alone but with a partner. The claimant alleges that on 30 August 2016 and against OH advice, he was required by his supervisor, Rupert Myles, to cover for a colleague, Steve (surname unknown).

5. The claimant also contends that he was not offered help and support during the disciplinary hearing and so had difficulty reading and understanding the notes and documents provided. He said that the expectation was that employees would attend disciplinary and grievance meetings without assistance from the employer. This was the other PCP.

6. Although the claimant claims that his manager, Victoria Lynch, refused to give him a ride in her work van back to the estate he was working at and did so knowing that he could not walk far because of his condition, he was unable to articulate how the circumstances around this one off incident amounted to discrimination. In the end, he agreed that this was simply part of the background narrative and was not being pursued as a separate discrimination allegation.

“7. The tribunal will have to determine:

7.1 Whether the respondent applied a PCP that:

- a) Client Operatives must cover for absent colleagues
- b) Employees must attend disciplinary and grievance hearing without assistance and support from the employer.

7.2 Whether the claimant was at a substantial disadvantage compared to non disabled employees because of the application of these PCPs to him.

7.3 Whether there were reasonable adjustments that the respondent should have made to remove the disadvantage caused to the claimant.

Unfair Dismissal

8. The respondent contends that the claimant was dismissed for gross misconduct for fighting with a Housing resident in the workplace and threatening and abusive behaviour towards said resident. The claimant contends that his dismissal was unfair because the

respondent reached its decision without taking into account his version of events. He also claims that he was not allowed to be accompanied at the disciplinary hearing.

9. The tribunal will have to decide:

9.1 Whether the respondent had reasonable grounds for believing that the claimant was guilty of the conduct in question

9.2 Whether that belief was formed after a reasonable investigation of the circumstances.

9.3 Whether dismissal was fair in all the circumstances, taking into account equity and the substantial merits of the case.

9.4 If unfair, whether any compensation should be reduced to take into account any contributory fault on the part of the claimant and/or;

9.5 Whether any compensation should be reduced to take into account the chance that the claimant would have been dismissed even if a fair procedure had been applied. “

4. The Tribunal heard evidence from Mr P Driver, who took the decision to dismiss, from Ms Glenn-Cox of HR and from Mr. N Fergus who heard the Claimant’s appeal. We also heard from the Claimant himself. We had an agreed bundle of documents.

### **Relevant law**

#### **Disability discrimination-duty to make adjustments**

5. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.
6. In *Environment Agency v Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4* the EAT gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must identify:
- the PCP applied by or on behalf of the employer, or the physical feature of premises occupied by the employer
  - the identity of non-disabled comparators (where appropriate), and
  - the nature and extent of the substantial disadvantage suffered by the claimant.

Once these matters were identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

7. Para 20 (1) of Schedule 8 to the Equality Act also provides that a person is not subject to a duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at a disadvantage by the PCP. An employer is required to make reasonable enquiries as to whether an employee is disabled and as to the effect of that disability.

#### Unfair dismissal

8. Section 94 of the ERA sets out the well-known right not to be unfairly dismissed. It is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Misconduct is reason which may be found to be a potentially fair reason for dismissal.
9. If the Respondent can establish that the principal reason for the Claimant's dismissal was a genuine belief in the Claimant's misconduct, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "*depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case.*"
10. In cases of misconduct employers are not required to ascertain beyond reasonable doubt that the employee is guilty of the misconduct charged. However the employer must establish its belief in that misconduct on reasonable grounds and after reasonable investigation and conclude on the basis of that investigation that dismissal is justified (*British Home Stores v Burchell* [1980] ICR 303.) The Claimant must also be given a fair hearing.
11. In *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [2009] IRLR 563, [2009] ALL ER (D) 179 the Court of Appeal reaffirmed that in unfair dismissal claims, the function of a tribunal is to review the fairness of the employer's decision, not to substitute its own view for that of the employer. The Tribunal must consider whether the decision to dismiss fell within the band of reasonable responses for an employer to take with regard to the misconduct in question. However, it is not the case that nothing short of a perverse decision to dismiss can be unfair within the section, simply that the process of considering the reasonableness of the decision to dismiss must be considered by reference to the objective standards of the hypothetical reasonable employer and not by reference to the tribunal's own subjective views of what it would have done in the circumstances. (see *Post Office v Foley* 2000 IRLR 827). The band of

reasonable responses test applies as much when considering the reasonableness of the employer's investigation as it does to the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* 2003 IRLR 23.) In assessing the sufficiency of investigation, the gravity of the charges and the effect on the employee will be relevant in assessing what is required for a reasonable investigation.

