EMPLOYMENT TRIBUNALS

Claimant: **Mr A Ali**

Respondent: **Bradford Teaching Hospitals NHS Foundation Trust**

Heard at: **Leeds** **On:** **6 December 2017**

Before: **Employment Judge Davies**

Representation
Claimant: **Mr Ross (counsel)**
Respondent: **Mr Proffitt (counsel)**

JUDGMENT

1. The Claimant's claim of unfair dismissal is not well-founded and is dismissed.

REASONS

1. Introduction

1.1 This was the hearing to determine a claim of unfair dismissal brought by the Claimant, Mr Ali, against his former employer, Bradford Teaching Hospitals NHS Foundation Trust. The Claimant was represented by Mr Ross of counsel and the Respondent was represented by Mr Proffitt of counsel. I was grateful to both counsel for their skilful and helpful approach. I was provided with an agreed bundle of documents. I heard evidence from the Claimant and Mr A Singh (Unison representative) on his behalf, and from Mr D Smith (Director of Pharmacy) and Mr A Pervez (Non-Executive Director) for the Respondent.

2. Issues

2.1 The issues to be decided were:

2.1.1 What was the reason for the Claimant's dismissal? Was it capability or some other substantial reason (his non-compliance with the Respondent's attendance requirements)?

2.1.2 If the reason for dismissal was a potentially fair reason, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant having regard, in particular, to whether it acted in compliance with its own Management of Attendance and Employee Health and Wellbeing policy?

2.1.3 If the Claimant was unfairly dismissed, what is the chance, if any, that he would have been fairly dismissed in any event, and when would that have occurred?

3. The Facts

3.1 The Respondent is the Bradford Teaching Hospitals NHS Foundation Trust. The Claimant was employed as a Pharmacy Assistant by the Respondent from May 2005. He was one of approximately seven such assistants. His duties included receiving goods from suppliers and checking them to ensure the correct products had been supplied; storing them appropriately; picking processed requisitions for wards, departments and clinics; and delivering goods to wards and departments. Some of these tasks were vital to the safe supply of medication within the hospital. If the Claimant was absent his duties had to be covered by other staff including, on occasion, the Principal Pharmacy Technician, because of the importance of the tasks.

3.2 The Respondent has a "Management of Attendance and Employee Health and Well-being Policy and Procedure" ("the Attendance Policy"). The Attendance Policy sets out a process for managing attendance at work, including persistent short-term absences. Since early 2016 the Respondent has used the Bradford Factor to monitor absence and determine trigger points for management actions. The formula is applied over a rolling 12 month period. Under the Attendance Policy, in general terms a Bradford Factor score of between 20 and 99 will trigger an attendance review meeting; a score of between 100 and 299 will trigger an informal stage 1 meeting; and a score of over 300 will trigger a formal stage 2 meeting and, potentially, a final formal attendance review meeting or capability hearing. Section 6 of the Attendance Policy is concerned with notification of absences. Paragraphs 6.6 provides as follows:

> **6.6 Work Related Injury or Illness**
>
> Where there is clear evidence that the illness or injury is work related, the manager will normally discount the period of sickness in question for the purpose of sickness absence triggers or adjust most triggers depending on the nature and the length of the sickness.
>
> In accordance with the NHS Terms and Conditions of Service Handbook for Agenda for Change employees, when aggregating periods of absence due to illness for the purpose of sick pay calculations no account will be taken in injuries or diseases sustained to members of staff in the actual discharge of their duties through no fault of their own.
> …

3.3 My attention was drawn to the relevant parts of the Agenda for Change Handbook referred to in the Attendance Policy. In the provisions governing sick pay, that Handbook makes clear that employees are entitled to a certain number of months on full pay and then a certain number of months on half pay during sickness absence. However, absences caused by injuries that are wholly or mainly attributable to the employee's employment and which have been sustained in the discharge of the employee's duties will not be included in the calculation of sick pay entitlement. The interpretation of that provision is in turn affected by the provisions dealing with injury allowance. The effect of those provisions is that the discount will not apply for an injury that is wholly or mainly

attributable to the employee's NHS employment if that injury was due to or seriously aggravated by the employee's own negligence or misconduct.

