Appeal No. UKEAT/0513/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
On 31 October 2013
Judgment handed down on 25 March 2014

Before

THE HONOURABLE LADY STACEY

MS V BRANNEY

MRS R CHAPMAN

SOUTH WEST LONDON & ST GEORGE'S MENTAL HEALTH NHS TRUST APPELLANT

(1) MR M K POOLOO
(2) MR V DUDHEE RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR IAN SCOTT (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR
For the Respondents	MR SEAN JONES (One of Her Majesty's Counsel) Instructed by: Messrs HCL Hanne & Co Solicitors St John's Chambers 1C St John's Hill London SW11 1TN

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Unfair dismissal. The Appellant was the employer of both Respondents. The Appellant dismissed both employees, arguing that they had committed gross misconduct in their treatment of service users in their care. The Employment Tribunal found that the dismissals were unfair. The Appellant argued that the Employment Tribunal had substituted its own view for that of the employer. **Held**, the Employment Tribunal had come to a decision to which it was entitled to come and had therefore not erred in law. While the ET appeared to have come near to substitution, it had not done so. Appeal dismissed.

THE HONOURABLE LADY STACEY

Background

1. This is an appeal by the Respondent against a judgment of the Tribunal chaired by Employment Judge Hall-Smith at London South, sent with reasons on 18 June 2012. We refer in this judgment to the employer as the Respondent and to the employees as the Claimants, as they were in the Tribunal below.

2. The Claimants were represented at the Tribunal by Mr Taylor and before us by Mr Jones QC. The Respondent was represented at the Tribunal and before us by Mr Scott.

3. The Notice of Appeal resulted in an order for a preliminary hearing before HHJ McMullen QC, Mr Gammon, and Ms Mills. By a decision sealed 3 May 2013, the EAT allowed a full hearing. It is noted in the judgment that the Employment Tribunal gave itself a large number of self-directions relating to what a reasonable employer would do, and its own role as an industrial jury and therefore a very cautious approach is required to arguments by counsel that the Employment Tribunal did not in fact carry out the directions which it gave to itself. At the preliminary hearing it was recognised that the essential ground of appeal was one of substitution and that the Respondent would be allowed at a full hearing to argue that the decision of the Employment Tribunal was perverse because of the way in which it treated the reliability of certain witnesses; the weight that the Employment Tribunal put on the evidence from both service users and others; and the weight which the Employment Tribunal put on the evidence from student nurses. Further, a full hearing was allowed on the ground relating to the Employment Tribunal substituting its view for that of the Respondent of what constitutes an assault. It was noted at the preliminary hearing that “the Tribunal’s view on the law of the assault is wrong.” Other matters, namely the disciplinary and appeal process, and the criticism

of witnesses led on behalf of the Respondent, (Ms Cairnes and Ms Goddard) were not allowed as freestanding grounds of appeal, but were allowed to be deployed as illustrations of the substitution mind-set.

The facts

4. The facts of the case are rather complicated and are set out helpfully in the chronology provided. The first Claimant began work for the Respondent, as a support worker, in 1994. In 2005 he transferred to Riverside Lodge, a small mental health and rehabilitation unit in which he worked as a support worker until he was dismissed on 30 April 2010. The second Claimant started work for the Respondent as a staff nurse in 1990. He worked at Riverside Lodge until 2010. The service users who lived in Riverside Lodge were people who had been formally detained under mental health legislation, and were challenging and very vulnerable.

5. The events which gave rise to the dismissals came to light by a process beginning on 5 January 2010 when a complaint was made by an independent mental health advocate on behalf of a service user, known as "R" about conditions at Riverside Lodge. The letter included complaints about "two Indian members of staff". On 13 January 2010 it was alleged that an incident occurred involving the second Claimant shouting aggressively at a service user, known as "M". On 15 January 2010 service user "R" was interviewed by the acting unit manager. On 18 January 2010 student nurse Weddy reported to the acting unit manager that another service user, "AK" had said in conversation "Vic, he intimidates and shouts at me." On 21 January 2010 an occupational therapist, Alex Armstrong-Roger reported in writing that she had observed the first Claimant forcefully grabbing the service user "M" by his arm and pushing backwards with enough force that "M" had to take a number of steps backwards.

6. On 21 January 2010 the first Claimant was suspended from duty, confirmed in writing by letter dated 26 January 2010. The letter was lodged on the day of the hearing before us, forming page 136 of the bundle. On 22 January 2010 the second Claimant was suspended from duty, confirmed in writing by letter dated 26 January 2010. On 29 January 2010 an investigating officer appointed by the Respondent, Mr Allen, interviewed service user AK, service user C, service user V and service user S. The same investigating officer interviewed, on 1 February, student nurse Lopez-Dito, student nurse Tarima, student nurse Pracchia and student nurse Weddy. On 11 February 2010, Mr Allen also interviewed Alex Armstrong-Roger, occupational therapist, and others, including the manager of the unit. Various interviews followed during the month of March, and on 6 April 2010, the second Claimant was interviewed by Mr Allen. On 16 April 2010, the general manager, Ms Cairnes informed the second Claimant that in light of the report produced by Mr Allen she required him to attend a disciplinary hearing on 29 April 2010 to consider allegations of gross misconduct. On 20 April 2010, Ms Cairnes informed the first Claimant that he was to attend a disciplinary hearing on 30 April 2010 also to consider allegations of gross misconduct.

