**Case Numbers: 3200242/2018 &
3200008/2017**

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# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr J Luckie**

**Respondent:** **Barts Health NHS Trust**

**Heard at:** **East London Hearing Centre**

**On:** **14-16 November 2018**

**Before:** **Employment Judge Ross (sitting alone)**

**Representation**

Claimant: In person
Respondent: Ms S. Ramadan, Solicitor

# JUDGMENT

(Amended on 15 February 2019)

**The judgment of the Employment Tribunal is that:-**

1. **The complaint of unfair dismissal is not well-founded.**
2. **The complaint of breach of contract is not upheld.**

*3. **The complaint of unpaid holiday pay is dismissed on withdrawal.**

4. **The Claim is dismissed.**
5. **The provisional remedy hearing listed on 1st February 2019 is vacated.**

# REASONS

1. The Claimant was continuously employed by the Respondent from 14 March 2005 until his summary dismissal on 22 September 2018. At the time of his dismissal, the Claimant was employed as Senior Information Specialist for the Women and Children's Clinical Academic Group.

2. By a claim presented on 12 February 2018, the Claimant brought complaints of unfair dismissal, breach of contract (a wrongful dismissal claim), and unlawful deduction from wages (in respect of holiday pay), having complied with the Early Conciliation procedure. The holiday pay complaint had been resolved by the time of this hearing; so I dismissed it on withdrawal by the Claimant.

**The issues**

3. The parties had agreed a revised list of issues (at p53a-b). I explained to the parties that the first part of the hearing would deal with liability only, but including the issues at 10a, 10b and 11 of the revised list, which respectively deal with contributory fault, what compensation would be just and equitable (the *Polkey* point), and whether there were any breaches of the ACAS Code.

4. Having pre-read the witness statements, I invited the Claimant to confirm whether the particulars of unfairness were those set out at points 1-5 of p.14 of the ET1. He contended that the Respondent had failed to follow its own disciplinary policy, and alleged the following breaches:

   4.1. Failing to interview him or take a written statement from him, which should have been done at the pre-investigation stage. As a result, the investigation occurred and the report was one-sided, which meant that the matter proceeded as a disciplinary case, when it would not otherwise have done so. This was both in respect of the assault and the management instruction to transfer.

   4.2. The evidence relied upon by the Respondent in respect of the assault matter was inconsistent. Such poor evidence should have been disregarded.

   4.3. The Respondent had failed to maintain investigator impartiality. The disciplinary hearing had taken place over two days. By the second date of the hearing, Mr. Galea, who had been presenting the management case, had retired. The Panel determined that the investigating manager, Sarah Cooper-James, should present the management case on the second date of the hearing. The Claimant's case was that this was contrary to the disciplinary policy and the ACAS Code of Practice.

   4.4. Although he did not further explain point 1 (failure to provide a safe work environment) from his questions, this appeared to be an allegation that his complaint (that his former line manager, Mr. Omigie, had assaulted him) was not acted upon. In addition, the Claimant's evidence was that he was unable to attend any of the Respondent's premises for investigatory interview due to his mental health after this alleged assault on him. This was a further way in which the overall procedure was unfair.

   4.5. Human Resources ("HR") advice received by the Respondent was inconsistent with earlier HR advice received by him; the Respondent should not have relied on the advice of Ms. Hendon in the decision to dismiss.

5. In respect of the allegation that he had failed to follow a reasonable management instruction, the Claimant contended that it was unfair to treat this as a disciplinary matter, when no formal consultation process had been followed, which he alleged was contrary to the Respondent's Managing Change policy.

## The Evidence

6. There was an agreed bundle of documents pages 1-740. The Claimant requested that further pages were added, which I permitted; in the event, no witness referred to them. The pages in this set of reasons refer to pages in that bundle. There was no challenge to the accuracy of the notes of meetings and interviews in the bundle and I found these were all accurate records, albeit that they were not verbatim.