3.4 The Claimant has a poor sickness absence record dating back almost to the start of his employment. I do not need to deal in any detail with the nature of his sickness absences or the reasons for them. He tells me that he had a couple of car accidents early on. In addition, he suffered an injury at work to his hand in 2009 which led to a number of substantial periods of absence over the next four years. Those arose partly because he needed some operations and partly because of the pain he was experiencing. He was taken through the Attendance Policy (which did not at that stage rely on the Bradford Factor) at that time. In March 2013 he had a final capability hearing, which was dealt with by Mr Smith. Mr Smith took the view that Claimant's hand injury, which had been caused by a pallet falling on him while he was carrying out his duties, was a work related injury within the meaning of the Attendance Policy. Therefore, he did not count the extensive absences associated with that injury in his assessment of the Claimant's sickness absence and decided that it was not appropriate to dismiss the Claimant.

3.5 The Claimant continued to have a poor sickness absence record and his attendance continued to be managed in accordance with the Attendance Policy. Picking up the story in 2016, the Claimant had five days' absence in January. He had an attendance review meeting in February. He was then absent from 13 April 2016 to 6 August 2016. He said that this absence was as a result of work related stress, because of his manager's approach to him following his previous attendance issues. In cross-examination he acknowledged that after he had gone on sick leave, some personal issues also arose, which contributed at least in part to his stress and anxiety.

3.6 The Claimant returned to work in August 2016. On 5 September 2016 he had an accident while at work. Putting it neutrally, the Claimant's head was hit by a door. He suffered a cut on his eyebrow and was subsequently diagnosed with concussion. He was absent as a result from 5 September to 2 October 2016. In his evidence to the Tribunal, the Claimant said that he was struck with such force that he was knocked back into the door frame. He said that he had a cut on his head and that blood was "pouring." He suggested that he had "stumbled" from the door, when his colleagues had given him tissues to help stop the blood and to cover his eye. He had then carried on to the ICU to deliver the package he had been on his way to deliver. Subsequently he went to A&E. I accepted Mr Proffitt's submission that this was an exaggerated account of what had happened. The Claimant took photos of his injury later that day, which I saw. They reveal a small but deep cut to his eyebrow. In the Datix report he completed on the day, the Claimant simply said, "I was walking up the stairs behind Technical Services Manager going towards pharmacy reception. As I walked through the door staff said hi as I said hi back, looking on my right as I turned left the door hit my face. Three staff members were present as was myself." I noted that the Claimant went to the ICU straight after the incident. If blood had indeed been pouring from his cut, it was difficult to believe that his colleagues would have allowed him to do so, given the health risks to which that would have given rise. Further, I did not find the Claimant a wholly persuasive witness. He had a tendency to try and argue the case rather than explain what had actually happened. In parts his evidence was implausible. For example, his evidence to me was that he had frequently told his manager before 5 September 2016 that the door was unsafe because of the

speed at which it closed. It was put to him that if he was so concerned about the door he would have taken particular care when going through it, whereas on his own account he had turned the other way to speak to a colleague before doing so. He was not able to give a convincing explanation of that, and I did not accept his evidence that he had made frequent complaints about the door before 5 September 2016. For all these reasons, I did not accept that the incident occurred quite as he described. I find that the account in his witness statement was exaggerated. There is, of course, no dispute that his head was hit, that he did suffer an injury and that he was subsequently diagnosed with concussion. He suffered headaches and migraines thereafter, which his medical advisers attributed to that concussion (see further below).

3.7 On 26 September 2016, while he was still on sick leave, the Claimant was invited to attend a long term sickness absence review meeting on 5 October 2016. In addition he was referred to Occupational Health ("OH"). In fact, the Claimant returned to work on 3 October 2016. OH provided a report dated 4 October 2016. The OH physician, Dr Trakoli, said that he had suffered from concussion as a result of his head injury and still experienced intermittent headaches and nausea. His symptoms were expected to improve gradually over a few weeks. He was fit to return to work with immediate effect on a brief phased return.

3.8 Ms Allatt, Pharmacy Principal Technician, held a long term sickness absence meeting with the Claimant on 6 October 2016. She wrote a careful letter setting out what they had discussed the same day (as she did on each subsequent occasion, reflecting in my view a careful and supportive approach to the Claimant). She noted that she had told the Claimant that his Bradford Factor score was 2560. The Claimant was given a target of having no sickness absences until April 2017. He was warned that if there were any further incidents he would have to have a formal attendance review meeting, which could potentially lead to a capability hearing. They discussed his most recent absence. Ms Allatt noted that the Claimant had been suffering from headaches and nausea. Ms Allatt asked how the Claimant was feeling and they discussed possible support and coping mechanisms. She noted that the Claimant had told her that there were some high levels of stress at home. Ms Allatt suggested that the Claimant reduce his hours for a short period until his health improved but he did not think that would be necessary.