7. There was no dispute before us that the Respondent is required to take seriously any complaint made of unacceptable behaviour by a staff member to a service user. The investigation which we describe below resulted in various matters being raised. Mr Allen found that some allegations were spoken to by more than one person, while others were not. No issue was taken with the Respondent making enquiries into the general demeanour of the Claimants as well as into specific incidents. As we set out below, some incidents came to loom large in the mind of the Respondent and of the ET.

8. The disciplinary hearings took place on 29 April for the second Claimant and 30 April for the first Claimant. Both were summarily dismissed. Both appealed against that decision and

appeal hearings were heard on 16 July 2010. Both were advised by letters dated 22 July 2010 that their appeals were dismissed.

9. At the end of the hearing for the first Claimant the dismissing officer stated:-

> **"… the panel have carefully considered the evidence of the management witnesses and staff accounts. We found the witness evidence credible. We did not consider that you had given an accurate account of events.**
>
> **There was insufficient evidence to substantiate the allegations, but the panel believed that these incidents may well have happened and relate to your conduct towards patients.**
>
> **This amounts to gross misconduct and therefore the panel had decided to summarily dismiss you from the trust. This means you leave the service as of today."**

In the letter dismissing the first Claimant it was stated: –

> **"In relation to the second allegation the panel considered all the evidence presented and found substantial differences between management's account of the incident and your account. The witnesses also give very credible account of the incident and evidence led substantiated management's account that you physically assaulted a service user by using force and pushing him during an outing to the bowling alley. The panel therefore formed the belief that you failed to provide an accurate account of the incident.**
>
> **Whilst there was insufficient evidence to substantiate each of the other allegations in isolation, the panel believed these incidents which relate to your inappropriate conduct towards service users whilst on duty, may well have taken place in the manner described.**
>
> **The physical assault of a service user is gross misconduct and in determining an appropriate sanction, I decide to summarily dismiss you from the employment… from today 30 April 2010."**

10. The Respondent's letter dismissing the second Claimant stated:-

> **"The allegations related to your aggressive controlling and intimidating conduct whilst on duty and in particular verbal abuse towards vulnerable service users.**
>
> **In addition to the notes of the interviews with clients, staff and students the panel heard evidence from a number of key witnesses, which confirmed a common theme of your inappropriate, controlling and unacceptable behaviour towards vulnerable service users, carers and student nurses. Student nurses described your failure to meet clients' basic needs, without explanation, and described your behaviour as intimidating. One of the student's clinical supervisors/lecturer from Kingston University, give evidence that his student consistently raised concerns about you as her mentor throughout a placement. He described your practice as authoritarian. The student stated she felt unable to raise these issues with you directly because she felt intimidated by you. At the conclusion of the hearing you were still unable to demonstrate any insight into the inappropriateness of your behaviour, the impact of your behaviour on others, including service users, or any understanding of how you would need to change.**
>
> **The panel felt the behaviour you displayed towards vulnerable service users was tantamount to psychological abuse. In addition, the panel felt that you failed to give appropriate care and**

attention to service users in your care, or provide an appropriate and acceptable standard of care to aid recovery.

The panel found these across misconduct allegations substantiated. The panel also concluded that you had breached your professional NMC code of conduct."

11. Thus the disciplinary hearings in respect of both Claimants were complicated because a number of matters came to light following a complaint. There was no dispute before us that the Respondent was entitled to investigate matters as and when they came to light and that they were required to take them seriously. The Respondent found following the disciplinary hearings that both Claimants had been involved in behaviour which was unacceptable and which merited summary dismissal. As stated, no points were taken before us that some matters were regarded as proved and others as only likely to have happened. We also noted that Mr Jones was able to represent both Claimants, there being no argument that there should have been a different disposal for each of them.

12. The other complication in the facts relates to the consideration of evidence from service users and the steps that the Respondent took to ascertain the capacity or lack of capacity of service users to give evidence. Mr Allen reported to the disciplinary hearings that: –

> **"All service users were assessed by medical staff that are well known to them and were assessed individually as to the fitness to be interviewed. The Trust's safeguarding process and procedures were also followed with all service users accompanied by their own advocate… who represented them during the interviews and when they were presented their statements to sign."**

While that report was available for the Claimants at the disciplinary hearings and at the appeal, the result of the interviews as to the fitness of the service users was not made available at that stage. As will be seen below, the Employment Tribunal required these assessments to be lodged. They are in the following terms: –

‘ “R” suffers from treatment-resistant schizophrenia with a complex delusional system. While I am not concerned about his fitness to be interviewed, it is unlikely that any account that he gives will be reliable, as a result of his delusional system.