7. I read witness statements and heard oral evidence from the Claimant and the following witnesses for the Respondent:

   7.1. Liam Slattery, Director of People Services (but Director of Workforce Services at the time of dismissal);

   7.2. Dr. Timothy Peachey, who was Deputy Chief Executive at the time of the appeal.

8. I found the Respondent's witnesses gave reliable evidence, often corroborated by documentary evidence. I was unable to accept key parts of the Claimant's evidence for reasons I shall come to. Where there was a conflict of fact, I preferred the evidence of the Respondent's witnesses.

## Findings of fact in respect of unfair dismissal

9. I heard and read a lot of evidence over two days of evidence, all of which I considered. There was an agreed chronology, which I will not repeat. The following are the relevant findings of fact.

*Background*

10. The Respondent was formed in April 2012, as a result of a merger of three NHS hospital trusts. The Respondent Trust includes four hospital sites plus various management offices, including at Prescot Street, near Tower Hill.

11. The Claimant's contract of employment is at p.53f. This specifies his base as Newham University Hospital, but goes on to state:

    "*You may, on occasions, be required to work at other locations within the Trust, subject to the needs of the service and any specific requirements set out within the job description applicable to this appointment.*"

12. This clause was generally invoked to require staff to attend meetings at other sites. But the clause is not expressly restricted in that way, nor did I see any contractual document or policy that suggested this clause was not wide enough to encompass a temporary transfer of an officer to another base.

13. Also, I considered the Claimant's job description, which tended to support the Respondent's case that its managers had reasonable grounds for their belief that the Claimant could be required to work at another base, at least in the circumstances of this case.

14. The Claimant worked at Newham Hospital until his dismissal, despite the fact that the Respondent moved his base on a temporary basis to Prescot Street. I explain this further below.

*The Respondent's Procedures*

15. The Respondent's Managing Change Policy is at p.54. At p.57, there are the following definitions:

> "*Major organisational change*
>
> *Includes: reorganisation, relocation of a service, merger, expansion or closure of a service, competitive tendering or outsourcing, a major change in working practice or a significant change in terms and conditions of service. This list is not exhaustive.*
>
> *Minor organisational change*
>
> *May be implemented without the need to go through formal processes within the policy but will require reasonable consultation.*
>
> *No posts are at risk of redundancy and may or may not impact employees e.g. change in practice or change in line management.*
>
> …
>
> *Organisational change*
>
> *Any structural or managerial change in the organisation of the Trust's service provision. This may or may not have an impact on employees*."

16. The Claimant contended that transferring him to Prescot Street was a Major organisational change, because he was the business information service for the Women and Children's CAG.

17. The Respondent has a detailed disciplinary procedure (see pages 86ff). This includes a flow chart of the disciplinary procedure, which includes the following before the questions of whether an investigation is needed or whether mediation is appropriate:

> "*Manager ask for employee's side and requests that they write a statement where appropriate.*"

18. "*Investigation*" is defined as "*An impartial fact-finding process*" (p.89). The Investigating Officer is required to "*Remain impartial throughout the investigation process"*.

19. There are examples of offences likely to constitute gross misconduct (p.98). This includes "*Assault/threatening behaviour/violence*" and "*Serious refusal to carry out a reasonable management instruction*".

*The investigation into failure to comply with a reasonable management instruction*

20. In August and September 2014, it was proposed that the Claimant re-located to management offices at Prescot Street. The Claimant was informed that a temporary move for 3 months would commence on 22 September 2014, due to limited management capacity at Newham Hospital.

21. There was no evidence that anyone other than the Claimant was to move.

22. The Claimant did not agree to re-locate on a temporary basis in the absence of formal consultation.

23. On 12 September 2014, the Claimant sought advice on contract variation from Sarah Richards, Head of HR (p.438). This advice was that:

> "*Our contracts of employment do state that it may be necessary to work at other locations from time to time. My understanding is that is what Lynne is asking you to do to meet business needs.*
>
> *You are right that a permanent change in location would be formally consulted on unless the individual or group is agreeable to that change in which case formal consultation is not required.*"

24. Without repeating the agreed chronology, the Claimant refused to re-locate at all. This led to a disciplinary investigation and disciplinary proceedings. The Claimant also raised a grievance about this.

