EMPLOYMENT TRIBUNALS

Claimant: Mr G Allotay

Respondent: Elysium Healthcare No 2 Ltd

HEARD AT: Cambridge ON: 6 & 7 December 2018

BEFORE: Employment Judge Michell (sitting alone)

REPRESENTATION

For the Claimant: In person

For the Respondent: Miss J Wilson-Theaker, Counsel

JUDGMENT

1. The claimant's claim of unfair dismissal is not well founded, and is dismissed.

2. The claimant is ordered to pay £1,000 towards the respondent's costs pursuant to rules 76(2)(b) & 78(1)(a) of Schedule 1 to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013.

WRITTEN REASONS

1. I gave my oral reasons for dismissing the claim and for making a costs order at the conclusion of the hearing. At the request of the respondent, I am asked by the respondent to give my written reasons. I do so below.

UNFAIR DISMISSAL

Background

2. The claimant was employed by the respondent as a healthcare assistant at Chadwick Lodge, which is an establishment providing care for about 100 service users who have been sectioned under the Mental Health Act 1983. All or most of them are vulnerable. Many of them self-harm.

3. One of those service users is "ST". Although ST has serious mental health issues, and has been known to be verbally abusive and loud at times, he has no track record, either before or after the incident at issue in this case, of being physically violent.

4. The claimant was dismissed for gross misconduct on 19 August following an incident on 12 July 2016 when the claimant allegedly assaulted ST. He claims that his dismissal was unfair. The claim is disputed.

5. The proceedings have taken some time to reach a hearing, for various reasons many of which are not the fault of either party. I thank them for their patience. I am also grateful for the measured way in which the claimant, a litigant on person, conducted matters at the hearing.

Evidence

6. I heard oral evidence from the claimant. For the respondent, I heard from Miss Connolly, Mr Keats, and Mr O'Conner. I was referred to numerous documents in a bundle of about 200 pages.

7. I heard oral submissions on liability at the conclusion of evidence, having indicated remedy would be considered thereafter as appropriate.

Issues

8. The claimant confirmed to me that his only claim is of 'ordinary' unfair dismissal. As to this:

    i. The reason for the dismissal, alleged misconduct, was not in dispute. (This constitutes a potentially fair reason for the purposes of s.98(2) of the Employment Rights Act 1996 ("ERA").) ii. There were various accounts of what took place on 12 July 2016, as explained below. However, it was accepted by the claimant that if he had acted as alleged by ST, such acts would constitute gross misconduct.

iii. Conversely, the respondent accepted that if the claimant had acted as he alleged, this would not constitute misconduct at all.
iv. The primary argument advanced by the claimant was that the respondent did not have reasonable grounds for its belief in his misconduct, because it failed adequately to investigate the allegations against him, and used an unfair procedure, and so did not have adequate evidence to support any belief in misconduct.

Factual Findings

9. I make the following findings on the material facts.

Background

10. The claimant had worked on the ward as a 'front line' member of staff for some years. He was very experienced. He had had all necessary training in 'breakaway' techniques and in 'prevention and management of violence and aggression'. The importance of verbal de-escalation was something with which he was familiar. He also knew, because he had been trained to know it, that staff ought not to try and restrain servers users alone themselves. His most recent relevant training was only a few months before the incident in issue.

11. The claimant also knew, as he properly accepted in evidence, that service users must be treated in a respectful way, and that maintaining their trust was crucial.

12. On 12.7.16, in the Day Report, the claimant asserted that he had been assaulted by ST. He claimed ST was "threatening violent towards the staff (i.e. the claimant) in an intimidating manner both hands raised and [chest] raised"; that ST had been "very upset throwing his hand in the air as if to aim at the staff"; that ST had blocked the claimant's exit; that the claimant "tried to break away by attempting to push him aside"; that ST "managed to hold on to the staff right hand tightly"; that "the staff attempted to free the hand by hold[ing] on to ST with the other left hand." He concluded by saying that "another staff immediately attend[ed,] intervened and deescalate[d]". So, on his account ST was not only violent, but a visible threat.

13. There was no CCTV footage of the incident, as CCTV cameras had not yet been installed at that time. However, Mr Life Dube was on duty near

the scene, and witnessed most of the key events. Mr Dube is a senior RMN at the hospital, and a qualified trainer on prevention and management of disturbed or violent behaviour. In accordance with hospital procedure, he made a short comment in the Day Report. He confirmed the incident, but said that the claimant's account "does not reflect the way I witnessed the incident". As will be seen, his account diverged significantly from the claimant's narrative, and supported ST's version of events.

