



EMPLOYMENT TRIBUNALS

Claimant: Mr J McBrearty

Respondent: Lancashire Teaching Hospitals NHS Foundation Trust

HELD AT: Manchester

ON: 7 and 8 November 2017

In chambers:- 17 November 2017

BEFORE: Employment Judge Porter

REPRESENTATION:

Claimant: Mr T Rigby of counsel

Respondent: Mr B Williams of counsel

RESERVED JUDGMENT

1. The claimant was fairly dismissed. His claim of unfair dismissal is not well-founded and is hereby dismissed.
2. The claimant committed an act of gross misconduct justifying summary dismissal. His claim of breach of contract is not well-founded and is hereby dismissed.

REASONS

Issues to be determined

1. At the outset it was confirmed that the issues were:

Unfair dismissal

- 1.1 what was the reason for dismissal;

- 1.2 was the claimant unfairly dismissed;
- 1.3 if so, should any compensation be reduced by reason of contributory conduct;
- 1.4 should any compensation be reduced by reason of the claimant's conduct post dismissal;
- 1.5 should any compensation be reduced under the **Polkey** principle, that is, what is the percentage chance that the claimant would have been fairly dismissed by reason of his conduct during the disciplinary procedure.

Breach of Contract

- 1.6 whether the claimant was guilty of gross misconduct justifying summary dismissal

Submissions

2. Counsel for the claimant made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-
 - 2.1 the conduct of the respondent was heavy-handed and disproportionate, breaching its own policies and the ACAS code. Its conduct escalated and inflamed the situation to seriously damage the prospects of a balanced and dispassionate decision about the claimant's continued employment;
 - 2.2 the claimant was suspended with very little evidence to justify it. This was bound to inflame the situation, and the temperature was raised further by having the claimant escorted off the premises by porters. Nobody spoke to a full-time trade union official before suspending the claimant;
 - 2.3 dismissal fell outside the band of reasonable responses bearing in mind in particular the nature of the offence and the mitigating circumstances;
 - 2.4 the conduct of the claimant as shown on the seven minute CCTV footage did not amount to gross misconduct. The disciplinary panel failed to address how any verbal assault, falling within the definition of general misconduct, was found to be gross misconduct within the meaning of the disciplinary policy. For any conduct to fall within

the description of gross misconduct under paragraph 3 of the disciplinary rules it must be at a significantly different level to any verbal assault under paragraph 2.2 the disciplinary rules;

- 2.5 the evidence as to what actually happened during the relevant seven minutes was inconsistent and did not support a finding of gross misconduct. It is clear that during the exchange between the claimant and his team leader, WH, voices were raised, including that of WH. The most important piece of evidence comes from WH in her original statement at page 33. She describes the claimant as agitated, confrontational, verbally inappropriate, using hand gestures, shouting, repeatedly coming back to her. She does not say that the claimant was pointing at her and/or swearing and/or swearing at her, she does not say that she felt intimidated by the claimant's conduct. At the outset Staff Nurse AS does not accuse the claimant of any more serious conduct. It is only at a later date that he says that the claimant swore. It is difficult to understand why AS changed his evidence. In any event, there is a difference between swearing in the workplace and swearing at someone by way of intimidation and threat.
- 2.6 three members of staff reviewed the entire CCTV footage for that evening. By 19 August 2016 the claimant had asked to see the entire CCTV footage. He was not shown it and by the time the disciplinary action was invoked someone had taken the decision to retain the seven minutes of CCTV footage but not to secure the rest;
- 2.7 there was an unreasonable, and unexplained delay in progressing the matter to a disciplinary hearing. That delay prejudiced the claimant's right to a fair hearing;
- 2.8 Miss D Mawson was the case manager. It was her responsibility to name the investigator and the disciplinary panel, to decide what should happen when the investigation was complete, on what grounds there should be any disciplinary action and on what charge. It is extraordinary that Ms Mawson did not at least set out the reason for progressing the matter to a disciplinary charge. The claimant was entitled to know the result and reasoning behind Ms Mawson's decision to proceed to a disciplinary charge, which was a serious step. The decision to progress to a disciplinary charge was disproportionate, a breach of policy and a further escalation of the incident;
- 2.9 the claimant had every right to be upset, to feel that he was not being treated justly. It may be that the claimant was unwise to visit

the hospital, in breach of the terms of his suspension, but there is no evidence to suggest that he was found doing anything threatening and/or unlawful, nothing to contradict his evidence that he was merely collecting and/or delivering documents or accompanying a friend;

- 2.10 the claimant is unable to say that the notes of the disciplinary hearings were an accurate record because he did not receive them until weeks after the event. The best practice, to prepare the notes during the hearing and to correct them if inaccurate at the time, was not followed;
- 2.11 it was a complete breach of natural justice to block the claimant from his own appeal hearing. The decision of the appeal panel was superficial. The panel did not conduct a proper review;
- 2.12 the investigation report contained hints and rumours about the claimant behaving badly in the past. That information should not have been brought before the disciplinary panel, whose view of the claimant was unconsciously prejudiced by reference to supposed previous bad behaviour;
- 2.13 the respondent did not have reasonable grounds to conclude that the claimant was guilty of gross misconduct. There was no basis for deciding that the claimant was verbally abusive and threatening. The respondent failed to make clear findings as to what exactly the claimant had done. It confused what the claimant had allegedly done in the past and what they thought he could do in the future;
- 2.14 the respondent has failed to provide a satisfactory explanation as to how it reached the conclusion that the claimant was guilty of gross misconduct;
- 2.15 the disciplinary panel in deciding the appropriate penalty took into account the fact that the team leader WH had become extremely anxious following the incident. However the disciplinary panel did not consider how much her anxiety was caused by the incident, how much was caused by the respondent's decision to progress the matter to the disciplinary hearing;
- 2.16 the disciplinary panel failed to give appropriate consideration to the mitigating circumstances. The claimant had a clean disciplinary record. He had not been accused of anything before. He has been throughout his employment a diligent hard-working skilled employee prepared to stay on, to go the extra mile. He was

obviously well regarded by other members of staff. He was perhaps pigheaded from time to time about matters relating to health and safety and following procedure. However, the respondent took no account of the fact that the claimant had worked for 36 years and given excellent service to the National Health Service. For the panel to regard this as "limited mitigation" is so wrong as to be quite offensive.

2.17 A finding of contributory fault is more relevant if there have been procedural defects leading to a finding of unfair dismissal. It should not apply when the dismissal is substantively unfair. The claimant's actions after dismissal cannot amount to contributory conduct;

2.18 applying the **Polkey** principles, it is impossible to say what would have happened had the respondent carried out a fair procedure. One cannot speculate as to what would have happened had the full CCTV footage been available. Nobody has seen the footage which may have brought different evidence to bear.

3. Counsel for the respondent made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:-

3.1 the tribunal cannot criticise the respondent for taking a robust stance on protecting staff and/or patients;

3.2 the claimant is inviting the tribunal to substitute its own view. However, dismissal fell within the band of reasonable responses;

3.3 the claimant understood the significance of the allegation, understood that his conduct could lead to suspension and dismissal;

3.4 a fair procedure was followed. It is difficult for the claimant to say that the notes of the disciplinary hearings were inaccurate when he has failed to set out the alleged errors;

3.5 the claimant refused to accept that he had done anything wrong, asserting that this was a storm in a teacup and that the respondent's reaction to it was disproportionate. However, the evidence is clear that during the incident the claimant was threatening, he did use foul language. The ability of the claimant to act in a threatening way is supported by his own actions at the disciplinary hearings, when he was threatening and used foul language;

- 3.6 the respondent did give appropriate consideration to the sanction. It was reasonable to take into account the fact that the claimant was not prepared to change his ways, could not, for example, see the difficulty presented by his persistent attendance at the respondent's premises, contrary to the terms of his suspension;
- 3.7 the delay in the conduct of the disciplinary process was regrettable but did not prejudice the claimant's right to a fair hearing;
- 3.8 the assertion about the lack of CCTV footage is a red herring. The claimant was dismissed because of his conduct during the seven minutes shown on the available CCTV footage. What happened before or after that incident is irrelevant. Nobody said that there was anything of relevance outside the seven minute period;
- 3.9 there was a reasonable investigation, all witnesses were interviewed;
- 3.10 the dismissing officer has given cogent clear evidence as to the reasons for the decision, which was not irrational;
- 3.11 the absence of the claimant from the appeal hearing was entirely of the claimant's own making. He absented himself;
- 3.12 in the alternative, the claimant was guilty of 100% contributory conduct, including his behaviour up to the point of dismissal, including his actions during the disciplinary hearing;
- 3.13 applying the Polkey principles, if there were any procedural breaches they were minor and following a fair procedure would make no difference to the outcome;
- 3.14 further, the claimant's actions after his dismissal means that he would never have returned to work. There was continued and persistent refusal to follow reasonable management instructions. His action shows that he lacked judgment. Had the claimant not been dismissed for the incident in August 2016 he would have been dismissed for his conduct soon after the appeal hearing on 3 May 2017;
- 3.15 the claimant was guilty of gross misconduct justifying summary dismissal.