25. The outcome was that the disciplinary charge was upheld and the grievance dismissed. On 7 July, a final written warning was given, requiring the Claimant to attend Prescot Street on 18 July 2016.

26. The Claimant appealed. His appeal was rejected. On 19 September 2016, the Claimant was instructed in the appeal decision letter that he must move to Prescot Street on 26 September 2016.

27. The Claimant failed to attend Prescot Street. On 26 September, his new manager requested a disciplinary investigation into failure to follow a reasonable management instruction.

28. Kamaljit Johal was appointed to investigate. Her investigation report was completed on 5 January 2017 (at p.375-379). This included as appendices interviews with relevant witnesses, specifically the Claimant's line manager, Mr. Omigie. This witness stated that the Claimant had arrived late, at 10.45 am, at Newham Hospital on 26 September and when asked whether he should be at Prescot Street stated "*That's irrelevant*". When asked whether Mr. Omigie did anything else, he responded:

> "*No. That's it. I deliberately stayed away as I've sensed he's very volatile. When you try to have a management conversation with him he's obstructive and always views he's being picked on so it was easier to let it go and let HR take the process.*"

29. The Claimant was invited to a meeting to discuss this allegation, and that of assault, on 8 November. The Claimant responded that he was willing to take part in the investigation when he was "*well enough and subject to any pending police investigation*" (p.510).

30. Two meetings with Occupational Health had been arranged, which the Claimant had not attended. The Claimant's evidence before me was that he was too unwell due to stress to enter any of the Respondent's premises. I found this evidence from the Claimant not to be true. I saw no medical evidence to suggest that he could not attend an Occupational Health appointment, even if this department was on one of the Respondent's sites, and, frankly, I found this piece of his evidence implausible. Given that this is Respondent is a large NHS Trust with several sites, the chance of running into a single alleged perpetrator was very small if a site other than his normal place of work was chosen.

31. Ms. Johal concluded that there was a case to answer and recommended a disciplinary hearing should be arranged.

*The investigation into the assault allegations*

32. On 20 October 2016, the Respondent received an allegation that the Claimant had assaulted Efosa Omigie and Delal Aziz. The Claimant alleges that he was assaulted by Mr. Omigie.

33. From 21 October 2016, the Claimant was signed off as unfit to work for a month.

34. On 24 October 2016, Mr. Galea informed the Claimant that he was suspended on suspicion of assault. On the same date, Mr. Galea commissioned an investigation by Sarah Cooper-James, Head of Counter Fraud and Security, into this matter.

35. This investigation report is dated 12 January 2017 and is at p.410 – 412. The appendices are the notes of interviews with Mr. Omigie and Ms. Delal Aziz (p.413-416). I will not repeat the content of those interviews; but they provide evidence that the Claimant assaulted both Mr. Omigie (by punching and pushing) and Ms. Delal (by scratching her when snatching back a return to work form). The inference from Ms. Delal's interview is that she had been off work, due to shock as a result of the incident, until 25 October 2016.

36. The main report of Ms. Cooper-James summarises the evidence. She records that the Claimant was invited to two meetings to discuss the allegation, but that he declined to attend either. She refers to the email from the Claimant of 8 November (p.510) and that the Claimant had failed to attend two Occupational Health appointments. She concluded that the Respondent had attempted to obtain the Claimant's version of events (see p.412).

37. Ms. Cooper-James concluded that there was a case to answer and that the Claimant's actions fell within the example of gross misconduct cited in the policy as "*Assault/threatening behaviour/violence*".

*The Disciplinary Hearing*

38. The Claimant was charged with two disciplinary charges in line with the recommendations of the investigation reports.

39. Mr. Slattery had no prior knowledge of the Claimant before being asked to chair the disciplinary hearing. Having seen him give evidence and be subject to cross-examination, I found him to be an honest and reliable witness, who was an impartial hearing officer. The Claimant did not suggest in cross-examination that he was not impartial.

40. Mr. Slattery chaired the disciplinary hearing panel, and was accompanied by a clinician, Mr. Eydmann and supported by a HR Business Partner.