3.9 The Claimant was absent from work between 7 and 18 November 2016 with diarrhoea and vomiting. On 22 November 2016 Ms Allatt wrote to him setting out how the Bradford Factor triggers operated and telling him that his score was 2544. She invited him to formal attendance meeting on 28 November 2016. As a result of that meeting, Ms Allatt referred the Claimant again to OH. She said that she wanted to see if there were any further ways in which the Respondent could support him to reach his target of no more sickness absences until April 2017 and to seek reassurance that his symptoms did not stem from the head injury he sustained at work.

3.10 Dr Trakoli reported on 6 December 2016. She said that the Claimant had been experiencing intermittent headaches, nausea and blurred vision, especially following periods of concentration, since his head injury in September 2016. The headaches were likely to stem from concussion. His GP had referred him to ophthalmology for further assessment. The Claimant was fit to continue working in his current role, but had informed her that he had made a few errors because

of visual fatigue associated with his blurred vision. Dr Trakoli suggested that he be allowed additional time to perform his work tasks so he could double check. Her view was that his symptoms would slowly improve over a period of months rather than weeks.

3.11 The Claimant was absent from work from 5 December 2016 to 23 January 2017. There was some dispute about the reasons for that absence. The Claimant said that it was because of severe headaches and migraines. That appears to have been what he told Ms Allatt at a stage 2 meeting on 19 January 2017 (see below). However, there was a subsequent indication in an OH report that this related to respiratory tract infections (see further below). I do not need to resolve the question why the Claimant was absent on this occasion.

3.12 On 9 December 2016 Ms Allatt wrote to the Claimant inviting him to a formal attendance review meeting on 4 January 2017. At that meeting, the Claimant explained that he was still suffering from headaches and blurred vision and was finding it hard to concentrate. He had not been referred for a head scan but was attending the ophthalmology clinic on 13 January 2017. Ms Allatt asked about his mental and emotional health and the Claimant said that he was having a tough time at the moment. Ms Allatt suggested the counselling service again. Ms Allatt explained that the Claimant's Bradford Factor score was now 4450 and that he would have to attend a final attendance review meeting. That would take place on 19 January 2017. Meanwhile the Claimant was again referred to OH.

3.13 The final attendance review meeting took place on 19 January 2017. The Claimant was still absent from work. Ms Allatt wrote a follow-up letter on 23 January 2017. She recorded her decision that there should be a capability hearing, because the Claimant's attendance continued to be an issue and was beginning to impact upon the service. She recorded that the Claimant had said that he was feeling much better but still suffering with headaches and blurred vision and finding it hard to concentrate. The stress he was under at home had improved. His GP had not referred him for a head scan. The ophthalmology clinic had found that there was no damage to his eye. His OH appointment had been postponed to 31 January 2017.

3.14 As I understand it the Claimant returned to work on 24 January 2017. He attended OH on 31 January 2017. Dr Trakoli provided a report the same day. She wrote that his "two latest absences in December and January" were due to "self-limiting upper respiratory tract infections." She again referred to his head injury in September 2016. She explained that the Claimant was now awaiting a CT scan. His nausea, irritability and intermittent low mood had improved. His main residual symptoms now were a headache and blurred vision after concentrating for prolonged periods. The anticipated course of improvement was over a period of months. The doctor made clear that there was no underlying medical condition that would trigger higher than average sickness absence.

3.15 The capability hearing was arranged for 4 April 2017. Ms Allatt prepared a management report. She noted that the Claimant had been absent on three further days after being told that he would have to attend a capability hearing at which he might be dismissed. Ms Allatt explained that the Claimant's absences were becoming very disruptive to the workflow of the pharmacy, to the extent that the Claimant could not be included in a rota because his attendance was so unreliable. Further, even when he was at work, he struggled to perform his tasks

and on several occasions had asked to go home early. She said that this was becoming unsustainable in the department and that the Claimant's continued and erratic absences were becoming a drain on the department and his colleagues. Ms Allatt set out a summary of the Claimant's absences and the way they had been managed since June 2015. The report contained a number of appendices, including the Claimant's full absence record and an Excel version of the Datix report relating to his accident on 5 September 2016.