### **Findings of relevant fact**

12. The Claimant was employed as a cleaning operative on the Respondent's Lambeth South contract where he worked on residential estates. He has Marfan's syndrome. This is a disorder of connective tissue and is a genetic condition. It is a multi-system disorder with manifestations typically involving the cardiovascular, skeletal and ocular systems. It is an inherited chronic disease. The Respondent does not dispute that the Claimant is a disabled person as a result of this condition.
13. An Occupational Health Report dated 11<sup>th</sup> January 2016 notes that the Claimant has Marfan's syndrome and that as a result "he has arthritis of his legs and hands and dislocated eye lenses on both sides. He is partially sighted in his left eye which is stable and in his right eye his vision has been fine since surgery." OH also reported that the Claimant had had no absences because of his Marfan's syndrome but was absent for some time following a motorbike accident in 2014 which caused significant injury to his left leg. This required further rehabilitation and that the Claimant had been advised would take a further 2 years to heal.
14. The Occupational Health Report made a number of recommendations.
  - "Mr Joseph is fit to continue working within his usual role doing all of his usual duties."
  - Because of his current medical condition he cannot cover a colleague's work location because of his current problems with leg pains."
  - He does not need any adjustments within his usual role currently.

Although somewhat baldly stated it is clear from the remainder of the report that the recommendation about being unable to cover a colleague's work location related to covering a colleagues location "on top of his usual role" (84). This was because in the past when he had been asked to cover a colleague's location on top of his usual role this had extended his working day past his usual hours of 8 a.m. to 4 p.m. and exacerbated his leg symptoms. Read as a whole the OH report specifies that the Claimant should not do a colleagues duties in addition to his own.

15. The OH report was discussed at a sickness review meeting on 3<sup>rd</sup> February 2016 (88). Cover for holidays was discussed. His manager Ms Lynch proposed that when the Claimant's colleague was on holiday the

Claimant would be asked to work his full time hours on the Rosendale Estate instead of his usual duties (which were the Rosendale Estate in the morning and the Vincent Estate in the afternoon). The Claimant said that this was not a problem. At an earlier sickness review meeting on 24<sup>th</sup> September 2015 (78) the Claimant had been asked if going upstairs was an issue and he had said that it was not.

16. The Respondent has a policy entitled "Management of aggression and violence at work". This document requires all of the Respondent's staff to attend either an external training programme or Pinnacle's personal safety awareness training session which should be backed up by regular refresher training. The Policy states that in the event of an act of aggression or violence staff should not argue with the aggressor but walk away and not retaliate. We accept the Claimant's evidence that he had not been given a copy of this policy until he was sent it after his suspension with a copy of his contract of employment.
17. On 30<sup>th</sup> August 2016 the Claimant was involved in an incident with a resident of the Rosendale estate. The Claimant telephoned his manager Ms Lynch after the incident to inform her that he had been attacked by a resident. Ms Lynch told the Claimant to leave the estate and to wait for her and that she was on her way to assess the incident. In the event the Claimant waited for an hour and 20 minutes for Ms Lynch to arrive. After her arrival there was a further incident (see below), which resulted in the police being called. When the police arrived the resident and the Claimant's uncle were arrested and the resident was charged and bailed. The police took a statement from the Claimant and others.
18. The following day the Respondent received video footage of part of the first incident from another worker. Once the Respondent had reviewed the footage the Claimant was suspended. He was given a letter from the Contract Manager Mr Smith saying that he had been suspended from work while an investigation was undertaken into the following allegations:
  - a. Fighting with a resident in the workplace
  - b. threatening and abusive behaviour towards a resident
  - c. conduct likely to damage the reputation of the company
  - d. serious breach of the code of conduct.

The Claimant was told that Mr Smith would need to speak to him as part of his investigation "to allow you the proper opportunity to put forward your side of events."

19. A copy of the Company's Disciplinary Procedure was enclosed. The Claimant was advised "You should not contact any member of staff, client officers or customers. However if you believe you need to contact a colleague or a client in order to provide evidence for your defence you must first speak to either myself or to a member of personnel to make necessary arrangements."