41. As well as reading the management case documents, Mr. Slattery read the Claimant's statement of case (p.433-437) plus the 28 appendices accompanying the document.

42. On 13 September 2017, Mr. Galea presented the management case. The hearing could not be concluded on the first day, when it dealt only with the charge relating to the refusal to comply with a management instruction. Therefore, the hearing was adjourned to 22 September 2017.

43. By 22 September, Mr. Galea had retired. No one had warned Mr. Slattery of this. Mr. Galea wanted payment and travel expenses for attending the second day of the hearing. Mr. Slattery decided that he did not want to incur such costs unless it was necessary. He decided to ask Ms. Cooper-James to present the management case.

44. In terms of reasonableness, this is a decision well within the band of reasonableness open to Mr. Slattery. After all, on the face of the evidence before him, Ms. Cooper-James had conducted the investigation impartially (and there was no suggestion that she had not conducted it impartially). Moreover, the investigation stage had concluded. Furthermore, the documents tended to suggest that the Claimant had a poor relationship with Mr. Galea; so, if anything, Ms. Cooper-James appeared a fair choice of presenting officer. Also, it is notable that the Claimant was suspended; delaying the hearing until a new presenting officer could be found would have been likely to delay the outcome of the hearing, which would not have been fair to the Claimant.

45. The disciplinary hearing proceeded. Mr. Omigie, who was on sabbatical, gave evidence by telephone. Ms. Aziz appeared in person. The notes of the hearing are at p.538-560h and p.590(g)(vi) and following pages (version amended by Claimant).

46. The Claimant had the opportunity to cross-examine both witnesses. The Claimant did not put his version of events to Mr. Omigie, only referring to the alleged

headlock after his evidence had concluded. The Claimant did not put to Ms. Aziz that she was lying or mistaken. Ms. Aziz confirmed that she did not know the Claimant prior to the incident; she said that it was hard for her to talk about it (p.557).

47. The Claimant then presented his case. The notes of this are at p.559 to 560g, which I will not repeat. Mr. Slattery noted that the Claimant had the original return to work form, in a crumpled state, at the hearing before him. At that hearing, the Claimant accepted that it was damaged when he got it; he accepted Ms. Aziz's evidence that it was in a ball when given to her. He said Mr. Omigie was angry, and had put him in a headlock, and that he could have blacked out.

48. After the Claimant had finished presenting his case, and both parties had summarised their arguments, the hearing was adjourned for the Panel to reach its conclusions. The Panel took over an hour to reach its decisions. Mr. Slattery was not challenged about his evidence at paragraph 28 of his witness statement; I find the matters set out there are what happened. In short, all the evidence was considered and the allegations were considered separately by the Panel.

49. In respect of the first allegation, Mr. Slattery explained how the Panel reached its conclusion, set out at paragraph 29 onwards of his witness statement. The Panel concluded that, although his base was Newham Hospital, the Claimant was consulted with, and given 30 days notice of the temporary re-location of his base. The Claimant did not object to the evidence that meetings about the re-location had taken place.

50. The Panel honestly believed on reasonable grounds that the proposed re-location was a Minor organisational change within the Respondent's policy. The reasonable grounds included the terms of the policy (p.57) which they considered, the advice given by Emily Hendon, Associate Director of People at Barts Hospital (p.193), the Claimant's contract, his job description, and the limited nature of the change (one officer, the Claimant, re-locating, on a temporary basis to a site only 6 miles away).

51. Having reviewed the scope of the change proposed and the Managing Change policy, Ms. Hendon had advised that it was a Minor Organisational change; and that the change proposed would be managed as part of an informal process between line manager and employee, rather than a "formal consultation". The Claimant claimed that she was asked the wrong question, or possibly given the wrong factual premise to the question. I did not agree; her brief was to advise in relation to the interpretation of the Managing Change policy, which she did. In any event, the Panel took into account where the Claimant had been based at work (Newham Hospital).