14. The claimant's entry in the Day Report is timed at 19:38. Hence it was made later that day than the Report of Joy Koroma timed at 18:45, in which ST's allegation that the claimant assaulted him is first recorded. The claimant's version of events was therefore written having had sight of and in response to ST's account as set out by Ms Koroma.

15. On the morning of 13.7.16 the Unit Manager reported the incident, to the effect that the claimant had allegedly inappropriately restrained ST. The police and CQC were duly informed (though no further action was taken by either authority), and the claimant was suspended the following day.

Investigation

16. Ms Connolly was tasked with investigating the matter. Quite rightly, she was keen that matters be dealt with within the time scale contemplated by the respondent's disciplinary procedure. She spoke with ST, and with various members of staff on or near the ward area that day. She was already very familiar with the physical layout of the area at issue.

17. In my judgment, the level and extent of enquiries she made were more than adequate. She was thorough and prompt.

18. Her investigations revealed the following:
    a. ST candidly accepted that he had made a rude comment to the claimant in connection with the removal of ST's TV from his room earlier that day whilst it was being cleaned. (I should add that the claimant acknowledged in his evidence that verbal abuse from service users to staff is not uncommon.)
    b. ST said that in response, the claimant had charged towards him 'like a bull', shouted at him, grabbed his arm and twisted it behind his back. ST said he was frightened and shocked by the claimant's conduct. His statement concludes : "even if I did swear- staff should not attack you like that should they?"
    c. ST's statement was consistent with the 14.7.16 complaint made on his behalf by ST's Independent Health Advocate, which sets out in detail ST's account. Again, ST accepts some measure of fault for having sworn, but again, the claimant is said there to be the

aggressor, charging at ST in response to some abusive language on ST's part.

d. Mr Dube said he had witnessed ST making a comment towards C (but he saw none of the kind of florid and threatening behaviour described by the claimant). He said ST was not aggressive in his presentation. He then said the claimant "charged" toward ST, grabbed his hand and bent his arm up his back. He said he had to ask the claimant 2 or 3 times to let go of ST, before the claimant eventually did so. He said that throughout, ST made no attempt to assault the claimant. He instead said "why are you doing this to me?", and appeared fearful. Thus Mr Dube's statement strongly corroborated that of ST.

e. "PD" and "JK", both members of staff, said they did not hear or see much of note. This did not take matters very far either way, as on the claimant's account they perhaps ought to have heard ST being abusive and visibly threatening and did not do so. Hence, as the claimant accepted in cross examination before me, the key witnesses were himself, ST and Mr Dube.

19. Ms Connolly also spoke with the claimant. He had already compiled a handwritten statement on 14.7.16, prior to his suspension. In that statement, the claimant asserts ST threatened him with violence, came at him with both hands raised, and that the claimant simply tried to breakaway.

20. The claimant later claimed he had been forced to write his 14.7.16 statement, had been rushed into doing it, and (perhaps inconsistently) been told he could not leave until it was completed. Even if this is correct frankly, there is much to be said for securing a statement at the earliest possible opportunity, especially when suspension is contemplated- it did not, in my view, prevent the claimant from adding to or correcting it if he felt appropriate later. He had several opportunities to do so, during the investigatory, disciplinary and appeal stages.

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21. When Ms Connolly spoke with the claimant on 17.7.17, he said ST had shouted and sworn at him, "lurched" towards him in an aggressive way, racially abused him, and grabbed him with both hands. The claimant said he then pulled himself out of ST's grip, twisting his own arm back to escape.

22. The claimant acknowledged he was wearing an alarm, which ought to have been used if his version of events was right. He did not satisfactorily explain why he had not activated it, in accordance with his training (it being

common ground that alarms are often used by staff for a variety of reasons).

23. Though the claimant acknowledged Mr Dube had been present, he said that no one had come to his assistance- and he made no mention of Mr Dube's intervention. He said he could not recall what Mr Dube said to him.

24. Ms Connolly also spoke very briefly with another staff member, Daniel Obou, who confirmed he did not see or hear anything relevant. Her investigating report incorrectly refers to a statement having at that stage been taken from him. I find that was an innocent error on her part. Nothing hangs on it, because when Mr Obou later gave a statement at the claimant's request, he confirmed he had nothing of substance to add.

25. Ms Connolly considered that matters ought to proceed to a disciplinary hearing.

Disciplinary

26. Mr Keats dealt with the matter. He was a careful, considered and impressive witness. I have no doubt he gave the issues proper attention.

27. He noted the claimant did not dispute that Mr Dube told him twice to let go of ST. This supported ST's account, because on the claimant's version (i.e. that he "had contact" with ST but did not "have hold" of him) it was hard to see why Mr Dube would need to make such a request.