“M” does not have capacity to consent to such an interview. He was not able to understand the information given to him regarding the investigation, despite attempting to word the information in a variety of ways. He is not fit to be interviewed and he does not have capacity and there is a risk that he will be distressed by the process.

“AS” suffers from ongoing positive symptoms of schizophrenia and significant cognitive impairment. Consequently he does not have capacity to consent to such an interview and is not fit to be interviewed.

“AK” capacity is likely to fluctuate and he suffers from positive symptoms of schizophrenia. However, he has in the past been able to give a good account of events witnessed on the unit. At this time he is fit to be interviewed but is likely to require extra time and support as he suffers from significant dysarthria.

“VP” is fit to be interviewed and would be able to give a clear and reliable account of what he has witnessed.’

13. The assessments were carried out by Mr Allen in the interests of witnesses. They were not carried out to test reliability in the interests of the Claimants; but the results nevertheless gave information about reliability. The results gave concern about the reliability of R, about the ability of AK in light of his physical condition of dysarthria, and gave no concern about the reliability of VP.

14. The reports which Mr Allen made for the disciplinary hearing showed that in respect of the first Claimant, the matters which Mr Allen had found having begun his investigation were as follows: –

1. [first Claimant] shouted at service user R using aggressive and offensive language on one occasion. This is also against another member of staff. (From 4 September 2009 – 5 December 2009 and 18 December until 5 January 2010.)

2. [first Claimant] was allegedly physically aggressive towards a service user M reported by another member of staff on 21 January 2010 whilst on a bowling outing.

3. [first Claimant] was observed to have dragged a service user A (1) to the toilet.

4. on another occasion is [first Claimant] "roughed up" a service user A (2) when he asked for a glass of milk. This was also against another member of staff.

15. In his report, Mr Allen concluded that having investigated all allegations, it was not possible to prove or disprove numbers 1, 3 and 4. He took the view that allegation 2 could be proved as it related to a complaint by a member of staff. The detail of that in his report was that Alex Armstrong-Roger stated that she had been involved in an outing to a bowling alley with a number of service users and staff, when she observed the first Claimant forcibly grab M by his left arm and shoving him backwards, with enough force that M had to take several steps back. Ms Armstrong-Roger called the first Claimant's name and stated "do not shove service users like that," to which the first Claimant said, "What?" As there were other people present, Miss Armstrong-Roger said that she would speak to him later. She explained that M had

walked round to one side of the car with the first Claimant and another service user. The other service user got into the car and the witness claimed to have seen the first Claimant grabbing M by his left arm and shoving him backwards. She gave some detail of difficulties which had occurred earlier on that the outing and from which she thought that the first Claimant might be "wound up". Mr Allen interviewed A, who said "I vaguely saw [first Claimant] push M". He also interviewed a student nurse, who said that she heard Miss Armstrong-Roger shout "do not manhandle the clients." Mr Allen interviewed the first Claimant and reported that he denied pushing M at all and said that he had no recollection of anyone making any comment. Mr Allen gave his own opinion, to the effect that because there were 3 witnesses, Miss Armstrong-Roger, A, and the student nurse all speaking to an incident happening, or in the case of the student nurse, hearing a remark about the incident, it seemed improbable that they were all inaccurate. His belief was reinforced by his view that the first Claimant's account was vague and non-committal. He thought that his complete denial of the events taking place made it seem unlikely and less plausible than the other witnesses.

16. In respect of the second Claimant, Mr Allen's report showed that the complete list of allegations was: –

1. [second Claimant] shouted at service R using aggressive and offensive language on more than one occasion. This allegation also involves another member of staff. From 4 September 2009 5 December 2009 and 18 December until 5 January 2010.

2. [second Claimant] shouted aggressively at a service user M in full view of staff and other service users. 13 January 2010.

3. ……

4. that [second Claimant] “roughed up” a service user a when he asked for a glass of milk. June 2009

5. (second Claimant) shouted aggressively at a service user in full view of staff and other service users. Reported 18 January.

6. service user alleged that (second Claimant) gave him a hard time to change your statement to favour you after a disagreement with another member of staff.

17. Mr Allen concluded following his investigations that the overall findings suggested that on a number of occasions, the second Claimant had not only raised his voice to vulnerable service users, but had also used abusive and threatening language. The incident which was alleged to have taken place 13 January 2010 was described as follows: M approached student nurse Weddy with the phone book in his hand and asked if she would help him to call his sister. As they were walking to the office the second Claimant shouted loudly from the kitchen. “M you cannot use the phone to call your sister on weekdays.” Student nurse Weddy said that she did not see a problem in helping M and was shocked. She said that M was distressed and upset. The second Claimant’s position on the matter was that the care plan for the service user was that he was not to call his sister during the week and that was the reason for his telling him not to do so. He denied having spoken in an intimidating way.

The decision of the Employment Tribunal

18. In a reserved judgment, the Employment Tribunal found that both Claimants were unfairly dismissed. A complaint had been made by the second Claimant of unlawful

discrimination on grounds of race. That was dismissed and no appeal was marked against the dismissal. We say no more about it.