52. To my mind, the Panel had all the evidence before it, including that of Ms. Richards provided to the Claimant. The Panel was entitled to reach its own conclusion and to prefer the evidence of Ms. Hendon. It did not just rely on her advice. It considered the policy's definitions (set out at p.57), the fact that the job description provided for travel between sites, and the nature of the change proposed. In my judgment, that approach was well within the band of reasonableness open to it and the decision reached on this issue was reasonable.

53. Mr. Slattery explained at paragraphs 49-52 of his witness statement why the Claimant's other arguments in respect of this first allegation did not succeed. I accepted that evidence.

54. The only reasons that the Claimant put forward for not wanting to move were his belief that workload would increase and a "*mistrust*" of management for failing to consult. The evidence accepted by the Panel was that there had been informal consultation, that a trial basis temporary move had been proposed, and that the Claimant had only complained about workload after the re-location.

55. The Panel considered that the issue of whether the decision to re-locate was reasonable had already been considered by a disciplinary panel chaired by Stuart Butt on 7 July 2016 and an appeal panel chaired by Tim Ewart. Both had concluded that it was. Further, the Claimant's grievances alleging bullying and harassment by his managers had not been upheld; the grievance decision was that all three (the Claimant, Mr. Galea, Mr. Omigie) had fallen short of the principles of Respondent.

56. The Panel found that this first allegation was proved and amounted to gross misconduct.

57. From my reading of the papers, and the oral evidence, reasonable steps had been taken to investigate the Claimant's arguments and to hear his evidence in respect of this allegation.

58. In respect of the assault allegation, the Panel considered all the evidence, as explained in Mr. Slattery's witness statement.

59. I found that the Panel had an honest belief based on reasonable grounds that the Claimant was guilty of assault. This was because:

    59.1. The accounts of Mr. Omigie and Ms. Aziz appeared to corroborate each witness. Their accounts were very different from the Claimant's.

    59.2. The Claimant's evidence was very unclear about whether he had failed to ask Ms. Aziz to give him the return to work document. Her evidence was that he had taken it by force. The Panel concluded he had snatched it, and on that basis, it accepted her evidence that her hand had been injured in the process. She had been so concerned that she reported the matter to the police.

    59.3. The Panel found Ms. Aziz was a credible witness; there was no reason why Ms. Aziz's evidence would not be correct.

    59.4. The Panel did not accept the Claimant's account of events. For example, the Claimant could give no convincing explanation of why he needed to retain the form. Mr. Slattery could not understand why he took the form so forcefully from Ms. Aziz.

60. The Panel made the findings set out in the decision letter of 22 September 2017, p.563. The Panel did not find the Claimant guilty of the punch to the face of

Mr. Omigie. The Panel made findings only where there was corroboration for it. Therefore, it found that the Claimant was guilty of physically moving Mr. Omigie and snatching the form from Ms. Aziz, causing a wound to her hand in the process.

61. I find that the decision reached by the Panel was well within the band of reasonableness in respect of this allegation. The investigation was reasonable, in that reasonable steps were taken to collect relevant evidence, and it produced the evidence relied upon. The Claimant's case was that his evidence should have been preferred; the Panel did not accept that and made findings which they were entitled to on the evidence.

62. The Panel found that each allegation proved was so serious as to amount to gross misconduct. Mr. Slattery explained why. I accepted that explanation.

63. In terms of sanction, the Panel decided that the appropriate sanction was summary dismissal. They considered how the Respondent had dealt with similar allegations found proved, and decided that this was consistent. On the evidence of the case, they found that there was no real mitigation. Mr. Slattery explained that although this was a first offence of assault or violence, those found guilty of assault would usually be first offenders, because such conduct was not tolerated in the NHS. Each allegation weighed equally in the decision to dismiss.

64. Although raised before me as something that the Panel failed to consider, the Claimant had not, at the disciplinary hearing, argued self-defence in respect of the assault matter.

65. I found that the reason why there was not more detail of the Claimant's case in the outcome letter was due to the fact that the letter was based on a note prepared by Mr. Slattery during the adjournment, so that the decisions could be read to the Claimant. Given the amount of evidence to digest, it is hardly surprising that this note was pithy and the letter concise. I draw no inference from this; it is probably explained by the limited time left to the Panel after a relatively long hearing (5 hours) spread over two days, and the need to get something on paper quickly.