28. At tribunal, the claimant said Mr Dube had told him to let go because he (Mr Dube) now had hold of ST. That was not what the claimant said at his investigatory, disciplinary or appeal hearing. Nor is it consistent with Mr Dube and ST's account, which was to the effect that ST posed no threat (and thus did not need to be held onto by anyone).

29. The claimant also demonstrated to Mr Keats his contact with ST, showing a holding and twisting action.

30. The claimant had the opportunity to challenge TC's evidence, but did not do so. He was also asked to explain why no one else had asserted that ST had attempted to assault him. He did not really address this. He said that service users "can fabricate information". But he made no specific allegation that ST somehow 'had it in for him', and had given a false account out of malice. More importantly perhaps, he did not suggest that Mr Dube was biased, or was deliberately giving a false account.

31. Only at this tribunal did the claimant assert for the first time that Mr Dube was probably upset with him because (he said) Mr Dube knew he ought to have acted earlier. Frankly, if that was right, it still does not obviously explain why Mr Dube would be partial in his account, and implicate the claimant.

32. Mr Keats considered that the claimant's evidence regarding non-use of the alarm was inconsistent. He said he had forgotten about it. He said everything happened in a flash. He said he could not get the alarm out. Such inconsistencies did not assist the claimant's credibility. On his account, Mr Keats felt he could and should have used the alarm, or called for help (which he did not do).

33. The claimant also added some details such as ST throwing a bin. If that had occurred, it was surprising it did not feature in the claimant's previous statements, or in Mr Dube's. The claimant's account as to why he did not avoid contact and move away was, in Mr Keats' view, not convincing.

34. The claimant also said to Mr Keats that he did not feel threatened by ST at the time. This might explain why the claimant did not use his alarm. But it is inconsistent with the claimant's description of ST's behaviour as set out in (e.g.) his 14.7.16 statement.

35. Mr Keats confirmed that the claimant had nothing further to add, before adjourning to deliberate.

36. Mr Keats determined on the balance of probabilities that ST and Mr Dube's account ought substantively to be preferred. He took into account the claimant's long service, and the likely impact of dismissal on him. He properly considered other possible sanctions short of dismissal. But in the circumstances he considered summary dismissal was the only viable option. He noted that the claimant had shown no remorse, and that the claimant's conduct was wholly out of keeping with the standard of care and respect to be afforded to a vulnerable adult.

37. The claimant appealed. The bases of his appeal were narrow. First, as he put it in his appeal letter, he claimed he had not been allowed to submit his "final signed statement". Second, he said that one statement had been submitted "in a false way". As to the first such complaint, which refers to the statement he gave to Ms Connolly, the claimant had in fact had at least a week to check and sign the statement and return it with any corrections. He did not do so. In any event, I find the claimant had more than enough opportunity to express himself and correct the statement if needed- in the context of the investigatory process and disciplinary hearing.

38. As to the second complaint, this refers to the claimant's understanding that Mr Obou had made a statement, but that he had not been given it. As I have explained above, this was the result of an innocent error by Ms Connolly. Mr Obou had not in fact made a statement by that stage, or witnessed anything.

39. On 22.9.16, Mr O'Conner heard the appeal. Again, he came across at tribunal as a particularly thoughtful and considered witness, who was keen to make sure a fair outcome was achieved. Mr O'Conner described the appeal as a 'review' in his statement, but in fact it is clear he gave the claimant the opportunity to make whatever representations the claimant considered appropriate -effectively enabling a rehearing or revisiting of evidence if appropriate.

40. The claimant asserted at tribunal (for the first time) that Mr O'Conner in effect pretended that he had a statement from Mr Obou, but refused to give it to him. I reject that assertion. First, because Mr O'Conner is a more credible witness and I accept his account that he did no such thing. Second, because the claimant accepted Mr Obou had not by that date in fact made a statement, and it would be bizarre for Mr O'Conner to pretend otherwise. Third, because the content of the appeal notes (where Mr O'Conner offers to get a statement from Mr Obou) completely contradicts the claimant's assertion. It may well be that the claimant is confused on the point, after all this time. But he is most definitely incorrect.

41. Mr O'Conner went through the above appeal points. The claimant was invited to add anything. The claimant asserted at about this time that "all of the staff members who had provided the statements were prejudiced against him". This was a new complaint.

42. After the appeal hearing, Mr O'Conner obtained a statement from Mr Obou, as he had said he would do, and sent it to the claimant by a letter dated 6.10.16. In his statement, Mr Obou duly confirmed he had not seen or heard anything.