19. The issues identified by the Employment Tribunal were as follows: –

1. The Respondent contends that the reason for the Claimant's dismissal was a reason related to the conduct.

2. Were the dismissals of the Claimants on 30 and 29 April 2010 respectively fair in all the circumstances in accordance with section 98(4) of the **Employment Rights Act 1996**?

3. In particular were the Claimants treated differently (inconsistent treatment by the employer) in terms of a sanction imposed by the Respondent on others?

4. Further if the Tribunal finds the dismissal was unfair on procedural grounds the Respondent contends it would not have made a difference in any event (**Polkey**); and further that the Claimants should in those circumstances be judged to have made a significant contribution to their dismissal in any event.

20. No argument was presented in relation to paragraph 3 above. In relation to paragraph 4 the Employment Tribunal adjourned for a remedy hearing at which the question of contribution and any reduction in respect of the case of **Polkey** would be heard.

21. The Employment Tribunal found that the disciplinary process adopted by the Respondent involved the Respondent accepting the allegations of the service users in the absence of any evaluation of whether the evidence could be regarded as reliable. It found that the disciplinary

officers placed more weight on the evidence of service users than on the evidence of the Claimants. The Employment Tribunal found that the approach of the Respondent throughout the entire process was to downplay any positive evidence in favour of both Claimants and to elevate evidence which was clearly critical of the Claimants. It could find no documentary evidence about the reference made to the supervisor from Kingston University and it noted that a description of the second Claimant as "authoritarian" would not have lead a reasonable employer in the context of the unit in which the second Claimant worked to categorise such a quality as amounting to gross misconduct. It found that the disciplinary hearing had essentially accepted accounts from service users which a reasonable employer should have approached with extreme caution, having regard to their unreliability.

22. The Employment Tribunal looked at the allegation of assault made against the first Claimant. They made the following findings in paragraph 107 and 108.

> **"107. The Respondent had treated the allegation, very seriously, which in the case of an assault would have been an approach which was entirely justified. However at its highest. This was an allegation which involved Mr Pooloo taking M by his arm and pulling him back, causing M to step backwards. At the time of the incident the bowling party would either be getting into the car or about to get into the car and we found that no evaluation had been undertaken by the Respondent into possible explanations or indeed, the quality of Alex Armstrong-Roger's account when she was on the other side of the vehicle.**
>
> **108. The Tribunal found that the Respondent's approach involved elevating an incident in the absence of any reasonable evaluation into a serious allegation of assault involving a deliberate hostile act on the part of Mr Pooloo. It did not appear to the Tribunal on the evidence that the Respondent had treated the matter particularly seriously at the time, in circumstances where Mr Pooloo was seated next to service user M on the return journey home and where the acting unit manager had neither completed an incident report not had entered the incident into the patient's notes. Kristina Lopez-Dito who had heard Alex Armstrong-Roger seeing do not manhandle the client reported that service user M appeared to be his usual personality, chatting following the alleged incident and that he seemed okay following the incident."**

The Employment Tribunal did find that a reasonable employer would have undertaken an investigation into the allegation. They found that a reasonable employer would have undertaken a reasonable evaluation into what could have occurred before categorising the incident as amounting to violent aggression or physical assault. They found in paragraph 114 the following: –

"114. There Tribunal did not consider that even if it had been the case that Mr Pooloo without justification had pulled service user M back by his arm as described, it was conduct of the same league as described as assault and abuse in the Respondent's disciplinary policy. The action described was pulling by the arm and did not amount to action involving a kick, striking a rather direct contact which could reasonably be described as amounting to an assault generally understood as involving a hostile act. The was no injury to service user M and the Respondent had never considered the possibility that what Alex Armstrong-Roger had described might have amounted to rough an appropriate handling of a service user, rather than conduct which was so serious as amounting to physical assault."

Thus the Employment Tribunal found that the reaction of the Respondent was not within the range of reasonable responses which are reasonable employer would have made.

Submissions for the Respondent

23. Mr Scott, counsel for the Respondent, opened by explaining that there had been two dismissals which of course had to be viewed separately. He reminded us that the legal principles concerning conduct dismissals are set out in the well-known cases of **British Home Stores Ltd -v- Burchell** [1978] IRLR 379 and **Post Office -v- Foley** [2000] ICR 1283. He referred to the very recent case of **Tayeh -v- Barchester Healthcare Ltd** [2013] EWCA Civ 29 at paragraphs 46 to 50. In particular, he emphasised from that case that an Employment Tribunal must

"focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether the employee has suffered an injustice."

24. He reminded us of the quotation in that case from the earlier case of **Foley** that

"it was also made clear in Iceland Frozen Foods Ltd… That the members of the tribunal must not simply consider whether they personally think that the dismissal was fair and they must not substitute their decision as to what was the right course to adopt for that of the employer. The proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting the judgment for that of the employer. But that process must always be conducted by reference to the object of standards of the hypothetical reasonable employer which are imported by the statutory reference to "reasonably or unreasonably" and not by reference to the subjective views of what they would in fact done as an employer in the same circumstances. In other words, all the other members of the tribunal can substitute their decision for that of the employer, that

decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not."