Evidence

4. The claimant gave evidence.
5. The claimant relied upon the written evidence of Andrew Ford, trade union representative. The tribunal agreed to consider that evidence, noting that it was a question of how much weight it was prepared to attach to the evidence of a witness who had not attended tribunal and could not be questioned on the veracity of their evidence.
6. The respondent relied upon the evidence of:-
 - 6.1 Mr Gareth Price, Chief Pharmacist, chair of the disciplinary panel;
 - 6.2 Mrs Gail Naylor, Nursing and Midwifery Director, Chair of the Appeal panel.
7. The witnesses, other than Andrew Ford, provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.
8. The tribunal, following the unopposed application by the claimant, viewed the CCTV footage considered by both the dismissing and appeal panels before reaching their decisions.
9. Agreed bundles of documents were presented. References to page numbers in these Reasons are references to the page numbers in the agreed Bundles.

Facts

10. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.
11. The claimant was employed by the respondent from 7 August 1995 and at the relevant time was employed as a Theatre Support Worker.
12. The claimant was working a shift on 17 August 2016 with his team leader (“WH”) and others.
13. On 18 August 2016 the team leader (WH) made a formal complaint to the theatre sister (“JC”) about the claimant’s behaviour on the shift on 17 August 2016. The team leader (WH) prepared a written statement in support of her complaint (page 33), extracts from which read as follows:

Earlier confrontation occurred in the recovery area from TSW McBrearty while providing post-operative care for a critically ill patient... I cannot recall the exact details of the conversation as I was focused on providing the care for the patient... At the time I felt frustrated as this was an inappropriate time to raise departmental issues as I was directly involved in the care delivery of a critically ill patient. I felt this was a distraction from patient care at the time.

However, when we were leaving the department ... TSW McBrearty came out of the changing rooms and the situation escalated again. I cannot recall the exact content of the conversation and how it became a discussion point again. In the first case I attempted to discuss the issues for resolution. However, at this time TSW McBrearty appeared to be agitated, was confrontational and verbally inappropriate. There were also lots of hand gestures in the nature of pointing. I attempted numerous times to reason with John and rationalise any issues which was unsuccessful and the situation continued to escalate. I felt this was stressful and intimidating situation. I felt uncomfortable with the nature of the conversation for example shouting and not providing with any opportunity to verbally communicate back. At this point my only method of communication was direct in nature by communicating in a direct way to try and end the situation immediately. However, this was also unsuccessful because he repeatedly continued to come back and start the same conversation again. I felt I like I had to move away to try and end the confrontation, therefore moving into the office at reception. At this point I felt very upset about the situation.

Ward staff and visitors on the corridor also witnessed this because the theatre doors were open. Ward staff came to check we were okay .

14. On 18 August 2016 the theatre sister JC informed the claimant of the complaint. The claimant was given the opportunity to provide his version of events.
15. The claimant was aware from that point that there was likely to be disciplinary action taken against him in relation to the incident on 17 August 2016.

[That is the evidence of the claimant.]

16. On Friday 19 August 2016 there were attempts to have a meeting with the claimant to confirm a decision to suspend him during the investigation of the incident. Nobody spoke to a full-time trade union official before suspending the claimant. The claimant was on a number of occasions invited to attend a meeting but he refused to attend unless a full-time trade union official was in attendance. The claimant rang the police from the ward to make an allegation that he was being harassed by management. Security officers asked the claimant to attend a meeting. Again the claimant refused to attend. The claimant was asked on a number of occasions to leave the clinical area. He refused.

17. By letter dated 19 August 2016 (page 34) the claimant was advised of the decision to suspend him from duty on full pay whilst an investigation was conducted “ into the allegations regarding an incident on Wednesday 17th August 2016 in which you were verbally abusive and threatening to another member of the theatre team .”
18. The claimant attended for work on 22 August 2016. He was escorted by porters from the premises.
19. On 22 August 2016 the claimant received a call from his trade union representative with regards to his suspension.
20. By letter dated 6 September 2016 (page 50) Debbie Mawson informed the claimant that she had been appointed as the commissioning manager (referred to as Case manager in the Disciplinary procedure), and that she had appointed an investigating officer to commence the formal investigation into the allegation that the claimant was on 17 August 2016 verbally abusive and threatening to another member of the theatre team.
21. The investigating officer, Samantha Seymour, commenced the investigation on 6 September 2016 and prepared a concluded investigation report dated 9 December 2016 (doc 104).
22. At the commencement of the investigation the investigating officer had written statements from the team leader WH (page 33. see paragraph 13 above) and the staff nurse (AS), who was named by WH as being present during the course of the incident.
23. The written statement of Staff Nurse (AS) (page 51), dated 19 September 2016, includes the following:

Prior to finishing our shift Wendy (WH) and I were in Lythgoe theatre reception and John (the claimant) came from the changing rooms where Wendy was completing her timesheet close to the offices. He initiated a conversation following on from an earlier issue which quickly escalated involving John appearing agitated using inappropriate language and aggressive tones. We tried to calm the situation but were unsuccessful. I am unable to provide details of exact conversation and words spoken.

On reflection, I feel the incident was stressful at the time. When the incident first started I thought it would be quickly and reasonably resolved. However, it unfortunately escalated into a situation that was stressful and in my opinion avoidable and unnecessary. I intervened to support Wendy were possible in attempts to discuss, rationalise and diffuse the situation. I noticed Wendy was becoming upset and emotionally stressed by the incident. It was at this point I attempted to end the situation quickly. However, I was faced a confrontational response. It was stressful because the speed at which the incident escalated

and how unpredictable I felt the situation had become. John eventually left the department. The theatre doors were open during his time allowing the incident to be seen and heard by any persons present on the corridor outside. Ward staff saw the incident and attended reception to speak to us when John left the department.

24. During the investigation the investigating officer interviewed:

- 24.1 team leader WH (21 September 2016);
- 24.2 staff nurse AS (21 September 2016);
- 24.3 anaesthetic and recovery nurse AH (29 September 2016);
- 24.4 staff nurse on Leyland Ward BG (29 September 2016);
- 24.5 a theatre nurse SE (5 October 2016);
- 24.6 clinical manager JC (4 November 2016)

[The tribunal has adopted the initials for each of these witnesses, as adopted in the investigation report - see paragraph 29 below.]

25. All individuals who were interviewed were provided with written statements to review and amend where necessary and return a signed copy to the investigating officer as a true reflection of the contents of the meeting.

26. The claimant was interviewed twice, on 21 September 2016 and 19 October 2016. He was accompanied by a trade union representative on each occasion. The claimant was given the opportunity to comment on the witness statements and provide his version of events. Notes were taken of the interviews with the claimant, who was given the opportunity to make amendments thereto. At the second interview the claimant was shown the CCTV footage of the incident and given the opportunity to provide his comments. The claimant was subsequently provided with a copy of that footage.

27. During the investigation and disciplinary process the claimant asked to view the CCTV footage for the entire evening – not just the 7 minutes which had been retained and used as part of the disciplinary process. His request was refused. It later transpired that only the 7 minute extract had been saved. The remainder of the CCTV footage for that shift was not retained.

28. On or about 10 November 2016 the claimant raised a grievance complaining about the failure to allow him access to the complete CCTV

footage for the shift on 17 August and other matters relating to the conduct of the investigation. Attempts were made to arrange grievance hearings.

29. Samantha Seymour concluded the investigation and prepared a report dated 9 December 2016 (doc 104). The report refers to the claimant as JMB throughout and identifies the relevant witnesses by reference to their position and initials as adopted at paragraph 24 above. There was no suggestion during the disciplinary process that the claimant was confused or disadvantaged by this. He was fully aware of the identity of the witnesses as their full names were given in the witness statements. The report includes the following:

2.0 Terms of reference/scope of the investigation

2.1 To investigate the facts surrounding that JMB was verbally abusive and threatening to another member of the theatre team on the 17 August 2016

3.0 Background

- 3.1 JMB has been employed by the Trust since the 7 August 1995 and is currently employed as a band 3 Senior support worker in Theatres at Chorley district Hospital. He is also a staff side representative for the Unite union.
- 3.2 On the evening of Wednesday, 17 August 2016 at 20:50 until 21:10 in Lythgoe theatre's reception Chorley district Hospital. JMB approached .. WH his team leader when leaving his shift regarding an earlier incident that took place in recovery.AS was also present in the reception area at this time of the alleged incident
- 3.3 WH states that JMB was confrontational, agitated, verbally inappropriate, he was 'finger-pointing' and would not allow her to speak. WH found the situation to be stressful and intimidating.
- 3.4 AS confirmed that JMB behaved in an inappropriate manner towards WH and himself

5. Findings

5.1 General Findings:

- 5.1.1 During the investigation meeting WH explained she was completing her timesheet at the end of her shift and was chatting with AS when JMB approached her about some earlier events in the shift... WH states that JMB was unhappy with the decision of letting the other Theatre Support Worker go home as he felt it was inappropriate when there was an emergency patient still in recovery..
- 5.1.2 In response WH stated that she explained to JMB that the patient was an elective patient with complications and not an emergency..