43. In Mr O'Conner's 6.10.16 letter, he offered the claimant the opportunity to explain his allegation concerning prejudice, or to add any new information, and propose any witnesses to be called, or make any further points. In making these offers, Mr O'Conner commendably went above and beyond what would often be offered to an employee in such a situation.

44. He said to me, and I accept, that had the claimant raised any material points or put forwards or asked for further evidence it would have been properly addressed.

45. The claimant did not respond in writing to Mr O'Conner's letter, nor to a follow-up letter from Mr O'Conner on 20.10.16 chasing for a reply and warning that in default, a decision would be made based on the evidence so far. Nor, the claimant accepted in evidence, did the claimant send any email in response to Mr O'Conner's PA's 20.10.16 email (in which she gave the claimant her direct dial number).

46. The claimant asserted in evidence that he rang to try and speak to Mr O'Conner (albeit not using Mr O'Conner's PA's number at any time), without success. Even assuming that is correct, and that Mr Conner somehow never got a message and thus never called back, it is wholly unclear why the claimant did not then write a letter or email to Mr O'Conner, or anyone else at the respondent, if he really had anything to add. In any event, he was given ample opportunity to do so.

47. In default of any response from the claimant, Mr O'Conner duly dismissed the appeal by a letter dated 3.11.16. In so doing, he took into account possible other sanctions, but agreed that dismissal had been and remained the only appropriate option. Again, he considered that the absence of remorse and the fact that the claimant persisted in his account despite what ST and Mr Dube said, weighed against any leniency.

The Law

48. The following principles are material:

a. When deciding whether or not a dismissal is fair for s.98(4) purposes, the question is not -did the employee in fact misconduct himself? Nor is the question, would the tribunal have dismissed the employee if it had been the employer? Rather, the issue is- was dismissal within the range of reasonable responses open to a reasonable employer? See further British Home Stores v. Burchell.
b. Section 98 of ERA does not require an employer to be satisfied on the balance of probabilities[1] that the employee whose conduct is in question had actually done what he or she was alleged to have done. Rather, it is sufficient for the employer to have a genuine belief that the employee has behaved in the manner alleged, to have reasonable grounds for that belief, and to have conducted an

[1] In fact, this was the test the respondent applied and found to be satisfied..

investigation which is fair and proportionate to the employer's capacity and resources. Santamera v. Express Cargo Forwarding t/a IEC Ltd [2003] IRLR 273, per Wall J, at paras 35 & 36.

c. It is important that employers take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to carry out work in his/her chosen field of employment is potentially at stake. Salford Royal NHS Foundation Trust v. Roldan [2010] IRLR 721.
d. It is also incumbent upon an employer conducting an investigation both to seek out and take into account information which is exculpatory as well as information which points towards guilt.
e. However, it does not follow that an investigation is unfair because individual components might have been dealt with differently, or were arguably unfair. A "forensic or quasi-judicial investigation" is not required. The employer is unlikely in any event to be qualified to carry out such an investigation, and may also lack the means.
f. That is why cross-examination of complainants by the employee whose conduct is in question is "very much the exception in workplace investigations of misconduct" . The question remains one of fact, as to whether such examination was necessary in order for the employer to act reasonably. See Santamera.
g. The question for a tribunal when considering the reasonableness of an investigation for misconduct is not, could further steps have been taken by the employer? Rather, the issue is, was the procedure which was actually carried out reasonable in all the circumstances?
h. Defects in the original disciplinary process may be remedied on appeal. Taylor v. OSC Group Ltd [2006] ICR 1602.

Application to the facts

49. It is not my role to assess whether or not the claimant was in fact guilty, or what I would have decided or done in the circumstances, either in terms of investigation or sanction. Rather, I must apply the principles I have set out above.

50. In so doing, I find that it was, clearly, well within the band of reasonable responses for the respondent to dismiss the claimant.

51. The investigation and disciplinary process was more than sufficient in the circumstances for s.98 ERA purposes. There was no foundation to the two faults which the claimant himself flagged up on appeal. In particular, and further to the material points I have already set out above:

a. The respondent's (uncontested) belief that the claimant had assaulted ST was supported by the evidence of ST and Mr Dube.
b. That evidence was consistent, and mutually supportive.
c. The claimant was given full access to the evidence gathered by the respondent. He was also given ample opportunity to present his case, and (at appeal stage at least) to provide or suggest witnesses/additional evidence which might support his account.
d. The claimant did not assert that ST or Mr Dube 'had it in for him' at the time. Nor did he ever assert -then or now- that the respondent was somehow using the events as some form of pretext to be rid of him.
e. The claimant's account of events was not consistent. His inconsistencies made him a less plausible and credible witness for those concerned at the time. Having heard his evidence, I understand why there were substantial doubts as to his reliability as a witness.
f. The questions I must ask are, was the respondent's belief that the claimant had acted as alleged by ST and Mr Dube founded on reasonable grounds? Was it reasonably open to the respondent to have such a belief? The answer to both these questions is, without any doubt, "yes".