3.16 The capability hearing on 4 April 2017 was conducted by Mr Smith with support from an HR officer. Ms Allatt presented the management case and the Claimant attended with his trade union representative, Mr Singh. Mr Singh made a number of points on the Claimant's behalf, in particular: (1) that non-work days had erroneously been included in the calculation of the Bradford Factor score; (2) that the Claimant's absence from April to August 2016 should have been excluded from the calculation because it was a work related illness; and (3) that the 28 day absence from 5 September 2016 and the 32 day absence from 5 December 2016 should both be excluded from the calculation because they arose from the head injury on 5 September 2016, which was a work related injury.

3.17 The notes of the capability hearing record some discussion about the head injury and subsequent absences. Mr Singh made the point that a RIDDOR report had been submitted and argued that this was a work related injury. The HR adviser explained that this only showed it had happened at work not that it was work related. It appears from the notes that she also referred to the absence that started on 5 December 2016 as being caused by a respiratory tract infection. There is nothing in the notes to show that the Claimant or Mr Singh disagreed with that.

3.18 In his evidence, Mr Smith explained that he agreed with Mr Singh that the Claimant's Bradford Factor score should be recalculated on the basis of working days not calendar days and that was done. Mr Singh had drawn attention to paragraph 6.6 of the Attendance Policy and Mr Smith went on to consider that. He started with the absence between 13 April 2016 and 6 August 2016. The relevant OH letter at that time said that the Claimant had had long-standing issues with his line manager since 2009 and that there had also been family issues, which remained ongoing. The report found that the Claimant's absence from work appeared to be as a result of work related issues but there were also pressures in his personal life that were likely to be having an impact. Mr Smith's evidence was that although he was not able to conclude definitively that there was clear evidence that this absence was work related he noted the content of the OH letter and decided that the fairest way to proceed would be to disregard that entire period of absence from the calculations.

3.19 Mr Smith then turned to the head injury. He took some time to consider what was meant by "work related" in paragraph 6.6. He noted that the second sub paragraph referred to injuries sustained by employees in the course of their duties through no fault of their own, while recognising that this was in the context of sick pay not sickness absence management. Mr Smith said that no evidence had been presented to support a claim that the door was faulty and in any event he considered that the Claimant had to bear at least some responsibility for the injury. He could not have been paying close enough attention to where he was walking otherwise he would have seen the door closing in front of him. Furthermore, Mr Smith noted that the OH report from 31 January 2017 recorded

that the Claimant's latest to absences in December and January were caused by upper respiratory tract infections and only the absence in September was the result of the head injury. For all those reasons, Mr Smith concluded that there was no clear evidence that the Claimant had had time off work as a result of injuries sustained through no fault of his own and that these absences should not be discounted. He did, however, agree to amalgamate the three one-day absences in February 2017 with the head injury absence in September given that they were for the same reason. This meant that they would be treated for Bradford Factor purposes as one single episode.

3.20 There had been three further days' absence since the management report had been prepared and Mr Smith agreed to discount those. That left three periods of absence: the September absence and the three associated absences in February; the November absence and the absence from early December to late January. The Bradford score calculated on the basis of those absences was 585. This was still, in Mr Smith's view, considerably higher than the 300 point threshold for triggering stage 3. He therefore turned to consider whether the Claimant was capable of providing regular and effective service in the future. In doing so, he had regard to the fact that the Claimant had had three further days' absence in the period immediately before the capability hearing, despite being faced with the possible termination of his employment. He had also left work early on eight other occasions since February 2017 and had had several instances of taking extended lunch and other breaks. That did not inspire Mr Smith with confidence about the Claimant's ability to make the necessary sustained improvement in his attendance levels. He also had regard to the Claimant's historic absence levels and noted that he had been through several stages of absence management on and off since 2009. Since 2006 he had never managed to go more than a few months without any period of ill health absence. Mr Smith considered the level of support provided to the Claimant and whether he had been managed in accordance with the Respondent's policies and procedures. Mr Singh had not challenged any of the steps taken by management or made any criticism of the support provided to the Claimant. Mr Smith noted the detailed chronology and account set out in the management statement of case. He concluded that the Claimant had been well supported and managed over a long period of time. In spite of this he had failed for several years to reach acceptable levels of attendance. Even after making a number of concessions during the course of the hearing Mr Smith found that his Bradford Factor score was still unacceptably high. He considered whether to issue the Claimant with a further warning but his attendance levels since being put at risk of dismissal suggested that another warning would probably be futile. Finally he considered the impact of the Claimant's absences on the running of the department. That evidence had not been challenged by Mr Singh and Mr Smith accepted that the Claimant's frequent absences combined with leaving early had an adverse impact on the running of the stores and on the Claimant's colleagues who had to cover his duties. His absences also had a material financial impact. According to the figures presented by Ms Allatt in the management statement of case the cost of the Claimant's absence to the Respondent over the preceding two years was in excess of £14,000. For all those reasons Mr Smith decided that the appropriate sanction was to dismiss the Claimant.