- 5.1.3 WH then described how JMB became confrontational towards her, pointing his finger at her and would not allow her to speak. WH says that JMB was agitated and verbally inappropriate towards her..'
- 5.1.4 WH stated that JMB kept turning to leave the reception but then persistently returned to confront her. When asked, JMB stated he returned once, however the CCTV images showed JMB returning to speak to WH on a number of occasions;
- 5.1.5 WH said she kept trying to inform JMB to take his concerns up with Sister Cooper the next day but he kept repeating himself and talking over her in a raised voice..
- 5.1.6 WH reports that the incident made her feel intimidated, stressed and she was upset, although she did not feel that JMB would have resorted to physical violence, as AS was with her.. AS stated that after the incident that WH was shaking, stressed and on the verge of tears;
- 5.1.7 WH stated she felt 'hurt' by JMB behaviour towards her due to them having had a long-standing friendship of over 20 years.
- 5.1.8 Following the events WH said she was worried about bumping into JMB because he said that he would speak to her the following day and she remains concerned about seeing him again.
- 5.1.9 Immediately following the incident WH stated she initially called JC and left a message about the incident on a mobile phone, WH states that she then locked the car door and rang AH and SE, her colleagues from Theatres, from the car park
- 5.1.10 AH confirmed that she got a phone call off WH who was in tears. WH told AH of the event and WH said that it was intimidating and scary with JMB.... SE reports that WH was upset and that she felt threatened by JMB and wondered if she had antagonised him... JC also confirmed that she received a voicemail from WH, JC describes her sounding 'deflated'. JC confirmed WH wanted support and reassurance from her
- 5.1.11 WH returned to work the following day on the 18 August 2016. However JC confirmed that WH had to go home as she was not fit for duty, she was upset and unable to concentrate
- 5.1.12 JC stated that when WH came into work at 4:30pm the day after the incident JC felt that WH "was trying to hold it together." JC discussed with WH and AS about what happened and JC said they appeared deflated, agitated and expressed anxiety.
- 5.1.13 When interviewed about the alleged incident, JMB stated that he came out of the changing room and AS & WH were stood outside

near the door. He stated that he said to WH that he would speak to her tomorrow, but WH then said she was not in tomorrow. JMB said his response was 'I will speak to you when you are in.' WH replied she was going on holiday. JMB stated he would speak to WH after holiday but WH said no you need to speak to Sister Cooper

- 5.1.14 JMB said he has never had this response from WH before and that he was frustrated.
- 5.1.15 JMB stated that he did not shout or swear at WH during the alleged incident, and feels that as he is Glaswegian people find him intimidating. JMB also confirmed that he has a 'loud voice'.
- 5.1.16 JMB stated that he was 4 miles away from WH & AS when discussing the earlier incident and did not go over to them and he only returned once from the doors to the Department
- 5.1.17 It was put to JMB that AS had said he was finger-pointing, JMB states that he likes to emphasise the point and apologised to AS for this when raised with him at the time
- 5.1.18 JC spoke to JMB the following day after the incident and advised him that she had seen the CCTV footage to which John replied "Well I'm fucked aren't I". JC reports that JMB was 'annoyed, aggressive and not very complimentary about the staff involved. JC said she did not feel threatened or scared because she 'has been exposed to JMB's temper before'
- 5.1.19 In response to viewing the 20 minute CCTV footage from 17 August 2016 which shows JMB, WH and AS on it, JMB had no comments to make when this was played to him at the investigatory meeting on 19th October 2016;
- 5.1.20 AS confirmed he had witnessed the event and he stated he found that JMB was confrontational and was in close body proximity with WH. AS also stated that JMB was 'loud, finger-pointing and swearing'
- 5.1.21 AS stated that as the incident continued, JMB became agitated, used inappropriate language, used aggressive tones, and that JMB was loud and persistent. AS felt that it was an intimidating and stressful situation
- 5.1.22 AS described the conversation as escalating quickly and that JMB's voice had raised and he was swearing
- 5.1.23 AS described that WH had tried to rationalise with JMB but JMB was persistent and kept going on at her. His voice became raised to the point where it was 'too much'. AS stated he also tried to

rationalise with JMB but he too was faced with the confrontational response

- 5.1.24 AS also stated he was concerned that JMB's raised voice could be heard from the hospital corridor as the doors were open.
- 5.1.25 When interviewed BG, staff nurse Leyland Ward confirmed that she had finished her shift on 17th August 2016 and was still on the Leyland Ward when she heard raised voices. BG then left the ward and was stood on the main corridor and could see JMB's arm waving and she heard him shouting, but could not hear the exact words that were being said. BG confirmed that it was predominantly JMB shouting and that he appeared angry....During the investigation JMB stated that he did not believe that BG had heard anything
- 5.1.26 After the incident BG states she went into theatres to check on the well-being of WH and AS. She can be seen entering the reception area at the end of the CCTV footage
- 5.1.28 The CCTV images show that JMB returned to speak to WH and on a number of occasions and steps forward into close bodily proximity with her. The images showed JMB consistently finger-pointing towards WH and AS. It appears that WH tried to end the discussion by moving to another area, but JMB followed her to the new location and the confrontation persisted

Additional findings

- 5.3.1 JMB and WH have had a long-standing friendship over 20 years, this was acknowledged by WH and JMB during their interviews
- 5.3.4 JC stated that JMB's work ethic and patient focus is brilliant.. WH states that JMB will speak to her and asked if she needs anything, he knows my standards. A S confirmed that JMB has a kind heart
- 5.3.5 JMB stated when asked that he has never had a verbal warning on meeting with JC she confirmed that there has been a number of previous incidents with JMB regarding his behaviour which have been dealt with informally
- 5.3.6 AH informed the investigating officer that on a different occasion JMB had a disagreement with her which led to her to going off sick for three weeks. This was due to the verbal abuse and public humiliation she had suffered as a result: " he called me an effing idiot and other verbal abuse." Following this period of sickness absence AH stated she was frightened to return to work

Conclusions

6.1 It is evident from the witness statements that on the 17 August 2016 both WH and AS found JMB confrontational, using inappropriate language and that he was agitated during the event. He denied this.

6.5 Witness statements from WH and AS confirm that JMB's voice was raised and swear words were used, although the witnesses could not recall the exact swear words used. BG working on Leyland Ward opposite theatres stated that she became aware of an incident and viewed JMB waving his hands and heard JMB shouting in an angry tone.

6.6 JMB stated that he is always loud and uses hand gestures to emphasise points but he denied swearing during the incident.

6.7 WH and AS both stated that despite WH trying to rationalise and reason with JMB, WH was faced with a confrontational response. WH stated that she was not provided with an opportunity to verbally communicate back but confirmed she did say he should take the matter up with Sister Cooper, Band 7, nevertheless JMB persisted in his actions towards her.

6.8 The incident has had an impact on the staff members involved. WH has stated that she is worried anxious and concerned about bumping into JMB. AH stated "I knew he was in the building the other day I was frightened I feel he's got it in for me".

6.10 JC confirmed that there have been a number of previous incidents with JMB in work which have been dealt with informally and feels that a lot of people don't take formal action because they are frightened of JMB.

6.11 When JC discussed the incident with JMB the following day and she mentioned about the CCTV footage, his response to her was "well I'm fucked then". This would indicate that JMB was aware of the significance of his behaviour the previous night.

6.12 During the investigation it became apparent to the investigating officer that there have been other incidents of inappropriate behaviour from JMB towards colleagues in work. These however have not been investigated as this is outside of the remit of the Terms of Reference of this investigation.

6.13 Therefore in conclusion there is a prima facie case to answer in respect of the allegation.

30. Attached to the investigation report were a number of appendices containing copies of all the documentation considered during the course of the investigation, including the notes of interviews and witness statements, together with a copy of a letter from the claimant dated 19 August 2016 to theatre sister JC, following their discussion about the incident on 17 August 2016. The letter (page 36) includes the following:

I have written this letter because I am concerned that when I attend work today I may be asked to leave the premises, the theatres and suspended on full pay until an investigation takes place

31. At his investigation interview (53) Staff Nurse AS said :

- 31.1 the claimant was swearing, that his body proximity was close, WB was upset and saying "I want to go home";
- 31.2 the claimant pointed his finger at AS, who told him to stop. The claimant said sorry but then carried on;
- 31.3 the claimant was persistent and kept going... "it became more raised and to the point this was too much. He'd crossed the line."
- 31.4 "I like John (the claimant) he has a kind heart."

32. By letter dated 6 January 2017 (page 123) the claimant:

- 32.1 was informed that the case manager believed there was a case to answer in relation to the allegation that the claimant was verbally abusive and threatening to another member of the theatre team on Wednesday, 17 August 2016;
- 32.2 was invited to a disciplinary hearing on 20 January 2017;
- 32.3 was advised that the allegation was in breach of the Trust's disciplinary rules relating to misconduct and gross misconduct and if found may result in disciplinary action which may include dismissal. The letter quoted the applicable disciplinary rules as being:

Rules applicable in cases of gross misconduct

Rules 3.10, 3.19 and 3.25 (set out in full)

General disciplinary rules

Rules 2.2 and 2.5 (set out in full)

- 32.4 was provided with a copy of the investigation report and supporting documentation, including witness statements and notes of interviews undertaken during the investigation;
- 32.5 was advised:
 - to provide names of any witnesses he wished to call;

- of the constitution of the disciplinary panel (Mr Gareth Price, Chief Pharmacist and chair of the panel, Kate Howarth, Clinical Business Manager for Surgery and Kathryn Downey, Strategic Workforce Business Partner);
 - of those attending the disciplinary hearing to present the management case;
 - of his right to be accompanied by a trade union representative or fellow employee.
33. On or around 6 January 2017 the claimant requested that the disciplinary hearing be postponed pending the outcome of his grievance. The respondent postponed the disciplinary hearing, advising the claimant that his grievance would be heard on 20 January 2017 instead.
34. By email dated 19 January 2017 (page 141) the claimant's trade union representative informed the respondent that the grounds for the grievance related to:
- The request for CCTV footage relating to the shift on 17 August 2017;
 - The timescale of the investigation in to the allegation against him;
 - An assertion that the case papers indicated a decision by the investigators that the conduct complained of amounted to gross misconduct
35. By email dated 20 January 2017 the respondent advised the claimant that the grievance was inextricably linked to the disciplinary action, there would no longer be a grievance hearing, but the grievance would be considered by the disciplinary panel as part of the disciplinary procedure.
36. The disciplinary hearing was rescheduled to take place on 21 February 2017.
37. Correspondence took place about the identity and relevance of the witnesses to be called by the claimant. The claimant gave an indication of the wish to call 46 witnesses but did not give a satisfactory response to the respondent's request for an indication of the relevance of their evidence.