20. On 15<sup>th</sup> September the Claimant submitted a grievance (105). He complained that on 30<sup>th</sup> August he had been assaulted by a resident. He had called his manager, Ms Lynch, who told him to leave the estate and wait for her. He had waited an hour and a half before she drove past him on Tritty Road and then had refused to give him a lift in her van and told him to return to the estate unaccompanied where a 2<sup>nd</sup> incident occurred with the original aggressor. This was in breach of the Respondent's safeguarding policy which states that "Pinnacle recognises that not all acts of aggression or violence can be avoided and will support staff in the aftermath of any such incident." The Claimant complained that he had not been supported as required. Instead he had been suspended. They had not asked him to make out an incident report. He had not received his contract of employment until the previous week and had not been made aware of the Employee Assistance Program.
21. On 16<sup>th</sup> September 2016 the Claimant was advised that he was required to attend a disciplinary hearing on 23<sup>rd</sup> September 2016 to answer the above charges. (108) He was told that his email of 15<sup>th</sup> September would be taken into account as "mitigation". However the letter was one of complaint about the actions of the Respondent and was not intended to be "mitigation" which of itself implies that the Claimant was guilty. The letter advised him of his right to be accompanied at the meeting by a colleague or trade union representative, but also repeated the prohibition on contacting members of staff or clients. Although unhappily worded we do not accept that the overall effect of the letter was to preclude the Claimant from asking a colleague to accompany him to the disciplinary meeting.
22. At the same time the Claimant was sent a copy of the video footage and a number of document in advance of the hearing (96). These were statements from
- a. Ms Lynch,
  - b. Mr M Margai (gardener) who witnessed the first incident
  - c. Mr Alves, who took video footage of the first incident
  - d. Mr Myles who was present at the 2<sup>nd</sup> incident
  - e. An email of complaint dated 31<sup>st</sup> August from the resident involved in the altercations, Mr Mouharrem,
  - f. A second email of complaint, dated 15<sup>th</sup> September, from another resident, Mr McCabe, who said he had witnessed the 2<sup>nd</sup> incident.
23. No formal investigation report was produced containing a summary of the evidence for and against the Claimant and it was not clear who had undertaken the Investigation. (At the disciplinary hearing Mr Devine is referred to as the Investigating Manager.) In any event the investigation appeared to consist of asking for statements from Ms Lynch, Mr Myles, Mr Alves and Mr Margai. (The latter two were extremely brief.) No-one interviewed or took a statement from the Claimant prior to the disciplinary hearing, despite the fact that Mr Smith had, in the suspension letter, stated that he would be interviewing the Claimant to let him put forward his version of events. No attempt was made to obtain statements made to the

Police by the Claimant or others at the time of the second incident or to obtain the charge sheet against Mr Mouharrem.

Evidence relating to the first incident

24. The video footage is of the first incident. It shows the Claimant and the resident angrily and aggressively shouting at each other. Both the resident and the Claimant are then restrained by residents on the estate. In the footage the Claimant is seen trying to shake off those who are trying to restrain him and to move forward towards the resident, despite the fact that the latter was also being restrained. We could not make out what the Claimant was saying but he was clearly angry and was shouting. The resident is also being restrained and trying to move towards the Claimant and can be heard to shout at the end of the video footage "I'll run you over". It is common ground that Mr Alves only started filming after the altercation had been going on for a little while and that it did not capture the beginning of the incident.
25. Mr Margai's short statement was as follows [spelling corrected] "I was working and when I turned around I saw the cleaner and a man fighting. I stopped them and told the cleaner to walk away but the man was still in a bad mood. He still wanted to fight the cleaner for chatting to his girl as he said so I left them only."
26. Mr Alves statement said that he had seen "one of the cleaners and a resident arguing. My first reaction was to try to separate them but they kept arguing. Then I saw the resident picking a broom and tried to hit the cleaner and then I start filming."
27. The resident, involved in this incident, Mr Mouharrem, had emailed a formal complaint to the Respondent on 31<sup>st</sup> August. In that email the resident states that he had challenged the Claimant "over the inappropriate sexual way he was behaving towards my girlfriend". He had confronted the cleaner saying he was making residents feel uncomfortable and the cleaner had replied "so what". The resident said that he felt the cleaner was being intimidating, stepped into his personal space, put his hand around his neck at which point the resident punched the cleaner. At that point Mr Margai stepped between them and told the Claimant "what are you doing you work here all you need to do is to say sorry." Mr Margai had apologised for the Claimant actions.