3.21 The Claimant was told of the outcome there and then, with Mr Smith providing a brief explanation consistent with the evidence he gave the tribunal. Mr Smith wrote to the Claimant on 13 April 2017 confirming the outcome and again setting

out the reasons. The letter explained clearly that Mr Smith had decided to include the period of absence from 5 December 2016 to 23 January 2017 because the OH report of 31 January 2017 stated that this absence was related to upper respiratory tract infections. Mr Smith also set out his reasoning in relation to the absences associated with the head injury. He referred to paragraph 6.6 of the Attendance Policy, placing emphasis on the words "through no fault of their own" in the sick pay part of that paragraph. He expressed the view that the injury sustained by the Claimant was caused by his own error of judgement. He added that he had taken account of the NHS Injury Allowance Scheme, which would not consider an injury to be work-related where it was "aggravated by the Claimant's own negligence."

3.22 It was not disputed that Mr Smith was giving a truthful account of his reasons and I accepted his evidence about that. In cross-examination it was suggested to Mr Smith that he had not explored in detail at the Capability Hearing what "work related" meant in paragraph 6.6. He said that both sides put their case. He looked into it and concluded that walking into a door was not a work related injury. The staff side were quite clear and the management were quite clear and he decided. His attention was drawn to the Claimant's self-certificate for the absence from 5 September to 3 October 2016. The relevant form asked whether the sickness was work related and whether it was caused by an accident at work. In both cases the Claimant had circled "yes." The form had been signed by the Claimant and by his manager. Mr Smith said that he had seen that document, because Mr Singh produced it during the hearing and then took it away again. However, the focus was on a different part of the form, because there was a dispute about whether a manager had added to the form subsequently to make reference to stress and anxiety. Mr Smith noted the content of the form but his interpretation was that the injury was not work related. Mr Smith was also asked about the Datix report. That indicated that the Claimant's initial report (referred to above) was investigated by Mr McDonald. Mr McDonald's conclusion was that the underlying cause of the incident was that the Claimant was not paying attention to the direction he was walking as he had been distracted by a colleague saying, "Hello" and accidentally hit the edge of the door at the top of the stairs as it began to close. It was put to Mr Smith that the Claimant had not been given the opportunity to challenge that account at the capability hearing. The Claimant's version of events was that he was following someone, Mr Moore, who let the door swing into his face and that that was what caused the accident. Mr Smith accepted that they did not go into the detail of what had happened on 5 September 2016 at the capability hearing and that he had not put to the Claimant that the accident was caused by his error. It was suggested to him that the question of fault was in any event irrelevant because that part of paragraph 6.6 related to the payment of sick pay. He said that when trying to determine if this was work related he looked at various documents. There was no clear definition of what it meant. He deemed that it was not work related. It was put to Mr Smith that he was applying a definition that depended on whether the employee was at fault or not. He disagreed. He explained by way of example that if someone injured themselves with a needle at work that would be classed as work related because where employees were required to work with needles, there was a risk of such injuries that could not be fully mitigated. On the other hand if someone was in the tea room and scalded themselves while making a cup of tea he would not regard that as work related just because the person happened to be at work. He was clear that the Claimant's accident fell on that side of the line: it was someone who was distracted and walked into the door.

3.23 I was not shown any evidence of how paragraph 6.6 has been interpreted or applied in other cases. The only evidence was what Mr Singh said in answer to a question from me, namely that normally the documentation was "quite important." Mr Smith was not shown any such evidence either.

3.24 The Claimant appealed against his dismissal. Mr Singh prepared a statement of case on his behalf. The basis of the appeal was that the absences related to the Claimant's head injury should not have been counted in the calculation of his Bradford Factor score because it was a work related injury within the meaning of paragraph 6.6 of the Attendance Policy. Mr Singh placed reliance on the return to work form, the Datix form and the RIDDOR report. Mr Singh said that Mr Smith had gone wrong by taking into account the reference to fault in the part of paragraph 6.6 dealing with sick pay. He also contended, seemingly for the first time, that the accident occurred because the hinge of the door had previously been reported as unsafe but had not been repaired. Mr Singh produced a statement from Mr Moore, which he said supported this. The statement of case did not take any issue with Mr Smith's decision not to discount the December/January absence on the basis that it was caused by a respiratory tract infection.