38. The respondent advised the claimant (176) that the majority of his requested witnesses were not deemed relevant as they were not present at the time of the incident. The respondent also advised the claimant, in advance of the disciplinary hearing, that one of the respondent's witnesses had asked that she provide her evidence in the absence of the claimant and that this request had been agreed by the respondent.
39. Disciplinary hearings took place on 21 February 2016, 2 March 2017 and 9 March 2017. The claimant was represented by a trade union representative. He and his representative were given full opportunity to state their case and to cross-examine the witnesses.
40. The panel formed the honest and genuine belief that the claimant had acted in an inappropriate manner during the disciplinary hearings, that he had:
- shouted and pointed at the panel members;
 - banged on the table in front of him;
 - refused to adhere to repeated requests to conduct himself in an appropriate manner;
 - behaved in an aggressive and intimidating manner;
 - used inappropriate language to the panel;
 - continued to interrupt and talk over others when instructed not to do so

[On this the tribunal accepts the evidence of Mr Price as supported by the documentary evidence.]

41. Throughout the disciplinary hearings the claimant and his trade union representative were given full opportunity to state their case, to cross-examine each of the witnesses called by the management side namely each of the witnesses who had given statements as part of the investigation (see paragraph 24 above). The claimant did not during the disciplinary hearing identify any other witnesses to the incident which had led to the disciplinary charge and which had been recorded on the retained 7 minutes of CCTV footage.
42. The disciplinary panel refused the claimant's request to call:

42.1 witnesses to give evidence relating to his request to view the complete CCTV footage on the night of 17 August 2016 and the respondent's failure to retain that footage;

42.2 Case manager, Debbie Mawson to give evidence relating to her decision that there was a case to answer.

43. During the disciplinary hearing Team leader WH stated that:

43.1 The claimant was in close proximity to her and was intimidating, it was a personal assault directed at her;

43.2 After the interview which had taken place during the disciplinary investigation she got into her car and locked her door because she was afraid to be on her own;

43.3 Since the incident she had felt vulnerable and anxious and had not been sleeping;

43.4 The claimant was vocal, people would get intimidated by him as he was passionate and would sometimes go too far and this time he had crossed the line;

43.5 She had seen the claimant on site during his suspension and this had caused her considerable distress

[On this the tribunal accepts the evidence of Mr Price, supported by the documentary evidence.]

44. The disciplinary panel considered the evidence before it, the claimant's statement of case and representations made during the hearing. Before reaching its decision the panel viewed the available CCTV footage and visited the area in the hospital to decide on the conflict of evidence between the respondent's witnesses and the claimant as to whether or not the door to the Theatre's reception area was open or closed at the time of the incident.

45. Before reaching its decision the panel noted that the investigation had raised allegations about previous incidents with the claimant becoming verbally aggressive or threatening. The panel decided not to rely on that evidence as it was unproven and did not fall within the terms of reference. They did not consider these allegations in reaching the decision to dismiss.

[On this the tribunal accepts the evidence of Mr Price, who gave clear and consistent evidence.]

46. In reaching its decision to dismiss the panel:

- 46.1 found on the balance of probability that the claimant had acted in an abusive and threatening manner towards the team leader WH. It accepted the evidence of the team leader WH and staff nurse AS, as supported by the CCTV footage, that the claimant was talking in a raised voice, pointing, at a close proximity to WH and AS, getting in their personal space;
- 46.2 accepted the evidence of AS that the claimant had been swearing;
- 46.3 acknowledged that the claimant had not physically assaulted either WH or AS;
- 46.4 having viewed the CCTV footage accepted the evidence of AS and WH that the claimant had been confrontational, intimidating and threatening;
- 46.5 considered whether the conduct amounted to gross misconduct. It decided that the conduct was gross misconduct, not general misconduct because:
 - 46.5.1 the claimant kept going back to WH and continued with his threatening behaviour, his arm waving, pointing. On this the panel accepted the evidence of WH and AS, as supported by the CCTV footage;
 - 46.5.2 the impact of the claimant's behaviour on WH had continued until the disciplinary hearing. The panel noted that:
 - 46.5.2.1 WH had said that she did not feel threatened at the time of the incident;
 - 46.5.2.2 AS had reported that WH had been visibly upset and shaky during the confrontation with the claimant;
 - 46.5.2.3 WH had felt so upset that she had locked herself in her car and called colleagues for support immediately following the incident;

- 46.5.2.4 at the disciplinary hearing WH was visibly shaking and remained emotionally affected by the incident;
- 46.6 did take into account the conduct of the claimant at the disciplinary hearings;
- 46.7 considered the appropriate penalty, including the imposition of a final warning;
- 46.8 took into account what it referred to as “limited mitigating circumstances”, that is, the claimant’s length of service and clean disciplinary record;
- 46.9 noted that in the letter from the claimant to Theatre Sister JC dated 19 August 2016 (see paragraph 30 above) the claimant had recognised that his behaviour was so serious that it may result in his suspension from the workplace;
- 46.10 decided that dismissal was the appropriate penalty because the panel held the view that there was a substantial risk that the conduct would be repeated bearing in mind that the claimant:
- 46.10.1 had not recognised the impact of his behaviour on others;
 - 46.10.2 had not accepted during the disciplinary hearings that what he had done was wrong;
 - 46.10.3 had expressed no remorse or apology for his actions;
 - 46.10.4 had behaved in an aggressive and intimidating manner during the disciplinary hearings, had shouted, used inappropriate language to the panel and had continued to interrupt and talk over others when instructed not to do so.
47. Mr Price confirmed the decision to dismiss by letter dated 10 March 2017 (page 340). The letter set out in summary the reasons for the dismissal and notified the claimant that he was summarily dismissed, his last day of employment being 10 March 2017. The claimant was advised of his right of appeal. The letter informed the claimant that he was not permitted to

enter Trust premises except for the purposes of receiving care as a patient or to attend any appeal.

48. The claimant exercised the right of appeal.
49. Despite the terms of the dismissal letter the claimant did enter on to Trust premises and Trust security were called on a number of occasions.
50. The respondent decided to hold the appeal hearing off the main Trust hospital site, at Preston business centre and that security would be present at the hearing.
51. The claimant was invited to the appeal hearing on 2 May 2017 to commence at 10.00am. He was advised of his right of representation. He exercised that right. He was not informed that security would be in attendance at the appeal hearing.
52. The Appeal Panel consisted of Karen Swindley, Workforce and Education director, Carol Spencer, Strategy and Development director, and Gail Naylor, Nursing and Midwifery director, who attended as chair of the panel.
53. The Appeal Panel was supported by Rachel O'Brien, strategic workforce business partner.
54. The claimant attended for the Appeal Hearing on 2 May 2017, accompanied by his trade union representative.
55. Prior to the appeal hearing starting, Rachel O'Brien reported to the Appeal Panel that the claimant had taken exception to the presence of security, that she and the claimant's representative had tried to persuade the claimant to move to a non-public area as the claimant was behaving in a loud manner in an area where patients and members of the public were present. The claimant had refused to do so. The panel noted that the claimant's representative had raised no objection to the presence of security and the panel remained of the view that the presence of security on site was reasonable. Rachel O'Brien was telephoned by the claimant's representative who informed her that the claimant wanted an e-mail explaining why there were security officers present. This conversation was on speakerphone and Mrs Naylor heard the claimant in the background being verbally abusive.

[On this the tribunal accepts the evidence of Mrs Naylor.]

56. An e-mail was sent to the claimant (page 465) confirming that the reason for security presence at the appeal hearing was for the protection of panel

members and the public/patients/witnesses given the reason for dismissal and the claimant's observed pattern of behaviour over recent weeks since the disciplinary hearing.

57. The claimant then asked that the e-mail be signed by the chair of the Appeal Panel. There were difficulties in printing off the e-mail but by the time that this was done Rachel O'Brien was advised by the claimant's representative that the claimant had left the site to go to the police station. The representative was given the opportunity to attend the Appeal hearing on behalf the claimant but the representative refused that offer. As a result Rachel O'Brien e-mailed the claimant to inform him that the appeal would be heard in his absence.
58. The appeal hearing commenced at 11.00am, in the absence of the claimant. The claimant arrived 10 minutes after the start and was declined entrance by security. The appeal panel was unaware of that until after the appeal hearing had finished. Nobody came in to the appeal hearing to inform the panel that the claimant had arrived.