Evidence of the second incident.

28. Prior to the hearing Mr Driver had accounts from Ms Lynch and the residents, Mr Mouharrem and Mr McCabe. It was not in dispute that the Claimant left the estate after the first incident as instructed. After waiting for an hour and 20 minutes the Claimant was walking towards the Vincent Estate when Ms Lynch passed him in her vehicle. She instructed him to go back to the estate to collect his motorbike and they would go together to the office to make a formal report. The Claimant asked if she could give him a lift and she declined saying that there was not enough room as she



already had a passenger and some paperwork on the seats. The Claimant was about 4 minutes walk away and returned to the estate on foot to meet Ms Lynch.

29. What happened next was the subject of much confusion. What is not in dispute is that there was an altercation involving Mr Mouharrem, the Claimant, the Claimant's uncle and the Claimant's cousin.
30. According to Mr Mouharrem's email when he returned to the estate some 30 or 40 minutes after the first incident the Claimant was "waiting for him and called him to come over". Mr Mouharrem says that "the Claimant had a bag in his hand" and so he went inside "to grab a baton for protection". When he went outside he noticed the Claimant's uncle and cousin coming towards him and he was then "chased by the Claimant and the 2 others". He says that the 2 men pulled out a machete and a baseball bat and at that point he pulled out his baton. He ran from the estate returning about 5 minutes later when his path was blocked by the uncle. He says that all 3 were making veiled threats towards him saying "don't come out at night, make sure you lock your doors, we know where you live." He suggests that the older man looked to be pulling a weapon and ran towards him. He says at that point the police arrived and he was arrested for affray.
31. Mr McCabe suggested that he witnessed Mr Mouharrem "being chased by the Claimant and the 2 other men", that he saw the younger of the 2 men pulling out a long metal object from his bag. Mr Mouharrem then pulled out a metal baton but ran off with all 3 chasing him. 5 minutes later Mr Mouharrem tried coming back but the older of the 2 relatives blocked his path and pulled out a metal object which he assumed was a knife. At that point the police arrived.
32. Ms Lynch in her statement says that she arrived at the estate having spoken to the Claimant on the road. She waited for the Claimant to walk down to the spot where his motorbike was passed and he then turned up "accompanied by 2 men who he introduced as his nephew and his cousin". He explained he was there to pick up his motorbike. She continues "suddenly a fracas broke out with Mr Joseph, his relatives and the guy Mr Joseph accused of punching him. By now they were screaming and running about in a really confusing manner. It was impossible at this stage to establish what actually set off the fight. Mr Joseph alleged that the guy accused had a spray – which he actually used to spray on their faces. Joseph alleged that he used teargas and other weapons which they could not verify on them." She said she called the police who came quickly. The attacker and one of Mr Joseph's relatives were handcuffed and taken away. The police took a statement from the Claimant.

#### Hearing process

33. On 21<sup>st</sup> September the Claimant asked if the disciplinary hearing could be postponed as his union representative was unable to attend until 6<sup>th</sup> October. He was advised that if his trade union representative could not attend he was required to put forward a reasonable alternative date within

5 days of the original hearing. The disciplinary hearing was rescheduled till 3<sup>rd</sup> October

34. By letter of 29<sup>th</sup> September the Claimant asked if he could be accompanied at the hearing by Ms Lozano as his companion. The Respondent responded that he could be accompanied by her only if she was a colleague or a Trade union representative. In the end the Claimant arrived on his own unaccompanied. It does not appear that he attempted to ask a colleague to attend on his behalf. He told the tribunal that as he had not been a member of the trade union when the incident occurred the trade union would not represent him.
35. The disciplinary hearing went ahead on 3<sup>rd</sup> October before Mr Driver. Mr Devine and Ms Glenn-Cox also attended. We accept that the hearing took some 3 hours. Mr Margai, Mr Alves and Ms Lynch attended to give evidence in person. (Mr Myles also attended but as he had not witnessed anything his evidence was of little or no value).
36. At the hearing Mr Driver asked the Claimant for his account. In relation to the first incident the Claimant said that he had glanced at the resident and his girlfriend and that then Mr Mouharrem had punched him in the face and that the situation had been unprovoked. The resident kept pursuing him and coming after him. Other residents were trying to stop him. The video was not taken until after the Claimant had been punched.
37. When the Claimant complained that he had not been supported Mr Driver told the Claimant that had he walked away and reported the incident after he had been struck, then he would have been supported by Pinnacle. However he had not walked away and he had been restrained. The Claimant said that he had a right to defend himself; he had been assaulted and was upset.
38. In relation to the second incident the Claimant said that when he went back to the estate to get his motorbike Mr Mouharrem was waiting for him. Mr Mouharrem then ran into his house and got a truncheon and gas spray. He had bumped into his uncle on the street (after meeting Ms Lynch and while on his way back to get his bike) and that he had told him what happened. His uncle had not accompanied him back to the estate but was at the end of the pedestrian access to the estate when he heard the commotion. He then came to the estate to assist. At that point the resident ran off and then came back and sprayed CFS gas in the air. He said he did not introduce his uncle and cousin to Ms Lynch. He had no bag with him. The accounts from the residents could not be right as he physically could not run. When the police came they arrested the resident and he had given a statement to the police. The second incident would never have happened if Ms Lynch had not asked him to go back to get his bike unaccompanied.