3.25 The appendices to the Claimant's statement of case included the return to work interview form completed by his manager on 3 October 2016. On that form a box had been ticked to indicate that the absence resulted from "an injury or incident at work." In addition there was an absence notification form completed by the Claimant's manager on 5 September 2016. He had ticked to indicate that this was an injury at work. He reported that the Claimant had told him that the door had closed on him and banged his head and hit his eyebrow. The statement of case also included the RIDDOR report completed by the Claimant's manager. His manager wrote that the Claimant, "turned to speak to [Ms Ghulam] and managed to hit his head on the edge of the door causing small incision to eyebrow which bled slightly." I have already indicated that Mr Singh had provided a statement from Mr Moore. Mr Moore described walking up the stairs with the Claimant. Mr Moore said that he started to open the door at the top of the stairs and noticed some people, including Ms Ghulam. Mr Moore said that when the door was open at approximately 40° he made his way through and turned to his left towards the reception desk. At the same time the Claimant was following through the door, at which point he said, "Hello" to Ms Ghulam who was present in the corridor to his right hand side. Then he turned to his left and banged his head on the door. He turned back and made his way to the office opposite. He had a small cut on his forehead just above his eyebrow. There was a slight amount of surface blood visible in the cut, which was not dripping.

3.26 Mr Smith was to present the management case at the appeal. He investigated the Claimant's contention that the door had been reported as having a faulty hinge by emailing 15 individuals who worked in the Pharmacy. All of the responses he received were to the effect that nobody else was aware of any problem with the hinges nor of any such problem being reported. The matter was also investigated with the Estates department and they confirmed that they had no record of any job in relation to the door being faulty.

3.27 The appeal hearing took place on 5 July 2017. There was a panel of three, chaired by Mr Pervez. Mr Smith presented the management side and the Claimant attended with Mr Singh. The same HR manager was also present. Mr

Pervez explained in evidence that this was a review of the original decision not a rehearing. However, the panel allowed the Claimant to raise the new point, namely that the hinge had been reported as faulty. The notes of the appeal hearing record that there was an extensive discussion about whether the head injury was a work related injury within the meaning of the Attendance Policy. There was also a detailed discussion of what exactly had happened. The notes record that the hearing was adjourned and that the panel went to inspect the door in the pharmacy. They were accompanied by the Assistant Director of Estates who expressed the opinion that the door was not faulty.

3.28 The notes of the hearing then record in very brief terms the panel's deliberations. Those notes begin, "We deliberated at length and one of the key decisions was the door." There is then a summary explanation of why the panel concluded that the door was not at fault. The note then records, "Uphold management decision, therefore the door is [sic] faulty and hence is not work-related injury Bradford factor score stands, followed correct procedure in line with policy."

3.29 The panel decided not to uphold the Claimant's appeal. A letter was drafted by the HR officer in line with the notes of the panel's deliberation and signed by Mr Pervez. The letter said, "The panel deliberated for quite some time and one of the key deciding factors was whether the door in the pharmacy was faulty as this will determine whether your sickness episode was work-related or not…." The letter explained that the panel had accepted the view of the Assistant Director of Estates that the door was not faulty. The letter concluded, "The panel's decision from the information provided at the hearing was that the episode of sickness would not be work related and the Bradford factor score stands. Management followed the correct procedure as per the Trust's Management of Attendance Policy and therefore the panel uphold the management's decision of dismissal."

3.30 In his witness statement Mr Pervez explained the respective positions taken by Mr Singh and Mr Smith at the appeal. He explained again what led the panel to conclude that there was no fault with the door either when they inspected it or when the Claimant walked into it. He said that they then had to consider whether the injury was work related in circumstances where there was no fault attaching to the Respondent and where the accident appeared to have been entirely the Claimant's fault. Mr Pervez said that he was persuaded by Mr Smith's contention that within the meaning of the policy a work related injury must mean more than simply an accident that happened on the Respondent's premises. The panel was therefore satisfied that Mr Smith's decision was a reasonable one. There were no other grounds on which the decision was challenged and they therefore dismissed the appeal. That reasoning in relation to the interpretation of paragraph 6.6 did not appear in the decision letter or the notes of the panel's deliberations. It was suggested to Mr Pervez in cross-examination that this was because the panel had not addressed the point. He disagreed. He said that the panel had discussed it at length and drew attention to the reference in the appeal notes to the panel deliberating for some time. Mr Pervez did not know why this was not reflected in the notes but he said more than once that the panel did have a discussion about whether this was a work related injury more generally, not just whether the hinge was faulty. They did discuss whether the fact that the Claimant was at work and carrying out his duties was enough and they were convinced that it was not. I accepted Mr Pervez's evidence. In contrast to the first part of the appeal notes, the summary at the end is plainly not word for word. Indeed, it seemed to me to be Mr Pervez outlining what was to be said in the outcome