[On this the tribunal accepts the evidence of Ms Naylor]

59. The appeal panel considered every ground of the claimant's appeal. Gareth Price and Katherine Downey were present at the appeal hearing to present the Management case and to answer questions. The Appeal panel viewed the CCTV footage which had been considered by the disciplinary panel.
60. The panel noted that the claimant argued that there was no evidence to support the finding that he had been abusive and threatening towards WH. The Appeal panel questioned Gareth Price on the evidence he heard at how the disciplinary panel reached the conclusion that the claimant had committed the act of misconduct.
61. The appeal panel found that:
- 61.1 the issues raised by the claimant in relation to his subject access request, in particular in relation to the complete CCTV footage, was outside the appeal process;
 - 61.2 the deletion by the Trust of parts of the CCTV footage for 17 August 2016 was in accordance with its policy. The CCTV footage in relation to the incident was made available to the claimant and the deleted footage was not relevant;
 - 61.3 the evidence provided by the witnesses and corroborated by the CCTV footage was sufficient to uphold the allegation that the

claimant had behaved in a verbally abusive and threatening manner on 17 August 2016. There was no reason to doubt the credibility of the evidence;

- 61.4 the evidence used by the disciplinary panel was that of the witnesses who were present at the time of the incident, along with the CCTV footage. The disciplinary panel had confirmed that it had not used the evidence from those witnesses who were not present at the time of the incident
- 61.5 the CCTV footage did not match the claimant's assertion that he was trying to leave and that WH and AS kept the interaction going;
- 61.6 the appeal panel were satisfied that the conclusions of the disciplinary panel were reasonable based on the evidence;
- 61.7 there was no evidence that WH had been coerced into making a complaint;
- 61.8 it was reasonable for the disciplinary panel to consider the claimant's grievance as part of the disciplinary case;
- 61.9 the claimant was fully aware of the allegation and the terms of reference;
- 61.10 the delays with the investigation were noted. There was no evidence to indicate that the evidence presented by the witnesses or any other evidence provided was affected by that delay;
- 61.11 there was no evidence that the order in which the witnesses had been interviewed during the course of the investigation affected the fairness of the investigation and/or disciplinary procedure;
- 61.12 in deciding whether the penalty, dismissal, was too harsh, the appeal panel was satisfied that:
 - 61.12.1 the witnesses had been emotionally affected by the claimant's behaviour and at no time had the claimant offered an apology;
 - 61.12.2 the original disciplinary panel had considered the claimant's length of service and previous clean disciplinary record in mitigation and considered other

sanctions to dismissal. However, the absence of remorse was a serious concern and there was no assurance that the behaviour would not be repeated in the future;

61.12.3 In the circumstances the employment relationship had irreparably broken down and the decision to summarily dismiss the claimant was reasonable and proportionate in circumstances;

62. The appeal panel reached the decision to uphold the claimant's dismissal and informed the claimant in writing by letter dated 9 May 2017 (page 488).

63. The claimant did not in his statement of case or grounds of appeal identify any relevant witness to the incident who had not been interviewed as part of the investigation and/or disciplinary process.

64. The respondent has a disciplinary procedure, which includes the following:

3. Principles

No disciplinary action will be taken against a trade union representative until the circumstances of the case have been discussed with a senior trade union representative or full-time official

5. Duties and responsibilities

Employees

Are responsible for

- ensuring they understand the rules relating to conduct
- make themselves available either in relation to an ongoing investigation, if appropriate, a formal hearing whether in work or when suspended
- fully complying with the terms of any suspension
-

Case Managers

Are responsible for

- Establishing the need and overseeing the procedure for an investigation into potential misconduct
- Appointing an investigating officer and Chair of any Disciplinary panel
- Receiving the investigation report and with the senior HR manager determining any further action within one week of receipt of the report
- Advising the employee in writing at any further action

Investigating officers

Are responsible for

- Obtaining all the relevant information and taking all reasonable steps to determine the validity and accuracy of the complaint/allegation made against the employee, in accordance with the Trust's guidelines for conducting investigations (appendix C)
- Adhering to the timetables laid down in this procedure
- Preparing a report for submission to the Case manager

10. Suspension.

Suspensions should not be undertaken lightly and its impact on the individual should not be underestimated...

Suspension is not disciplinary action but a holding measure whilst an investigation is carried out. Consideration needs to be given firstly to the alternatives, which may be available...

Suspension should be considered when it is:

- necessary to protect the care of patients or service users
- safeguard the employee against further allegations or
- protect the integrity of the investigation

In such cases where it is necessary to suspend a representative of a recognised trade union/staffing organisation, the circumstances must be reported to the full-time officer immediately.

Every effort will be made to conduct and conclude the investigation within a time limit of no more than six weeks. If suspension from duty lasts for 28 days or more and no disciplinary charges have been made and communicated in writing, the employee shall have the right to appeal to the Chief Executive against continuation of suspension. The Case Manager will update the employee on any continuation of the suspension on a monthly basis together with the reasons for this.

12. Formal procedure

12.2 Disciplinary hearing

A formal disciplinary hearing will not be convened until the Case manager/investigating officer is satisfied that, following a thorough investigation, there is a prima facie case to be answered

13. Disciplinary action

13.1 First written warning

A first breach of a general disciplinary rule should normally initially result in counselling. In cases of breaches of general disciplinary rules serious enough to require disciplinary action or where counselling has failed to secure the required improvement, formal disciplinary action may need to be taken which may result in a first written warning.

13.2 Final written warning

A repeated breach of the general disciplinary rules may result in a final written warning, where there is a current first written warning in force. Alternatively, a first and final written warning may be issued where an offence is serious enough not to be tolerated a second time, but does not justify dismissal.

13.3 Dismissal or other penalty

Where an employee's conduct still fails to improve or where an employee is found guilty of gross misconduct, dismissal or some other action such as downgrading or transferring with or without downgrading may be taken.

Appendix A

Disciplinary rules

1. Introduction

Disciplinary action may only be taken... for any breach of the following rules. The disciplinary rules are divided into two main groups:-

General disciplinary rules

Rules applicable in cases of gross misconduct

The rules listed below, whilst not exhaustive are an indication of the rules in relation to general and gross misconduct, but will depend on the severity and/or circumstances of each breach.

2. General disciplinary rules

the following deviations from the general standards of conduct and performance, if recurrent, could result in the dismissal, which would follow the full disciplinary procedure

.....

2.2 insubordination, or verbal assault, as an employee or on the Trust premises

2.5 personal misconduct of a nature adjudged not sufficiently serious to affect an employee's position at work during the course of his/her employment

3. Rules applicable in cases of gross misconduct

An employee who commits any of the following offences will be dismissed unless the employee satisfies management that there are mitigating circumstances:-

....

3.9 Any physical or indecent assault or deliberate act of harassment, including acts motivated by gender, race, religion, sexual orientation or disability

3.10 Verbal or physical assault of staff, patients or visitors or fighting

3.19 The perpetration of any act of gross misconduct and/or clinical incompetence

3.25 Personal misconduct of a nature adjudged sufficiently serious to affect an employee's position at work during the course of his/her employment

It is unlikely that any set of disciplinary rules could cover all the circumstances which may lead to disciplinary action...

It is emphasised that there could be other offences/situations not specified in this document which involve a breakdown of trust or confidence between the individual and the employer and which may result in disciplinary action including dismissal.

Additional Facts relating to Contributory Conduct and Breach of Contract claim

65. On 17 August 2016 the claimant acted in a threatening and intimidatory manner towards his manager. The claimant raised his voice to his line manager, invaded her personal space, pointed at her and another colleague, acted in an aggressive manner, was told to stop pointing, told to calm down, but just carried on.

[On this the tribunal rejects the evidence of the claimant, which is wholly inconsistent with the evidence as set out in the investigation report and the CCTV footage. The tribunal accepts the notes of interviews as an accurate record of the evidence of the respondent's witnesses, in particular, WH and AS. The tribunal notes that the evidence of those witnesses was tested by cross-examination of those witnesses during the disciplinary process.]

66. The claimant, a trade union representative for a number of years, has a good knowledge of the disciplinary procedure and rules. He was fully aware that his behaviour on 17 August 2016 towards his line manager was unacceptable and was seriousness enough to warrant suspension.

67. At the disciplinary hearing on 21 February 2016 the claimant was represented by a trade union representative. He and his representative were given the opportunity to cross-examine the witnesses. The claimant refused to leave the room when asked to do so, when his team leader WH was giving evidence and it was explained that it was this witness who did not want to give evidence in the presence of the claimant. WH agreed to give evidence with the claimant in attendance provided that any questions were raised by his trade union representative. The claimant interrupted while his own representative was asking questions, making accusations

that WH's companion was prompting WH, who became upset by the claimant's interruption and left the room. The claimant was again told not to interrupt, to let his representative do the talking. The claimant again interrupted, requiring a further interruption to the hearing.