66. Insofar as the Claimant alleges that the Respondent breached its disciplinary policy by stating that he should have been invited to provide a written statement to give his side of events before the decision to formally investigate was taken, I accepted the Respondent's evidence that the allegations in this case were serious ones, potentially amounting to gross misconduct. I accepted that it was not "*appropriate*" to invite a written statement in this case.

67. The Claimant had an opportunity to put his case before the disciplinary hearing in September 2017 in any event. He failed to attend interviews so as to provide his side of the case. Also, he refused to attend the Occupational Health appointments. I do not accept that he had any good reason for those refusals. Given his evidence about the 20 October incident, which I did not believe, I rejected his evidence that he had such stress-related symptoms that he could not attend an Occupational Health appointment at all. If he had such severe symptoms, I would have expected medical evidence stating this.

68. In any event, I am satisfied that even if the Claimant had had an invitation to provide a written statement, it is unlikely that he would have acted upon it, given the stance that he had taken, evidenced by his email of 8 November 2016. If his concern was in part that the police investigation was ongoing, I consider it even less likely that he would have answered an invitation to put his case in writing, until that investigation was concluded.

69. Moreover, I am certain that, had the Claimant put his case in writing before or during the investigation process, it would have made no difference to the outcome in this case. I heard nothing from the Claimant to explain why it would have altered the Panel's decision.

*The Appeal*

70. Dr. Peachey's evidence began by explaining why the Claimant's first appeal against the decision to dismiss made in February 2017 was upheld. Prior to this appeal, Dr. Peachey had had no involvement with the Claimant. The Panel on that occasion concluded that there was a risk that the Claimant had not received notification or evidence for the disciplinary hearing and set aside the decision to dismiss.

71. The first Appeal Panel made it a requirement that the Claimant set out in writing his case for the new disciplinary Panel (which was the Panel chaired by Mr. Slattery).

72. After receipt of the dismissal letter, the Claimant appealed; the grounds of appeal are at pages 578a-e.

73. The appeal was heard by Dr. Tim Peachey and an Appeal Panel. Notes of the appeal are at pages 590i-590o.

74. From the evidence of Dr. Peachey, it is apparent that the Appeal Panel addressed the grounds of appeal and took into account the Claimant's "New Appeal Hearing - Case document 22.1.2018" (at p.590g(ii-v)). Dr. Peachey was not challenged about the impartiality of the Appeal Panel.

75. I accepted Dr. Peachey's evidence as to why each ground of appeal was rejected.

76. The finding that there was no evidence that the Claimant ill-health had any impact on the fairness of the disciplinary Panel's decision is quite understandable and wholly reasonable on the face of the evidence.

77. In respect of the failure to invite the Claimant to make the offer of a written submission, the Appeal Panel found that the Claimant had not offered to provide such a statement, that the Claimant had not engaged with Occupational Health, and that the disciplinary hearing had given him a chance to present his case. At the end of the disciplinary hearing, the Claimant had stated that he had no further points to make (p.560g). The Appeal Panel concluded that there was no unfairness in this respect.

78. The Appeal Panel found that the management case could, but did not, rely on an expired written warning.

79. The Appeal Panel rejected the ground which alleged that the Claimant was denied the right to make fair representations. The Claimant had been required to, and had, made written representations ahead of the disciplinary hearing in September 2017. The Claimant had decided not to attend arranged investigatory meetings and Occupational Health referrals.

80. The Claimant alleged that the investigating officer had become the presenting officer after the first day of the hearing. This ground was rejected for cogent reasons, not least of which was that the Claimant had not mentioned this at the time of the hearing and he could not demonstrate how it was unfair or how it caused any detriment. He merely complained that he was "*unsure what had taken place*" and "*felt something irregular had taken place*".

81. The Appeal Panel found that the Respondent had followed its own disciplinary policy, that a full investigation had been carried out, and that there was no evidence of bias or unfairness.