letter once the panel's deliberations had been concluded. The question for me was whether, as Mr Pervez said, the discussion went beyond merely the question whether the hinge was faulty. I accepted that it did. Mr Pervez was consistent in saying that it did in cross-examination. It seemed to me that the outcome letter focused on the new point raised by the Claimant, and having dismissed that dealt in summary with the remainder of the appeal in the first sentence of the final paragraph, by recording the panel's decision that this episode of sickness was not work related and that the Bradford Factor score stood.

4. Legal principles

4.1 So far as unfair dismissal is concerned, the Employment Rights Act 1996 provides, in s 98, so far as material as follows.

> **98 General**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it –
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> …
> …
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.
> …

4.2 The category of "some other substantial reason" is a catch-all. The employer must show that the reason is potentially a fair one within s 98(1)(b), i.e. that it could, but not necessarily that it does, justify dismissal. In order to amount to some other substantial reason, the reason must be substantial and genuine. Mr Proffitt helpfully reminded me of the decision of the Court of Appeal in *Wilson v Post Office* [2000] IRLR 834. The Court of Appeal cited with approval the well-known principle derived from *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, that the reason for dismissal is the set of facts known to the employer, or beliefs held by him, that cause him to dismiss the employee. Further, the Court of Appeal held that where the set of facts that caused the dismissal of the employee was that his attendance record had not met the employer's requirements, it was an error to find that the reason for dismissal was "capability" as defined in s 98(2)(a) and 98(3). It was more properly characterised as "some other substantial reason." Once the employer has established that the reason for dismissal was some other substantial reason, considerations of reasonableness then fall to be considered under s 98(4).

5. Determination of the claims

5.1 The first issue is to determine the reason for dismissal. The Claimant did not dispute that the reasons given by Mr Smith and Mr Pervez for dismissing him were genuine. Further, in his able submissions on behalf of the Claimant, Mr Ross accepted that those reasons were properly characterised as some other substantial reason for dismissal, namely that the Claimant had failed to comply with the requirements of the Attendance Policy. In the light of the findings of fact above, I have no hesitation in finding that this was the reason for dismissal.

5.2 Accordingly, the Respondent had a potentially fair reason for dismissing the Claimant. The second question is therefore whether it acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss him. Mr Ross submitted that the Respondent did not act reasonably because:

5.2.1 it did not follow the Attendance Policy when concluding that the absences caused by the Claimant's head injury should not be excluded from the calculation of his Bradford factor score because this was not a work-related injury;

5.2.2 it did not properly investigate what had happened on 5 September 2016;

5.2.3 it mistakenly treated the Claimant's absence from 5 December 2016 to 23 January 2017 as being caused by a respiratory tract infection; and

5.2.4 these matters were not corrected at the appeal stage.

5.3 As to the Attendance Policy, Mr Ross's primary position was that the second sub-paragraph was only relevant to sick pay and should not have been taken into account. Put simply, Mr Smith should have found that this was a work-related injury because it happened at work and while the Claimant was in the course of performing his work duties. Mr Ross accepted that the performance of the work-related duties must have put the individual at risk of the particular injury (so that, for example, someone who happened to faint in the corridor and hit their head giving rise to a period of concussion would not satisfy that test). If the second sub-paragraph was to be taken into account, Mr Ross's fallback position was that it was only where the employee's negligence caused or seriously aggravated the injury that the absence should be counted. That came from the Agenda for Change handbook.