39. Ms Lynch attended the disciplinary hearing. The evidence that she gave at the hearing was confusing and not wholly consistent with the evidence in her statement.
40. By letter dated 18<sup>th</sup> October 2016 the Claimant was dismissed. Mr Driver found that the Claimant was guilty of gross misconduct in that, during the video footage, he had been shown shouting and swearing at the resident telling him to “come here”. Although he accepted that this was not fighting (in that he and the resident had not come to physical blows) he concluded this was not the conduct of someone who was walking away from the situation and not retaliating. He concluded that the Claimant’s conduct was “just as aggressive as the resident’s” and that he did not walk away from the situation despite a clear instruction to do so. Although the resident had accepted that he had punched the Claimant he could not accept that the Claimant was a victim, and that had he not been restrained it was likely that there would have been an escalation into physical violence.
41. In relation to the second incident he concluded that the Claimant had returned to the estate with the intention of intimidating and threatening the resident and that his actions in relation to this incident were pre-meditated. He said that he believed that the cousin had run away when the police arrived because he had an offensive weapon in his bag. “It is unacceptable that you would return to the estate with your relatives and behave in such a way that led to your uncle being arrested.”
42. The Claimant had covertly recorded the disciplinary hearing. Ms Lazaro provided a transcript of omissions from the official notes which was not disputed by the Respondent.
43. The Claimant appealed and his appeal was heard by Mr Fergus on the 24<sup>th</sup> November 2016 and not upheld. Mr Fergus watched the video and concluded that the Claimant acted aggressively and that “Mr Driver was entitled to conclude that the Claimant was displaying threatening and abusive behaviour” and that the fact that the Claimant had been punched did not excuse his behaviour. In relation to the second incident he also concluded that Mr Driver had come to a logical conclusion from the evidence in front of him.

## **Conclusions**

### **Disability discrimination**

44. It is the Claimant’s case that the Respondent failed to make reasonable adjustments. In particular he says that the Respondent had been advised that he could not provide cover because of his disability and that he should not work alone but with a partner. He alleges that, against OH advice, he was required by his supervisor to cover for a colleague, Steve.
45. The Respondent accepts that it applied a PCP that cleaning operatives should cover for absent colleagues. However it says that the Claimant was

not at a substantial disadvantage compared to non-disabled colleagues by this requirement.