68. The disciplinary hearing was reconvened on 2 March 2017. The claimant conducted himself in a rude and aggressive manner, raising his voice, challenging the right of the Chair of the Panel to conduct the hearing to his requirements. The claimant interrupted and talked over other people in the hearing. He refused to accept direction from the Chair of the Panel, for example, stating that he did not agree with an adjournment of the hearing. When Mr Price, the Chair of the disciplinary panel, told that claimant that he may need to ask the claimant to leave the room if he continued in this way the claimant responded "How are you going to get me out of this room? How are you going to remove me?" The claimant was advised that his behaviour was seen as threatening but the claimant continued with his interruptions and objections. The claimant began shouting and pointing at the panel members, banging on the table in front of him, refusing to adhere to repeated requests to conduct himself in an appropriate manner at the hearing.
69. Once more the disciplinary hearing was not completed. The claimant refused to cooperate in agreeing a further date, asserting that what he was doing on a particular day was "none of your business." A date was fixed and the claimant given reasonable notice of it
70. The disciplinary hearing was reconvened on 9 March 2017. The claimant tried to take control of the meeting, telling the panel that he had another appointment that afternoon and therefore the disciplinary hearing could not finish that day. The claimant requested the original copy of the letter he had sent requesting the complete CCTV footage. Kathryn Downey, HR support to the panel, informed the claimant that a copy of the letter was within the statement of case and that the panel was making every effort to hear the claimant's case that day. The claimant then informed Kathryn Downey "it is the man that makes the decisions". Ms Downey informed the claimant that as a member of the panel she was within her right to speak and would be grateful if the claimant refrained from closing her down when she was speaking. The claimant responded by stating "I will close you down every day young lady." The claimant then stood up to leave the meeting and Ms Downey informed the claimant that she was making one last request. The claimant began to shout over Ms Downey stating that he was not going to do anything until the letter was in front of him. An adjournment was required. Later the claimant repeated the points he was making and was asked by the panel not to be repetitive. The claimant responded by raising his voice, pointing at the panel using inappropriate language. For example the claimant said "when it goes to ET (employment tribunal) you will

get your arses wiped". When Ms Downey asked the claimant not to point at her he replied "if you don't like it I don't care I do that. There is no ray gun coming out". When the chair of the panel sought to direct the conversation to the relevant points the claimant repeatedly said "You are not going to shut me up." At one point he started shouting at Mr Price " I am going to make this point young man and if you want to shut me up you just try." Later the claimant continued "You can't stop me I will keep talking you just watch me. You don't talk to me like that you don't tell me what to do."

71. At one point in the disciplinary hearing Ms Downey made a point to which the claimant replied "That's bullshit" The minutes of the meeting record the following exchange after that:

Ms Downey: John

The claimant ; " Don't you get upset about that young lady"

Mr Price: "John please do not swear

The claimant: "What are you going to do about it?"

Mr Price: Please do not swear

The claimant: That is not swearing

The claimant's trade union representative "Whether you think it swearing or not please continue John. Don't lose yourself in this.

[The tribunal accepts that these minutes accurately reflect what was said in the meetings. The claimant has adduced no satisfactory evidence to challenge their accuracy.]

72. The claimant continued to conduct himself in an unacceptable, aggressive manner. The claimant then informed the panel that he was leaving as he had an appointment. Mr Price informed the claimant that the panel encouraged him to stay so that the disciplinary meeting could conclude with him present. The claimant responded "You can encourage me all you like young man ... I don't care. Are you going to stop me ... I don't think so." Mr Price advised the claimant that the panel may continue the meeting in his absence. The claimant stated "Continue all you like - makes no difference to me. When you are in court we will see how you continue. I am already going to the police and I will sort you out before." Mr Price interpreted this as the claimant trying to threaten and intimidate him.

The Law

- 73 An employer must show the reason for dismissal, or if more than one, the principal reason, and that the reason fell within one of the categories of a

potentially fair reason set out in Section 98(1) and (2) Employment Rights Act 1996 (“ERA 1996”). It is for the employer to show the reason for dismissal and that it was a potentially fair one, that is, that it was capable of justifying the dismissal. The employer does not have to prove that it did justify the dismissal because that is a matter for the tribunal to assess when considering the question of reasonableness.

74 Misconduct is a potentially fair reason for dismissal. **British Home Stores Ltd v Burchell [1980] ICR 303** provides useful guidelines in determining this question. It sets out a three-fold test stating that the employer must show that:

- he genuinely believed that the conduct complained of had taken place;
- he had in mind reasonable grounds upon which to sustain that belief; and
- At the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

The Tribunal notes and takes regard of the fact that the guidelines set out in **Burchell** are guidelines only and that the burden of proof on the question of reasonableness does not fall upon the employer under this head, and is a question for the Tribunal to decide, when appropriate, in determining the question of reasonableness under Section 98(4) ERA 1996, under which the burden of proof is neutral. **Boys and Girls Welfare Society v McDonald [1997] ICR 693**, as confirmed in **West London Mental Health Trust v Sarkar [2009] IRLR 512**, which was not disturbed on this point by the Court of Appeal. As HHJ Peter Clark and the Employment Appeal Tribunal in **Sheffield Health & Social Care NHS Foundation Trust v Crabtree UKEAT/0331/09** observed in paragraph 13, **British Home Stores Ltd v Burchell** was decided before the alteration of the burden of proof effected by section 6 of the **Employment Act 1980**. At paragraph 14 the Employment Appeal Tribunal held:

“The first question raised by Arnold J: did the employer have a genuine belief in the misconduct alleged” goes to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer.”

At paragraph 15 the EAT held:

“However, the second and third questions, reasonable grounds for the belief based on a reasonable investigation, go to the

question of reasonableness under section 98(4) Employment Rights Act 1996 and there the burden is neutral.”

75. Once the employer has shown a potentially fair reason for dismissing, the Tribunal must decide whether that employer acted reasonably or unreasonably in dismissing for that reason. The burden of proof is neutral. It is for the Tribunal to decide. Section 98(4) ERA 1996 states:-

“The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case”.

The test of whether or not the employer acted reasonably is an objective one, that is, Tribunals must as industrial juries determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. There is a band of reasonable responses. The Tribunal must determine whether the employer’s action fell within a band of reasonable responses. **Iceland Frozen Foods Limited v Jones [1983] ICR 17.** (Approved by the Court of Appeal in **Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827.** The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. **Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR 23.** The tribunal bears that in mind and applies that test in considering all questions concerning the fairness of the dismissal. In determining the reasonableness of an employer’s decision to dismiss, the tribunal may only take account of those facts (or beliefs) which were known to the employer at the time of the dismissal.

76. The reasonable investigation stage has been subjected to refinement in two judgments, which are relevant here. First, **A v B [2003] IRLR 405,** a judgment of Elias J (President) and members, indicates that there is to be a standard of investigation which befits the gravity of the matter charged. If what is sought to be sanctioned is a warning, the standard of investigation will be lower than where dismissal is concerned. Elias LJ, now in the Court of Appeal, reinforced that position in **Salford v Roldan [2010] EWCA Civ 522,** indicating that where the circumstances of a dismissal would create serious consequences for the future of an employee, such as deportation, particular care must be given to the investigation.

77. Whether or not the employer acts fairly depends on whether in all the

circumstances a fair procedure, falling within the range of reasonable responses, was adopted. The form and adequacy of a disciplinary enquiry depends on the circumstances of the case. What is important is that, in the interests of natural justice, the employee can be given a chance to state his or her case in detail with sufficient knowledge of what is being said against him or her to be able to do so properly. **Bentley Engineering Co Limited Mistry [1979] ICR 2000.**

78. In deciding whether the dismissal is fair the Tribunal must consider whether summary dismissal falls within the band of reasonable responses, taking into account all the surrounding circumstances, the employer's practice, the contract of employment and any definitions of gross misconduct contained therein, the knowledge of the employee, the seriousness of the offence. What conduct amounts to gross misconduct will depend on the facts of the individual case. Generally gross misconduct is conduct which fundamentally undermines the employment contract, is a deliberate and wilful contradiction of the contractual terms or amounts to gross negligence.

79. The tribunal has considered the current ACAS Code of Practice and the six steps which an employer should normally follow when handling disciplinary issues, namely:

- Establish the facts of each case;
- Inform the employee of the problem;
- Hold a meeting with the employee to discuss the problem;
- Allow the employee to be accompanied at the meeting
- Decide on appropriate action
- Provide employees with an opportunity to appeal.

The tribunal notes that the Code states that it is important to deal with issues fairly including dealing with issues promptly and without unreasonable delay, acting consistently carrying out any necessary investigations, and giving the employee the opportunity to state their case before any decisions are made.

80. The tribunal has considered and applied Sections 118-124 Employment Rights Act 1996. We note in particular:-

- a. Section 122(2) under which a tribunal may reduce a basic award where the employee's conduct before dismissal makes a reduction just and equitable;
 - b. Section 123(1) whereby the tribunal is directed to make a compensatory award in such an amount as it considers just and equitable in all the circumstances;
 - c. Section 123(6) whereby a tribunal should reduce the compensatory award by such proportion as it considers just and equitable where the dismissal was to any extent caused or contributed to by any action of the claimant.
81. In **Nelson v BBC (No2) [1979] IRLR 346** the Court of Appeal said that three factors must be satisfied if the tribunal are to find contributory conduct:-
- the relevant action must be culpable and blameworthy
 - it must have actually caused or contributed to the dismissal
 - it must be just and equitable to reduce the award by the proportion specified
82. In **Gibson v British Transport Docks Board [1982] IRLR 228** Browne-Wilkinson stated that what has to be shown is that the conduct of the claimant contributed to the dismissal. If the claimant has been guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy, then it is open to the tribunal to find that the conduct contributed to the dismissal.
83. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

(These include, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence)

84. The claimant was dismissed and the effective date of termination was 10 March 2017.
85. The tribunal has considered the reason for dismissal. The tribunal does not accept the assertion that the respondent reacted in a heavy-handed

and disproportionate manner to the incident on 17 August 2016, does not accept that there was very little evidence to support the suspension of the claimant, does not accept that the decision to have the claimant escorted off the premises by porters unnecessarily inflamed the situation. A genuine complaint about the conduct of the claimant on 17 August 2016 was made by WH. There is no satisfactory evidence to support the assertion that WH was coerced in to making that complaint. It was a serious complaint by a line manager that someone in her direct line of authority had been confrontational, verbally inappropriate and that she had found what she described as a confrontation stressful and intimidating. (See paragraph 13 above). The respondent acted reasonably in deciding to carry out an investigation of that complaint. The suspension was a reasonable step to take pending that investigation. It was not heavy-handed or disproportionate. The decision to have the claimant escorted off the premises by porters, when he arrived at work on 22 August 2016 in breach of the suspension was not heavy-handed or disproportionate in the circumstances, does not suggest that the decision to dismiss the claimant had already been made. The claimant had acted badly on 19 August 2016, refusing to attend meetings, refusing to leave the clinical area when requested to do so, telephoning the police to make allegations of harassment when he knew full well that he was being called to these meetings to face the disciplinary action he was expecting because of the incident on 17 August 2016. The claimant fully understood that the meetings he persistently refused to attend on 19 August 2016 were related to the disciplinary action he was expecting - hence the reason for him refusing to attend without a full time official in attendance.