82. I agree with the Appeal Panel. The disciplinary process followed was well within the band of reasonableness. There was no feature of it that was unfair, in the circumstances of this case. The investigation reports were thorough, and all material witness and documentary evidence obtained. The disciplinary Panel had then held a fair hearing, at which the Claimant was able to cross-examine witnesses, present evidence, and make submissions.

83. The Appeal Panel upheld the finding that the Claimant was guilty of gross misconduct as charged. Dr. Peachey explained why; I accepted that evidence and his explanation as to why the decision to summarily dismiss was upheld.

84. The appeal decision was set out in an outcome letter dated 31 January 2018 (p592-597). I need not repeat the contents; it points towards a fair appeal hearing and a properly considered decision.

85. I concluded that the appeal process was manifestly fair.

**<u>Findings of fact in respect of contributory fault and wrongful dismissal</u>**

86. On the issue of whether the Claimant assaulted Ms. Delal Aziz or Mr. Omigie, I reminded myself that an allegation of assault is an allegation of a criminal offence. The standard of proof remains the civil standard but there must be cogent evidence of the offence for that standard to be satisfied.

87. Moreover, I reminded myself of the issues, that I am required to consider include whether the Claimant's conduct contributed to the dismissal in a blameworthy way, and whether any form of gross misconduct was committed.

*Assault allegation*

88. I rejected the Claimant's evidence about the incident on 20 October 2016. His account of events before me was riven with inconsistencies, when compared to his earlier statements, and inherently implausible. I found that his evidence about this incident was not credible and I rejected it. I took into account his career at the

Respondent, where he had no previous findings of assault or violence against him; but I accepted Mr. Slattery's evidence that those found guilty of assault in the NHS will always be persons with no previous findings of assault against them, because such conduct is not tolerated in the NHS and perpetrators are dismissed for first offences.

89. Although I did not hear from either Ms. Aziz or Mr. Omigie, their oral evidence at the disciplinary hearing was far more consistent with their earlier statements (at p.413-415). Their evidence corroborated each other. Moreover, the Claimant had had nothing to do with Ms. Aziz before this incident; at the disciplinary hearing, he was unable to explain why she might not be truthful.

90. I relied upon the evidence of Ms. Aziz and Mr. Omigie, save that I decided that without hearing from Mr. Omigie and without corroboration (Ms. Aziz did not see the alleged punch, apparently arriving after that point in time), I was not in a position to make a finding that he was punched.

91. I found the following. The Claimant had been off sick. A return to work interview was arranged. The Claimant demanded a copy of the return to work interview form, which Mr. Omigie allowed him to take. Having returned the original, the Claimant then demanded it. He lost his temper because Mr. Omigie refused. He did act in an aggressive way, physically trying to get the document off Mr. Omigie.

92. Ms. Aziz overheard the interview; she realised that Mr. Luckie was not being supportive. She heard him demand the original of the form. She got up from her seat, went to the Claimant's room and saw a scuffle, with Mr. Omigie holding the Claimant back to give the form to her. The form was in a rolled up ball by this point. She saw the Claimant push Mr. Omigie out of the way to get to the form which she was then holding.

93. The Claimant grabbed at the form in Ms. Aziz's hand to get the form. In the process, he scratched Ms. Aziz's hand. More significantly, he left her so shocked that she had to take time off work.

94. My reasons for rejecting the Claimant's evidence are as follows.

95. First, the Claimant was the protagonist who started the incident by demanding the original form when he had no right to keep it. It is implausible that, after some 10 years of service, he believed he could keep the original of a return to work form completed by his manager. The Claimant is an intelligent person; the form is clearly a management record and tool. There would be no point completing one otherwise. This leads me to conclude that he was in the angry state that Mr. Omigie describes. I witnessed the Claimant giving careful evidence and submissions; I doubt he would have acted as he did on the relevant date unless his emotions were running high.

96. Secondly, the Claimant's account of events has shifted. On 5 December 2016, the Claimant gave a statement to the police (p.507). This records two assaults by Mr. Omigie (grabbing by the neck and pushing into a headlock; then pulling the Claimant back by grabbing him around the back of the neck).