25. In respect of perversity, Mr Scott made reference to the well-known case of **Yeboah -v- Crofton** [2002] IRLR 634 at paragraph 93. He reminded us that the statutory provision with which we were concerned is section 98 of **ERA 1996**. He drew attention to paragraph 141 of the ET judgment which is in the following terms: –

> **"For these reasons it is the unanimous judgment of the tribunal that the Respondent failed to act as a reasonable employer within the meaning of section 98(4) of the ERA 1996 in dismissing the Claimants. Accordingly, it is the unanimous judgment of the tribunal that the Claimants were unfairly dismissed."**

26. He referred to paragraph 30 of the judgment from which it could be noted that there was no criticism of the extent of the investigation which was described as "a very thorough investigation". Therefore, argued Mr Scott, it had been recognised by the ET that there was nothing wrong with the investigation of the complaints made against the Respondents. The Respondents had fulfilled the three part test in the case of **British Home Stores v Burchell**, but had been found wanting by the Employment Tribunal when it came to section 98(4) of **ERA 1996**. The investigations were set out in documents included in the supplementary bundle, from which it could be seen that the proceedings were quasi-judicial in that the investigator heard from witnesses. Mr Scott's argument was that the Respondent had erred in law in various ways in the course of those hearings and the decisions made as a result of them.

27. The first problem addressed was the medical assessments of capacity of service users. He argued that the ET had required, on the third day of the hearing, that evidence of medical assessments of the capacity of the service users should be produced. He referred to paragraph 32 of the reasons which showed that the ET had considered the evidence which had been produced after the parties had closed the cases. Mr Scott argued that the fact that the

service users had been assessed as to their capacity to be witnesses by medical staff who knew them had been included in the investigation reports. No issue had been raised about this at any stage in the disciplinary procedure including the appeal. He argued that it was an error of law for the Tribunal to require them to be produced and to examine them and then to place very significant weight on its own examination of those assessments. He argued that the Tribunal had erred by substituting itself as the decision maker when it carried out its own examination of medical assessments. He argued that the Tribunal drew conclusions based on its own assessments, and did so after the parties had closed the case thereby denying the Respondent the chance to lead evidence about it. He argued that the Tribunal's own assessment of the service users' evidence was a central matter in its findings. He made reference to paragraph 140 of the reasons which is in the following terms: –

> **"To the extent that the Respondent, as we found, failed to undertake any evaluation of the reliability of the evidence and accepted without question the accounts of the service users, we concluded that the Respondent failed to act as a reasonable employer. We conclude that the approach of both the panel at the disciplinary hearing and at the appeal hearing failed to act as a reasonable employer by its acceptance of allegations in the absence of any order of any reasonable enquiry or evaluation. These were serious allegations against the Claimant and a reasonable employer would have considered the allegations against the entirety of the evidence rather than as we found adopted an approach which accepted without reservation the evidence of potentially unreliable witnesses and in the case of Mr Pooloo placed the most damaging interpretation on an incident when both service users and staff were about to get into a car for the return journey to the unit which might equally have involved rough handling or an accident."**

28. Mr Scott argued that if the Employment Tribunal were entitled to look at the medical assessments they were wrong to decide that they should be used to decide that the service users were unreliable. He pointed out that one of the service users had been noted to suffer from dysarthria which is a speech disorder and not a mental impairment. The Tribunal made no reference at all to an assessment of a service user referred to as V although the medical assessment of him indicated that he was fit to be interviewed and could be taken to be able to give a clear and reliable account of what he had witnessed.

29. Mr Scott argued that the Tribunal had substituted its own view of the seriousness of the second Claimant's conduct because it had described the ward concerned as "difficult" and therefore a ward that might well justify controlling behaviour. Counsel argued that the Tribunal had no professional ability to make any such a valuation. It should instead have asked itself whether a reasonable employer could have regarded behaviour described as controlling and intimidating on such a ward as unacceptable from a qualified experienced nurse. The matter of professional standards was very much one for the Respondent, who had to run the service, rather than one for the Tribunal.

30. In a similar argument, Mr Scott argued that the Tribunal had substituted itself or had been perverse in finding, in respect of the second Claimant, that the only evidence of ill-treatment towards service users had come up from service users themselves, other than the incident which happened and 13 January. In so stating the Tribunal had overlooked evidence given by nurse Weddy and the ward manager who had indicated that one of the service users felt intimidated by the second Claimant.

31. Mr Scott argued that the substitution mind-set was further demonstrated by the criticism made by the Tribunal of the weight placed on the accounts of student nurses when they described the second Claimant as "controlling". That evidence was given to the disciplinary hearing and Mr Scott argued that it was hard to see how the Employment Tribunal could reach a conclusion that the weight given to it was disproportionate other than by substituting its own view. The complaint made by the nurse about the incident of 13 January was about the way that the second Claimant had shouted at the service user, rather than about the content of the instruction from the second Claimant to the effect that the service user could not use the telephone.