52. It follows that I find the dismissal was fair for s.98 ERA purposes. The claim is not well founded, and is dismissed.

COSTS ORDER

53. At the conclusion of the hearing, and following my oral judgment, I was asked by the respondent to make a costs order pursuant to r. 76(2)(b) & r. 78(1)(a) of Schedule 1 to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ("the ET Regs"), on the basis that the claimant's claim was misconceived i.e. had no reasonable prospect of success. Counsel confirmed that no application was made under r.76(1)(a) of the ET Regs i.e. unreasonable conduct of proceedings etc.

54. The respondent has apparently spent over £27,000 on litigation (a significant proportion of which sum would have been incurred as a result of the tortuous route the claim took to arrive at the final hearing.) However, the respondent limited its application to £6,236 (with no VAT element), which I am told was the cost of counsel and solicitors' attendance at this two day hearing.

Merits

55. The Claimant did not really seek to argue that his case in fact ever had a reasonable prospect of success. (My judgment in effect found that it did not have any such prospect.)

Means

56. I heard from the claimant as to his means. On his evidence, which was not challenged, and which the respondent did not ask for him to corroborate, it is clear that his means and ability to pay are very limited. He is on JSA, paying £145 him every two weeks. He lives in council accommodation, for which the local authority pays the rent. He has no savings, and has a debt of about £600 owed to the council in relation to his accommodation. He had 4 children (three of whom are teenagers), who do not live with him. He pays £16 every 2 weeks for child benefit. He has not worked since December 2017 (when he had a job for about 4 weeks). He has been looking for work in the care sector (and has applied unsuccessfully for about 50 vacancies), but has resolved now to look for other types of work, which he thinks will be easier to find. He asserts that he could afford to pay about £10 p.w. towards satisfaction of any costs order.

57. I have a discretion to take into account the claimant's means. See r.84 of the ET Regs. I do so.

Other factors

58. I also take into account the following matters:
    a. The claimant is a litigant in person. This notwithstanding, the claimant has been on notice of the respondent's intention to apply for costs for some time on the basis of the weakness of his case. A cost warning was given to him in 'without prejudice save as to costs' letters dated 4.5.17, 22.11.18 & 29.11.18. In each letter, the respondent offered not to apply for costs if the claimant withdrew his claim. So, the claimant was aware of the means by which he could avoid a costs application. He ought therefore to have taken advice on his position, or further considered it himself.
    b. The claimant had access to legal advice and assistance. He approached the CAB in December 2017. He tells me (having been given an indication that he did not need to go into any legally privileged matters) that he did not ask the CAB about the merits of his case. He also approached solicitors, Liberty Law, in August 2018 following the re-instatement of his claim, and instructed that firm to write 3 letters on his behalf (at a cost of about £600), the last of which was dated 14.11.18. However, he tells me he did not ask Liberty Law about the merits of the case, despite having already received at least one costs warning from the respondent before or during the currency of Liberty Law's instruction.

c. The claimant had access to the trial bundle since May 2017, and to the respondent's statements since December 2017.
d. This was not a case where matters become clear after the 'dust has settled' at trial. A proper consideration of the papers -by the claimant and/or by his advisors- would have showed how weak his case was.
e. The respondent did not apply for a strike out/deposit order, notwithstanding sub para (d) above. (This can be a relevant factor. Cf AQ Ltd v Holden [2012] IRLR 648, EAT, para 34 per HHJ Richardson.)

59. With the above in mind, I think it is appropriate to exercise my discretion to make a costs order. However, I limit that order to £1,000. I do so primarily because of the claimant's presently limited means -though bearing in mind he may yet get paid work outside the care sector.

60. The sum of £1,000 is not significantly more than the claimant managed to pay Liberty Law for the three letters. It is also no less than the respondent would have had to pay if it had applied for a strike out/deposit order at a preliminary stage. Given that the papers largely 'speak for themselves', this may very well have proven a cheaper option. At the least, I think a deposit order would have been made- which may have instigated a 'reality check' on the claimant's part.

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Employment Judge Michell, Cambridge

Date.....02/01/2019.....

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FOR THE SECRETARY TO THE TRIBUNALS