46. The OH report makes it clear that the Claimant should not work over and above his hours of 8 a.m. to 4 p.m. It makes it clear he should not do a colleagues duties in addition to his own. The Claimant was not required to do that. He was required to work the whole day on one estate instead of half a day on the Rosendale and the other half on the Vincent.
47. On the day of the incident in question the Claimant says that he had been required to cover his colleague Steve's duties. He told the tribunal that this required working on the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> floors of the estate buildings and to do heavy outdoor works such as weeding and, cleaning the bins, tasks which he did not normally do.
48. There was however no evidence before the Tribunal that the Claimant was at a substantial disadvantage in covering such tasks. On the contrary, at a sickness absence review meeting on 24<sup>th</sup> September 2015, the Claimant had told the Respondent that there were no issues with going upstairs (79). Following the OH report the Claimant had specifically been asked about cover. At that time the Respondent proposed to the Claimant that if his colleague was off the Claimant would work the full day at Rosendale (rather than half a day Rosendale and half a day at Vincent estate) and the Claimant reported that that was not a problem.
49. We find therefore that the Claimant was not at a substantial disadvantage in being required to cover Steve's duties at the Rosendale estate for the full day. If he was at a substantial disadvantage then, given what they had been told, the Respondent could not reasonably have been expected to know that the Claimant was likely to be placed at a disadvantage by the PCP. It follows that there was no failure to make a reasonable adjustments.
50. (The Claimant's case before us, and also at the appeal hearing, appeared to be that had he not been providing cover at the Rosendale estate that afternoon, but doing his usual duties, the incident would not have happened. That however is not a relevant consideration in considering the duty to make reasonable adjustments or the fairness if the dismissal.)
51. It is also the Claimant's case that the Respondent applied a PCP that "employees should attend disciplinary and grievance hearings without assistance and support from the employer". The Claimant clarified that what he meant by this was that the Respondent should have allowed Ms Lazaro to attend the disciplinary hearing to assist him with documents. As a result of his condition his eyesight was poor. Although he could read, it was difficult and he could not concentrate because his eyesight was so poor.
52. The occupational health report states that the Claimant is "partially sighted in his left eye which is stable and in his right eye his vision has been fine

since he had surgery.” In the subsequent sickness review meeting the Claimant was asked if he agreed with the content of the report and said that he did.

53. When the Claimant asked if Ms Lazaro could accompany him to the disciplinary hearing he made no reference to his eyesight problems. He made no attempt to contact a colleague (or to ask the Respondent to allow him to contact a colleague) to accompany him at the meeting. When asked why he had not done so the Claimant said that he thought that that a colleague would get into trouble if he attended with the Claimant.
54. We accept Mr Driver’s evidence that the Claimant did not appear to have any problems during the disciplinary hearing with reading documents. The notes record that the Claimant asked a couple of times if he could read through his documents (120, 125). All the witness statements were read aloud to him. The Claimant did not suggest in the grounds of appeal or during the appeal hearing that he had difficulty reading documents before or during the disciplinary hearing.
55. On balance we find that the Claimant has not established that he was at a substantial disadvantage compared to non-disabled employees because Ms Lazaro was not allowed to accompany him. If he did have difficulties with his eyesight it was not clear why that disadvantage could not be overcome by representation from a colleague, rather than Ms Lazaro. If we are wrong (and he did have such difficulties) then we find that the Respondent could not reasonably be expected to know, that the Claimant was likely to be placed at a disadvantage by not having a companion at the hearing who was not an employee.

#### Unfair dismissal

56. In this case, we are satisfied that Mr Driver, the dismissing officer, had a genuine belief that the Claimant was guilty of misconduct, namely threatening and abusive behaviour towards a resident, conduct likely to damage the reputation of the company and serious breach of the Code of Conduct.
57. However, we find that the dismissal was unfair for insufficient investigation. The Claimant was suspended in order that the Respondent could carry out an investigation. The investigation was cursory at best and there was no interview with the Claimant. The Respondent is a sizeable entity. It employs some 2300 employees across the UK. It has a dedicated HR function. It has the resources to carry out a proper investigation into alleged misconduct. Both events were far from clear. Although the first incident was partially covered by video footage a reasonable investigation required enquiry as to exactly what happened throughout, including who started it and the degree of provocation to which the Claimant was subject (highly material to the issue of the degree of culpability and the appropriate sanction). What occurred during the second incident was also wholly unclear. A reasonable employer of the size and resources of the

Respondent would have conducted a more thorough investigation, preferably undertaken prior to the disciplinary hearing so that the employee (whose job is at stake) is given a chance to put forward his side of events in a less stressful environment than a disciplinary hearing.