32. Turning to the alleged assault by the first Claimant on the service user, Mr Scott argued that the Employment Tribunal had substituted its own view or had made findings which were perverse. He argued that the Tribunal had "carried out a re-trial" of the issue of what might may not amount to a physical assault. It had gone wrong in doing so because what it should have done was to ask itself whether there was evidence before the disciplinary hearing from which a reasonable employer could have, by preferring the direct evidence of the nurses, come to the view that there was unacceptable conduct by the first named Claimant. He submitted that it was plainly allowable for a reasonable employer to prefer the evidence of one witness over another on a matter such as this. He argued also that the Tribunal had contradicted itself by stating that the matter was apparently not treated seriously at the time. It made that finding, at paragraph 108, in contradiction of paragraph 95 where it found that the Claimant was suspended on the same day. Finally on the question of misconduct, he argued that the Tribunal had erred in its conclusion about what is an assault. He referred to paragraph 114 in the following terms: –

> **"The tribunal did not consider that even if it had been the case that Mr Pooloo without justification had pulled service user M back by his arm as described, it was conduct of the same league as described as assault and abuse in the Respondent's disciplinary policy. The action described was pulling by the arm and did not amount to action involving a kick, striking a rather direct conduct which could reasonably be described as amounting to an assault generally understood as involving a hostile act. The was no injury to service user name and the Respondent had never considered the possibility that what Alex Armstrong-Roger had described might have amounted to rough an appropriate handling of a service user, rather than conduct which was so serious as amounting to physical assault."**

33. Mr Scott argued that it was not for the Tribunal to consider the definition of assault; it was for the Respondent to decide what was acceptable behaviour within its provision of care.

34. Mr Scott made reference to the case of **Morgan -v- Electrolux Ltd** [1991] is ICR 369 as an example of a case in which a Tribunal gave itself a direction described as "impeccable" but then proceeded to substitute its own view. He argued that the Tribunal in the present case while it may have directed itself properly clearly used its own judgement in deciding what it would

have done rather than in deciding whether or not the actions taken by the Respondent were within the range of reasonable actions.

35. As regards disposal, Mr Scott argued that in the first Claimant's case it was plain that a properly directed Tribunal could have found that a reasonable employer could have dismissed the first Claimant fairly. As regards the second Claimant, the statements from the service users were such that dismissal by the Respondent could, if those statements were accepted by the Respondent, be a reasonable response. The Tribunal had given its own clear views. It would not be fair to require the same Tribunal to reconsider. Therefore his motion was to have the case remitted to be re-heard in front of a different Tribunal.

Submissions for the Claimants

36. For the Claimants, Mr Jones began by submitting that the test under the case of **Burchell** had not been entirely satisfied by the Respondent because there has to be an investigation which is reasonable in all the circumstances and at paragraphs 61 and 65 the Tribunal had found that the investigation carried out on behalf of the Respondent was to the effect that certain allegations could not be substantiated but were nonetheless pursued. He made reference to the case of **Salford Royal NHS Foundation Trust -v- Roldan** [2010] EWCA Civ 5 to 2 at paragraphs 56 to 60. He argued that in accordance with the guidance given in paragraph 60 it was obvious that a reasonable employer had a duty to be particularly careful when dealing with evidence against employees who had 20 and 16 years of service. In the present case the allegation was one of physical aggression. He argued that the Employment Tribunal were properly interested in that and that paragraph 115 of the reasons showed that it had reasons for deciding that the Respondent had not proceeded reasonably. It spelt out that it was concerned that the employer had not considered the possibility that the first Claimant's denial of the incident could have been true.

37. He made reference to the case of **Tayeh** in which the classic passage concerning substitution is given. He argued that Mr Scott was inviting the EAT to do what he was accusing the Employment Tribunal of having done. Mr Jones made reference to the case of **Bowater -v- Northwest London Hospitals all NHS Trust** [2011] EWCA Civ 63. In that case, the Claimant was a nurse who was dismissed by her employer. The ground of dismissal was gross misconduct, consisting of making an inappropriate remark when restraining a patient. The employer found, both at a dismissal hearing and at an internal appeal, that despite the claimant's good record and her recognition that she had made a serious mistake, she had acted in an inappropriate manner and that she should be summarily dismissed. The Employment Tribunal found that the decision to dismiss the claimant fell outside the band of reasonable responses which are reasonable employer could adopt. Before the EAT, a finding was made that the Tribunal had wrongly substituted its opinion of what would have been reasonable. The EAT noted that "The relevant standard, of which no account was taken, was how would this comment be treated by a reasonable NHS Trust, and was the decision to dismiss, when it was made, outside the band of responses of a reasonable NHS Trust in the circumstances?" In the Court of Appeal, it was held that the Employment Tribunal had carefully set out the primary facts and the respondent's views of them. It was for the Employment Tribunal to decide, after having found the facts, whether the respondent acted within the range of reasonable responses open to it in respect of the claimant's conduct. It having done so, it was not for the EAT to interfere with that decision. We were referred to the judgment of Longmore LJ in the following terms: –