86. The fact that the respondent had not spoken to a full-time trade union official before suspending the claimant does not support the assertion that the reaction to the complaint of WH was disproportionate, or that dismissal was not for the reason stated by the respondent. The Disciplinary procedure states that:

No disciplinary action will be taken against a trade union representative until the circumstances of the case have been discussed with a senior trade union representative or full-time official.

However, suspension is expressly stated not to be disciplinary action. In relation to suspension the procedure does not expressly state that the decision to suspend will not be taken until the circumstances of the case have been discussed with the full-time official. The procedure states:

In such cases where it is necessary to suspend a representative of a recognised trade union/staffing organisation, the circumstances must be reported to the full-time officer immediately.

It is clear that the circumstances were reported to the claimant's trade union as it is his evidence that he was notified by his trade union of the suspension by a telephone call on 19 August 2016.

87. The claimant has made much of the failure of the Case Manager, Miss Dawson, to give evidence and/or to set out the reasoning behind her decision to progress the matter to a disciplinary charge. However, the claimant has adduced no satisfactory evidence to support any assertion that the decision to progress to a disciplinary charge was disproportionate. In any event, the reasoning of any case manager or investigating officer to progress to a disciplinary charge is tested during the disciplinary hearing. It is for the disciplinary panel to decide whether there is sufficient evidence to support the charge as laid against the claimant. That is what happened here. The decision to dismiss was taken by the disciplinary panel, not Miss Dawson. There is no merit in the assertion that the failure of Miss Dawson to give evidence and/or to set out the reasoning behind her decision indicates that the reason for dismissal was not as stated by the disciplinary panel and/or that the evidence before the disciplinary panel was in some way engineered and/or escalated to justify the decision to dismiss.
88. The fact that the respondent quickly identified the misconduct as potentially an act of gross misconduct which may justify dismissal, the fact that the invitation to the disciplinary hearing cited the description of gross misconduct first, does not support the assertion that the decision had been made to dismiss the claimant from the outset for some other reason, does not support the assertion that the respondent had in some way exaggerated the serious nature of the alleged conduct to engineer the claimant's dismissal. The alleged conduct was serious. WH's complaint of intimidating behaviour by someone under her line of authority was a serious matter. There is no satisfactory evidence to support the assertion that the disciplinary panel were in some way manoeuvred in to a decision to dismiss by the identification of the incident as potentially amounting to gross misconduct. There is no satisfactory evidence to support the assertion that the disciplinary panel were swayed from a balanced and dispassionate decision by the order of wording in the invitation to the disciplinary hearing and/or by the way in which the case papers had been prepared. The suggestion that the disciplinary panel were being swayed and/or unduly influenced by unnamed players behind the scenes is totally without merit, wholly unsupported by any satisfactory evidence.
89. Having considered all the evidence the tribunal accepts the evidence of Mr Price and finds that the reason for the dismissal was conduct in that the respondent held the honest and genuine belief that the claimant had, on 17 August 2016, behaved in an abusive and threatening way towards

another member of the theatre team, his Team Leader WH. The tribunal accepts the evidence of Mr Price and finds that, in reaching the decision, the disciplinary panel relied solely on the evidence relating to the conduct of the claimant during the incident on 17 August 2016, as demonstrated on the available CCTV footage. The tribunal does not accept the claimant's assertion that the respondent, as a result of the claimant's behaviour after the incident, in some way escalated the severity of the claimant's conduct on 17 August 2016 to engineer a dismissal for a different reason. There is no satisfactory evidence to support such an assertion.

90. Conduct is a potentially fair reason for dismissal within s98 (1) and (2) Employment Rights Act 1996.
91. The tribunal has considered all the circumstances of this case, including those matters referred to in s98(4) Employment Rights Act 1996, to determine whether, in all those circumstances, the dismissal of the claimant for the reason stated was fair or unfair. In deciding whether the decision to dismiss was fair or unfair it is not for the tribunal to substitute its view for that of the employer. The question is did the respondent act fairly within the band of reasonable responses of a reasonable employer in concluding that this employee was guilty of gross misconduct and dismissing him.
92. Having considered whether the respondent carried out a reasonable investigation of the alleged misconduct, the tribunal notes in particular as follows:
 - 92.1 An independent investigator was appointed;
 - 92.2 the respondent interviewed all relevant witnesses. The claimant did not, either during the investigation and disciplinary process, or before this tribunal, provide the name and/or identity of any witness to the incident who was not interviewed;
 - 92.3 Notes were taken of all interviews;
 - 92.4 the claimant was interviewed during the investigation and given the opportunity to comment on the available evidence;
 - 92.5 the failure of the respondent to provide a copy of the CCTV footage before and after the incident on 17 August 2016 did not make the investigation unfair. The allegation related to the exchange between the claimant and WH and AS in the time between the claimant leaving the changing room and

exiting the building, which took approximately 7 minutes. The entire exchange was captured on the CCTV footage, which formed part of the evidence during the disciplinary process. The tribunal rejects the assertion that the entire CCTV footage for that evening may have brought additional relevant evidence to bear. The charge of misconduct related to the 7 minute period captured on the retained CCTV footage. The claimant failed to establish either during the investigation or disciplinary procedure or before this tribunal that there was any relevant additional exchange and/or conduct between himself and the others before or after the 7 minute period captured on the CCTV;

- 92.6 evidence was heard at the disciplinary hearings when further information was obtained. The claimant and his trade union representative were able to ask questions of the witnesses, were given full opportunity to comment on all the evidence before the disciplinary panel;

In all the circumstances the tribunal finds that the respondent did conduct a reasonable investigation of the alleged misconduct. The standard of investigation did befit the gravity of the matter charged, that is, a charge of gross misconduct against a long serving employee with a clean disciplinary record.

93. Having considered whether, having conducted that investigation, the respondent had reasonable grounds to support its belief the tribunal notes in particular as follows:

- 93.1 there was no finding by the disciplinary panel as to the exact words used by the claimant in his exchange with WH and AS during the incident on 17 August 2016;
- 93.2 the evidence before the panel of WH and AS, as stated in their initial witness statements, was clear. Although they could not recall the exact words used by the claimant, they were clear that the claimant's language was inappropriate, he was gesturing with his hands, he was agitated, confrontational, he was shouting, not providing any opportunity for a response. WH found the incident stressful and intimidating. AS also found the incident stressful. Both remarked that they tried to diffuse the situation but the claimant persisted;
- 93.3 there was nothing to suggest that either WH or AS were lying or exaggerating their evidence. WH acknowledged that

she had had a long-standing friendship of over 20 years with the claimant – the claimant agreed. AS had commented that he liked the claimant, that he had a kind heart;

93.4 At his investigation interview (53) AS said that the claimant was swearing, that his body proximity was close, that WH was upset and saying “I want to go home”, that the claimant had “crossed the line.” (see paragraph 31 above.) The respondent was reasonable relying on that evidence. AS had not mentioned swearing in his previous written statement but the respondent was reasonable in relying on AS’s evidence, viewed as a whole. There was nothing before the disciplinary panel to suggest that AS was lying or was now exaggerating the severity of the claimant’s behaviour during the course of the incident;

93.5 The claimant denied the allegations. In deciding whether to accept the evidence of WH and AS the disciplinary panel was reasonable in taking into account the conduct of the claimant at the disciplinary hearing, when the panel formed the honest and genuine belief that the claimant had acted in an aggressive manner, had used inappropriate language. The fact that the panel took into account, when deciding the conflict of evidence, their belief that the behaviour of the claimant during the disciplinary hearings was consistent with the alleged behaviour on 17 August 2016, was reasonable;

93.6 The panel found that the evidence of WH and AS was supported by the CCTV evidence. The CCTV footage clearly shows that the claimant was agitated, was gesticulating, was pointing, invading the personal space of WH, and kept turning to leave but then turning back, walking back directly in front of WH and carrying on with his pointing. It was reasonable for the respondent to find that the CCTV footage supported the evidence of WH and AS.

Having considered all the circumstances the tribunal finds that there were reasonable grounds to support the finding without the need for a word by word account of what had been said during the exchange, what exact swear words had been used. There may have been minor inconsistencies in the evidence of the witnesses but the witness evidence together with the CCTV footage provided reasonable grounds for the belief.