5.4 As set out above, I was not provided with any evidence of how this policy is applied generally by the Respondent, nor was I shown any guidance about what a work-related injury comprises. That was the position before Mr Smith too. Paragraph 6.6 is not in absolute terms. It says that where there is "clear evidence" that the injury is work-related the manager will "normally" discount the period of sickness for the purpose of sickness absence triggers. The fundamental question for me is whether Mr Smith acted reasonably in all the circumstances in his approach to that part of the policy. I have set out his evidence in some detail above. It seemed to me that his approach was one that was reasonably open to him in the circumstances. He decided not to discount the periods of absence that related to the head injury. I do not accept that he simply adopted a "fault-based" approach. Equally, it was plain that he did not consider that the mere fact that the accident happened at work was enough. He plainly gave consideration to examples that might fall on either side of the line – a needle injury on one side and the scalding example on the other. As part of that consideration, he had regard to what the sick pay provisions said about fault. He did not purport to apply those provisions to the sick absence situation – he expressly

acknowledged that they related to a different situation. But he took the view that they gave some insight into how the Claimant's situation should be approached. Equally, he acknowledged that the Claimant's manager had signed a form that indicated that the Claimant's sickness was work related, but he did not think that was determinative of the question whether the absence should be discounted from the Bradford Factor calculation. That, too, was an approach that was reasonably open to him. Drawing all the information in front of him together, both policy documentation and evidence about what actually happened, he came to the view that this was an accident that happened when the Claimant was distracted and was hit by a door. He concluded that there was not clear evidence that it was a work related injury and he concluded that it should not be discounted in this case. I find that this was reasonable in all the circumstances.

5.5 Furthermore, I do not accept the submission that Mr Smith acted unreasonably by failing to investigate in greater detail at the capability hearing either the technical approach to how the Attendance Policy should be applied or what actually happened on 5 September 2016. It was clear that Mr Singh on the Claimant's behalf carefully explained how he said the Attendance Policy should be interpreted and why he said it should be interpreted in that way. Ms Allatt took a different approach. It was not unreasonable for Mr Smith to reach his own view in the light of their arguments. Equally, I do not consider that Mr Smith acted unreasonably in failing to carry out further investigation into what actually happened. While the Claimant's position was plainly that Mr Moore was at fault for letting the door go, he did not dispute that he had been distracted at least momentarily by Ms Ghulam greeting him, when turned to look the other way. His own account at the time in the Datix report was to that effect. It was reasonable for Mr Smith to take the view that regardless of whether Mr Moore had let the door go or not the Claimant had not been looking where he was going, on the basis that, if he had been, he would not have been hit by the door. I find that Mr Smith did not act unreasonably by failing to explore this in any more depth at the capability hearing. It was reasonable for him to conclude on the basis of the material that was before him, including what the Claimant said at the hearing, that this was an accident that happened at work rather than a work related injury and that it was not appropriate to exclude it from the Bradford Factor calculation.

5.6 As Mr Ross fairly accepted, there is a fundamental difficulty with the Claimant's third point, because the Claimant did not suggest during the course of the capability hearing or in his appeal that Mr Smith's finding that the December/January absence was caused by a respiratory tract infection was incorrect. As set out above, there was clear reference to this during the course of the capability hearing and the Claimant did not say at that point that what the OH physician said was incorrect. In those circumstances, and given the clear terms of the OH report, it seemed to me that Mr Smith's finding was reasonably open to him, even though there was other evidence suggesting that these absences were related to the head injury. Mr Smith said in the dismissal letter that this was why he was not discounting this absence, and the Claimant did not raise it as a ground of appeal.

5.7 Given that I have found that Mr Smith's approach was reasonable in all the circumstances, the fourth ground of complaint, that these matters were not corrected on appeal, does not arise. However, a proper appeal is an important part of a fair process, so I did consider whether what happened at the appeal stage was reasonable. For the reasons set out in the findings of fact above, I

found that the appeal panel did consider the more general question of whether Mr Smith had been right not to exclude the absences that related to the head injury, not just the question whether the door itself was faulty. In those circumstances, the appeal panel properly considered the points raised and reached a decision that was reasonably open to them.

5.8 The Claimant's grounds of complaint therefore do not succeed. I was satisfied that dismissing the Claimant was within the range of what was reasonable in the circumstances. Mr Smith gave proper consideration to the relevant factors, not merely the fact that he had reached the trigger point. It was reasonable to take into account the Claimant's past absence record as a guide to his likely future record, even though some of his previous absences were related to his work related hand injury, car accidents and work related stress. Mr Smith was well aware of the issues associated with the hand injury because he was the person who had decided not to dismiss the Claimant in 2013, but in any event it was reasonable to regard past absences as a guide to whether the Claimant might be able to comply with attendance requirements in the future. It was reasonable for Mr Smith to conclude that another warning would be unlikely to bring about any change, and to take into account the impact on the Pharmacy, the Claimant's colleagues and the financial implications in deciding that dismissal was appropriate.

Employment Judge Davies

Dated: *6 December 2017*