> **"19. It is important that, in cases of this kind, the EAT pays proper respect of the decision of the ET. It is the ET to whom Parliament has entrusted the responsibility of making what are, no doubt sometimes, difficult and borderline decisions in relation to the fairness of dismissal. An appeal to the EAT only the lies on a point of law and it goes without saying that the EAT must not, under the guise of a charge of perversity, substitute its own judgment for that of the ET."**

38. Mr Jones argued that in the Notice of Appeal it was argued that Ms Goddard said she had no reason to think that the service users were unreliable. That was not correct. The medical assessments showed that there was reason to think that some at least of the service users might be unreliable. Counsel asked rhetorically if an employer could fairly terminate employment on unreliable evidence. He argued that the Tribunal could not be criticised as acting perversely when it considered all of the evidence that the Respondent had had before it. The second Claimant had denied the allegation made against him and therefore it was in issue. The assessment of the service user was that he was prone to delusions. This ought to have been disclosed to the Claimants before the hearing. The assessment of the particular service user, which was made only after he had been interviewed, was that it was "unlikely that any account he gives [would] be reliable, as a result of his delusional system". Mr Jones argued that the Tribunal had found that there had been an absence of an enquiry or reasonable enquiry as to whether the service users could be reliable witnesses. He argued that that finding appeared to be confirmed by the assertion in the Notice of Appeal that "the contents of the medical assessments had not been an issue that had been raised or considered at any stage during the disciplinary or appeal process." (We do not accept that as a fair reading of the grounds of appeal. It is meant to indicate that the point now taken was not taken at the stage of investigation and disciplinary hearings.) He argued that the Tribunal was not substituting its view of the competence of the service users. Rather, it was criticising the Respondent for failure to take into account what was relevant. Mr Jones argued that it could not be perverse for the Tribunal to focus on the service users who were found to be unreliable in their medical assessments and to ignore the one service user who was said to be capable of giving a reliable account. The point was that there were two service users who were found to be unreliable but that was not brought to the attention of the Claimants at the hearings, nor was it considered properly by the Respondents when they relied on that evidence and decided to dismiss. We explored with Mr Jones whether his argument might only go to remedy on the basis that even if

the Respondent had discounted the evidence of the two service users about whose reliability some question might be raised, it would still have been open to the Respondent to dismiss. The Respondent could have relied on the evidence of the third service user, whose reliability was not in doubt. Mr Jones however argued that that ignored the fact that the Respondents felt that there was a pattern of behaviour and that all the incidents added up. He said that there was no basis for a conclusion that evidence from only one reliable service user was sufficient for dismissal to follow. He noted that that particular incident had in any event happened 4 years earlier which made it even less likely that it would have been such as to lead to dismissal.

39. On the question of the Tribunal's assessment of professional standards, Mr Jones said that it was not the key to the decision. He argued that the Tribunal had found that the disciplinary proceedings were predetermined. They found that the chairman of the disciplinary panel was deliberately unfairly selective in her approach to the evidence. There was a failure to undertake any evaluation of the reliability of the evidence of the service users. In those circumstances there was sufficient to render the dismissal unfair.

40. Mr Jones argued that the Tribunal's view of the evidence of ill-treatment was correct and did not involve substitution. It was accurate to say as was said in paragraph 34 that the evidence came from the service users themselves apart from the evidence relating to the telephone incident on 13 January 2010.

41. When it came to the weight to be attached to student nurses' evidence, Mr Jones argued that the Respondent misunderstood the Employment Tribunal's decision. At paragraph 43 the Tribunal had noted that the student nurses had not been asked about the care plan. They did not suggest that the fact that the witnesses were students made their evidence any less cogent. The difficulty that the Tribunal correctly saw was that no effort had been made by the Respondent to

find out about, and to consider what effect knowledge of the relevant provision of the care plan might have had on the student nurses' perception of events. He argued that any reasonable employer would have asked, in relation to the telephone incident, if the witness was aware that the service user was not allowed to call his sister on weekdays. Had she known that then she would not have been concerned that "no rationale was given." As Mr Jones put it, "that provision would turn a potentially arbitrary denial of the service user's right into proper adherence to the care plan." It was plain, counsel argued, that the witnesses wanted to help the service user and did not understand, because they did not know about the provision of the care plan, that he was not allowed to make the call. Therefore the Tribunal were concerned that the student nurses were giving evidence without knowing the whole story and that the Respondent had chosen to rely on their evidence in those circumstances.

42. In relation to the first named Claimant's alleged assault on service user M Mr Jones argued that the Tribunal had in mind that the accusation was one of "physical aggression". That was what was said in the dismissal letter and it was plainly what the employer had decided. The Tribunal determined that there had been insufficient investigation of the issue as to whether or not that there had been aggression. In the whole context of the care provided by the Claimants to the service users, it was argued that the Tribunal should have looked at this question and should have borne in mind that there was evidence which was supportive of the first named Claimant and which did not reveal him to be a person with a tendency to be aggressive. The Tribunal had not made up its own mind in substitution for that of the employer. Rather it had decided that the Respondent had improperly left out of account evidence which it should have considered. Mr Jones argued that in those circumstances it was open to the Tribunal to make a finding of unfairness.