94. Having considered the procedure adopted by the respondent the tribunal notes and find that:

- 94.1 the specific allegation of misconduct was put to the claimant who was given full opportunity to state his case both during the investigation and at the disciplinary hearings;
- 94.2 the respondent followed a fair disciplinary procedure in that the claimant was represented at the disciplinary hearings, he and his representatives were given full opportunity to state their case and the matters put forward on behalf of the claimant were considered by the dismissing and Appeal Panels before reaching their decisions;
- 94.3 it was reasonable for the disciplinary panel to consider the claimant's grievance as part of the disciplinary case. The grounds of the grievance related directly to the disciplinary charge. The claimant's right to a fair hearing was not prejudiced by that decision;
- 94.4 it was reasonable for the disciplinary panel to refuse to call Ms D Mawson to give evidence to the panel as to her decision that there was a case to answer. The claimant's right to a fair hearing was not prejudiced by that decision;
- 94.5 the failure of the claimant to attend the Appeal hearing was of the claimant's own making. He may have been upset by the attendance of security officers but their attendance did not prevent the claimant from participating in the Appeal hearing. The claimant chose not to attend the Appeal Hearing but instead went to the police station to complain about the attendance of the security officers. The appeal panel made it clear that it would postpone the start of the hearing but that the hearing would go ahead that day in the absence of the claimant. The claimant had trade union representation. The trade union representative was given the opportunity to attend the reconvened appeal hearing, in the absence of the claimant, but he declined. The appeal panel was unaware, at the time, that the claimant had arrived 10 minutes after they started and was declined entrance by security;
- 94.6 There was considerable delay in the conduct of the disciplinary hearing. The tribunal is concerned that the reason for the considerable delay in holding the disciplinary hearing has not been fully explained by the respondent. However, having considered all the circumstances, the tribunal is satisfied that such delay did not affect the fairness of the hearing. The investigation took place quickly. Witness

statements were obtained from the relevant witnesses within a reasonable time of the incident;

- 94.7 The fact that the claimant was suspended does not affect the fairness of the decision. Suspension pending investigation of the complaint by WH fell within the band of reasonable responses. It is unfortunate that the suspension carried on for so long. The claimant, a long serving employee with a clean disciplinary record and no comprehension that his conduct on 17 August 2016 was wrong, was naturally upset by the suspension. However, the length of the suspension does not affect the fairness of the procedure;
- 94.8 As stated above, it is not clear how the claimant says that the failure to notify the full-time Union official before the suspension was a breach of the disciplinary procedure. In any event, any such procedural fault was minor and did not affect the fairness of the procedure overall.
- 94.9 The claimant has made much of the failure of the Case Manager, Miss Dawson, to give evidence and/or to set out the reasoning behind her decision to progress the matter to a disciplinary charge. However, the tribunal does not accept that this failure affected in any way the fairness of the procedure overall. This may have been a technical procedural fault but it did not affect the way in which the disciplinary and appeal panels conducted themselves.
- 94.10 the ACAS guidelines were followed in that:
- 94.10.1 an investigating officer was appointed to carry out an investigation to help to establish the facts of each case;
 - 94.10.2 the claimant was informed of the problem;
 - 94.10.3 meetings were held with the claimant to discuss the problem;
 - 94.10.4 the claimant was advised of his right to be accompanied at the meeting and exercised that right;
 - 94.10.5 the disciplinary panel decided on the dismissal and the claimant was advised of the reasons;

94.10.6 the claimant was provided with an opportunity to appeal.

In all the circumstances the tribunal finds that viewed overall, the procedure adopted was fair.

95. In deciding whether, in reaching the decision to dismiss, the respondent acted within the band of reasonable responses of a reasonable employer faced with similar circumstances the tribunal notes in particular that:

95.1 the act of misconduct did amount to gross misconduct, fell within the definition of gross misconduct contained within the disciplinary procedure. The respondent did give a satisfactory explanation for reaching this finding. The respondent was reasonable in concluding that the persistent nature of the claimant's conduct during the short exchange on 17 August 2016 made the abusive and threatening behaviour an act of gross misconduct. The respondent was reasonable in concluding that the claimant was verbally abusive and threatening without any evidence as to the actual words used, without any evidence as to the actual swear words used, without any evidence that the swearing had been directed specifically at WH, rather than just being the use of unspecified swear words as part of the claimant's speech. The respondent acknowledged that there was no physical assault. The respondent was reasonable, in reaching its decision that this was gross misconduct, in relying on the evidence as to the effect the claimant's conduct had had on WH. There was no satisfactory evidence before the respondent to suggest that WH had exaggerated the effect of the claimant's conduct on her, or that her continued upset was caused by some other reason, for example, the possibility that the claimant, with whom she had been friendly for many years, may lose his job. The evidence before the panel was that WH had been upset during the incident, immediately after the incident, when she had locked herself in her car and called others for support, and in the next few days when returning to work. It was therefore reasonable for the respondent to accept WH's evidence that her upset, caused by the claimant's conduct on 17 August 2016, had continued from that day up to the disciplinary hearing;

95.2 there is no satisfactory evidence to support the assertion that the respondent artificially escalated the severity of the claimant's actions to secure his dismissal;

- 95.3 the respondent was reasonable in concluding that the claimant was aware of the company's disciplinary procedure, was aware immediately after the incident that his conduct was serious enough to warrant suspension;
- 95.4 the dismissing panel considered the claimant's length of service and clean disciplinary record. The respondent was reasonable in describing this as "limited mitigation". That description does not mean that the respondent did not take these factors in to account or take them seriously: the respondent did take them in to account. However, the respondent was genuinely and reasonably concerned that the claimant had not apologised for his actions, had failed to accept that what he had done was wrong;
- 95.5 the disciplinary panel considered whether dismissal was the appropriate penalty and considered alternative sanctions. It was reasonable to dismiss rather than impose a lesser penalty because the claimant had not given any indication whatsoever that he understood that his behaviour had been unacceptable, that he would not do the same again. The respondent was reasonable to consider, in deciding sanction, whether it was likely that the claimant's conduct would be repeated. The claimant did not give any indication that his behaviour was an isolated incident, a one-off, and would not occur again. To the contrary the claimant gave every indication to the disciplinary panel that this abusive and threatening behaviour was likely to continue;
- 95.6 the tribunal has considered very carefully whether the respondent failed to give sufficient weight to the fact that the claimant had worked in the NHS for many years and had faced no previous disciplinary action in that time, in spite of the fact that he was recognised as being at times loud and aggressive. The suggestion is that the claimant is loud, is aggressive, but the respondent has successfully coped with that for many years and, therefore, could reasonably manage more of the same thing, and dismissal for a one-off event, lasting no more than 7 minutes, was not the appropriate sanction, especially as the claimant was recognised as being a good worker, a man with a kind heart. The tribunal accepts that a different employer may have taken that view, may have chosen to impose a final written warning. However, the respondent was reasonable in deciding that dismissal was the appropriate sanction

because the claimant was not prepared to accept that what he had done was wrong, was unacceptable. The claimant gave no indication at all that he was prepared to change, if given another chance.

In all the circumstances the tribunal finds that dismissal did fall within the band of reasonable responses.

96. Taking into account all the circumstances the tribunal finds that the dismissal was fair.

Contributory fault

97. In any event, if the tribunal is wrong on that, if the dismissal was unfair, the tribunal has considered whether the claimant contributed to his dismissal. The tribunal notes in particular its findings at paragraphs 65 - 72 above. The tribunal finds that:

- 97.1 the claimant was guilty of verbally abusive and threatening behaviour on 17 August 2016. That is clear from the evidence given during the investigation and disciplinary procedure as supported by the evidence of the CCTV footage;
- 97.2 the claimant was guilty of wholly unacceptable behaviour during the course of the disciplinary hearings. He was loud, aggressive, threatening, refused to follow reasonable management instructions to stop interrupting. His behaviour when WH was giving evidence was wholly unacceptable

The claimant was guilty of culpable behaviour which directly led to his dismissal. The tribunal rejects any suggestion that the respondent should be expected to put up with the type of behaviour exhibited by the claimant. Any award of a basic or compensatory award will be reduced by 100%.

Breach of Contract.

98. The question is whether the claimant was guilty of gross misconduct justifying summary dismissal. The tribunal refers to its findings, particularly at paragraphs 65 - 72 above. The claimant on 17 August 2016 acted in a threatening and intimidatory manner towards his manager. He persisted with that behaviour when told to stop. The claimant's behaviour during the disciplinary procedure gave a clear indication that the claimant did not consider himself to be bound by the

terms of his contract of employment. He used threatening behaviour to members of the disciplinary panel, he refused to take reasonable instruction. His behaviour when WH was giving evidence was wholly unacceptable and viewed in isolation amounted to gross misconduct justifying summary dismissal. The claimant knew that WH, a friend of many years, had been upset by his behaviour on 17 August 2016, had raised a complaint against him, and had felt intimidated enough to request that the claimant not be in the room when she gave her evidence. WH agreed to the claimant's attendance on conditions which the claimant immediately and repeatedly broke, causing WH more upset.

99. The claimant was guilty of gross misconduct justifying summary dismissal.

Employment Judge Porter

Date: 5 December 2017

JUDGMENT SENT TO THE PARTIES ON
6 December 2017

FOR THE SECRETARY OF THE TRIBUNALS