58. The failure to obtain an account from the Claimant in advance of the hearing gave the dismissing officer a lopsided picture before the start of the hearing. It is apparent to the Tribunal from a reading of the notes of the disciplinary hearing that Mr Driver did not approach the hearing with a wholly open mind and that having watched the video footage about the first incident and seen the statements about the second incident he had come to the fixed view that the Claimant had culpably failed to remove himself from the situation. When the Claimant suggested that he was at a disadvantage because he could not cross examine Mr McCabe Mr Driver answers "a statement is enough, you don't need to cross examine, it clear enough to me." (135B).
59. Mr Driver failed to remedy the lack of investigation by conducting his own reasonably thorough investigation into matters.
60. In relation to the first incident it was the Claimant's case that he had been attacked without provocation, punched and that the resident then sought to attack him with a broom. Although there is clear evidence of the Claimant (and the resident) behaving aggressively on the video, there was insufficient investigation into the extent of the provocation. It was accepted that the Claimant had been punched but as Mr Margai said "the man wanted to fight" and Mr Alves referred to a broom. The statements from Mr Margai and Mr Alves are brief. No probing questions were asked in order to understand more closely what had happened. Mr Margai's statement suggests that it is the resident that still wanted to fight. In the disciplinary hearing Mr Margai said "you walk away and keep standing around so the fellow keep going back for you" and suggested that the Claimant hadn't listened to him and walked away. We observe that it might be difficult for even the most peaceful individual to keep his cool after being punched and then attacked with a broom.
61. In relation to the second incident, we would have expected the investigatory Manager or Mr Driver to have interviewed both Mr McCabe and Mr Mouharrem. While we understand that it may not always be appropriate to obtain witness statements from third parties, Mr McCabe and Mr Mouharrem had made complaints and had therefore put themselves into the frame. Neither had been approached. Mr. Mouharrem had been arrested and charged (unlike the Claimant) and his credibility was in issue. He had also accepted that he had been carrying a weapon. This is particularly so given the divergence in the various accounts and the Claimant's case that he could not have planned the attack or been waiting for Mr Mouharrem given that he only returned to the estate because he had been instructed to do so by Ms Lynch. He had also been refused a lift. No attempt was made to ask the police if they would release the statements or to ascertain what Mr Mouharrem had been charged with.

When all three of the statements are considered no clear account emerges. Mr Driver's finding that the Claimant returned to the scene with the intention of threatening the resident and that he and his relatives had done so, is based on insufficient investigation.

62. At the disciplinary hearing the Claimant says several times that Mr McCabe's and Mr Mouharrem's version cannot be correct as he cannot run. The Respondent was aware that the Claimant had a disability and that he had injuries to his left leg following motorbike injuries. No follow up questions were asked about the Claimant's position that he could not run.
63. It was the Claimant's undisputed evidence, that he had not received the Respondent's policy "Management of aggression and violence at work", until after he had been suspended and that he received it with his contract of employment after the incident occurred. At the disciplinary hearing no questions were asked about the Claimant's knowledge of the policy and Mr Driver did not check the Claimant's training records.
64. We are conscious that the law requires employers only to carry out such investigation as is reasonable and not necessarily to pursue every possible avenue of enquiry. Nonetheless we consider that the process was unreasonably shorthand. While it may not ultimately have been possible to reconcile all the accounts we find that given the confusion there was insufficient investigation into the degree of provocation at the first incident and who the real aggressor was during the second incident. While the Claimant had not been blameless and had clearly reacted aggressively the issue was the extent of the Claimant's culpability which would inform the appropriate sanction.
65. The failure to carry out a proper investigation was not something that was remedied at appeal. Mr Fergus considered the Claimant's grounds of appeal but undertook no further investigation. He did not seek to analyse the discrepancies between the various witnesses evidence. Mr Fergus told the Tribunal that that he had reviewed Mr Driver's deliberations and concluded that he came to a logical conclusion from the evidence in front of him.
66. For these reasons we find that the dismissal was unfair. However we acknowledge that the Claimant was not blameless in the events that led to his dismissal and that issues of contribution will arise.
67. The issue of remedy is adjourned to be heard on 11<sup>th</sup> October 2017. In unfair dismissal case the primary remedy is reinstatement/re-engagement. If the Claimant does not wish to be reinstated or reengaged or those remedies are otherwise inappropriate the Tribunal will consider compensation. In considering both reinstatement/reengagement and the amount of compensation the Tribunal will any consider contributory conduct on the part of the Claimant and the issue of "Polkey" (i.e. whether the compensatory award should be reduced to take into account the

chance that Claimant might have been dismissed in any event had a proper investigation taken place).

68. The Claimant will prepare and send to the Respondent on or before 25<sup>th</sup> August 2017
  - a. copies of all documents which evidence his search for alternative employment, and if he has undertaken paid work, copies of pay slips, invoices receipts etc.
  - b. an updated schedule of loss.
  
69. On or before 27<sup>th</sup> September the Claimant shall sent to the Respondent a signed witness statement detailing his efforts to find new employment, cross referring where appropriate to any documents so disclosed.

Employment Judge F Spencer  
27<sup>th</sup> July 2017