43. As regards the assertion that the Tribunal had gone wrong in considering that the employer did not regard the matter as serious when in fact it suspended the Claimant on the same day, Mr Jones argued that the first Claimant's suspension was not as a result of the complaint made by the service user as could be seen from paragraphs 95 and 96. In those paragraphs the Tribunal found that the first Claimant was suspended on 21 January 2010, on the basis that a complaint had been made. However service user M had not made any complaint and so that must refer to a letter from his advocate dated 5 January 2010. We should record that Mr Scott added a document to the supplementary bundle on the day of the hearing before us, being a letter from the Respondent to the first Claimant dated 26 January 2010 in which it is stated as follows: –

> **"I write to confirm that following the meeting we had on 21 January 2010… You are suspended from duty pending an investigation of a complaint which has been received from a patient. I explained that it was the serious nature of the allegations, coupled with, another incident which had been brought to my attention that day, which had led to the decision to suspend you."**

In the circumstances it seemed to us that the decision to suspend related to both of the incidents.

Discussion and decision

44. As indicated in the reasons given at the preliminary hearing for allowing a full hearing, in this case, the question which we are asked to determine is essentially whether or not the Employment Tribunal substituted its own view for the view of the employer in a way which it was not entitled to do. We have not found this particularly easy to determine. The reasons given by the Employment Tribunal do, at first sight have the air of substitution. We have however come to the view that on a closer reading, there was no impermissible substitution. The Employment Tribunal was entitled, and indeed bound, to consider carefully the evidence on which the Respondent reported to decide to dismiss to employees, particularly when they were of long-standing and had no record of misconduct. The investigation was always going to

be a difficult one, given the relationship between the service users and the Claimants. The vulnerability of the service users meant that such complaints as were made or came to light had to be taken seriously. The duty towards the Claimants meant that careful thought had to be given to fact finding. The Employment Tribunal had the benefit of hearing the evidence led from the various witnesses, which of course we did not. It was entitled to consider carefully the impression made on it by the witnesses, and to decide, as it did, that the outcome of the case had been predetermined.

45. The Employment Tribunal were entitled to decide that the Respondent had acted unfairly with regard to knowledge of the capacity or otherwise of the complainers. The Respondent had investigated the complainers' capacity because that was a requirement of their protocol for patient care. It disclosed that some were likely to be unreliable. That was not disclosed in any way to the Claimants and therefore they went to the disciplinary hearing and appeal without knowing that there was question mark over the witnesses' capacity. It is unusual to have advance notice of the reliability or otherwise of witnesses in disciplinary situations. The fact is that in this case such advance notice was available due to the health of the witnesses. The Employment Tribunal were correct to regard the Respondents as acting unreasonably in keeping that knowledge from the Claimants. Mr Jones for the Claimants submitted that this should have been disclosed and while he was not entirely clear at the time at which it should have been disclosed he argued that it should have been sooner rather than later. We should make clear that we appreciate that there may be questions raised over the reliability of all witnesses, and there is no suggestion from us that service users cannot be reliable witnesses. We accept, however that the knowledge was essential for a fair disciplinary procedure.

46. The last incident which was investigated took place when some service users were taken on an outing. A complaint was made that one of the Claimants had pushed a service user when

they were getting back into the car to return to the unit. We do not think it was part of the function of the Employment Tribunal to consider whether or not the action that was complained of would have amounted to an assault in a criminal court. Even if it were, we note that the action, if proved would amount to an assault in that it was not an attempt to rescue the service user from danger but rather was an attempt to push him. Nevertheless, we have come to the view that the Employment Tribunal were entitled to consider whether or not the Respondent had investigated thoroughly enough in all the circumstances, the physical action that was taken. As one would expect, there is a prohibition on any physical aggression towards a service user. The witness, Alex Armstrong-Roger, appears to have been clear that the push was one with aggressive intent. On one view, the employer would have been entitled to accept her evidence. Nevertheless the Employment Tribunal took the view, having heard the witnesses, that the matter was not sufficiently investigated. That might appear to be the Employment Tribunal substituting its own view on the question of what constituted assault. We had some difficulty with this part of the case. In our opinion it is not difficult to understand that any aggressive conduct towards service users would not be tolerated. Nevertheless, we are of the view that the Tribunal were entitled to decide that the proper inference about the intention in the Claimant's mind when the incident happened was not properly investigated.

47. We are very mindful that the Employment Tribunal heard the witnesses which we have not. We do not think that their decisions can be categorised as perverse. We require to be careful not substitute our own views for theirs. We are of the view that the ET came near to substituting its own view for that of the Tribunal, but that it did not actually do so.

48. We therefore dismiss the appeal.