97. However, in the case document submitted in respect of the appeal on 26 April 2017, the Claimant gave far fewer particulars, and stated that he was "*strangled and assault by EO*" (423g); but did not mention a headlock, nor a second assault. The document prepared by the Claimant for the disciplinary hearing before Mr. Slattery (p.432, 435) was in the same terms and did not mention a headlock. I find the lack of this relevant detail troubling.

98. At the disciplinary hearing, Mr. Omigie gave evidence by telephone. The Claimant had the opportunity to cross examine him. The Claimant did not put to him that he had used a headlock, nor that he had pulled him back into the room by the neck. The Claimant had no real explanation for this, and was evasive in his answer to the question of why he had not put his case to Mr. Omigie. I have taken into account that the Claimant is not a lawyer; but he is a graduate and, I found, an intelligent person. I infer that he did not put his case to Mr. Omigie because he knew that the witness would be able to explain it away.

99. In the police statement, the Claimant said that Ms. Aziz had left the room before he was grabbed by the neck for a second time. In the disciplinary hearing, the Claimant's evidence was that he was grabbed by Mr. Omigie again before she left (560-560a). His oral evidence before me was slightly different again.

100. The Claimant's account of the incident at the disciplinary hearing (p559ff) is that he "*could have blacked out*". This is not mentioned in the statement to the police nor in any one of the Claimant's earlier accounts of what had happened during that incident.

101. Thirdly, the Claimant's account of how he took the form from Ms. Aziz without any contact was implausible. The Claimant admitted in oral evidence that the form was "*scrunched up*" when given to Ms. Aziz by Mr. Omigie. In the disciplinary hearing (p.559), he accepted that it was in a "*ball*" at that time. This corroborates the evidence of Ms. Aziz that it was in fact in a "*ball*" by that point. This fact gives the Claimant some difficulty, because I could not see how he could have taken such a "ball" from her without making contact with her hand. I am sure that the force he used to get the ball from her hand caused her scratch injury. I rejected his account that because the top part was protruding from her hand he did not make contact; this seemed impossible, particularly in a fast-moving incident.

102. At the disciplinary hearing, the Claimant stated that he had "*effectively*" asked Ms. Aziz for the form. This is not mentioned in the statement to police, nor does he give any such account in his witness statement before me. It is quite obvious that he took that form by force, by snatching it, from an officer who was doing what she had been instructed to do by Mr. Omigie, her manager.

103. Moreover, the state of the form led me to find that his account of the actions of Mr. Omigie to be untrue. The statement to the police states that Mr. Omigie "*waved it around and put it behind his back*", then told Ms. Aziz to take it and go. Given the state it was in when delivered to Ms. Aziz, this account cannot be correct; it could not have been "*waved*".

104. Fifthly, had the incident unfolded as the Claimant alleged, and had he really been assaulted by Mr. Omigie, I have no doubt that he would have complained about it in

writing immediately. The Claimant made a point of repeating how his relationship with his managers had broken down. I found it extraordinary, in that context, that it took him around 1 hour 35 minutes to complain in writing about what was alleged to have happened. Moreover, his first written complaint (p.387) is so short on detail that it leads to the inference that the Claimant had had no assault on him to describe, or else he would have mentioned the headlock and/or being strangled and/or that he could have blacked out.

105. Further, the Claimant did inform the police, but this was about 25 minutes after the event, which I found inconsistent with his evidence of the level of force used upon him.

106. In summary, I found that the Claimant was in denial about the events on that day. He knew that his actions on 20 October 2017 crossed a line into conduct so serious that his employer would be able to dismiss for it.

107. The credible evidence of Ms Aziz shows that the Claimant meant to push Mr. Omigie out of the way to get to the form, which she was holding. The Claimant may not have meant to assault Ms. Aziz, but his actions were clouded by anger, and in such a scenario, injuries are more likely to happen. I have concluded that pushing Mr. Omigie was an assault and the injury to Ms. Aziz arose from violent behaviour. I have considered, but rejected, the suggestion that the Claimant was acting in self-defence.

108. In short, the Claimant did commit gross misconduct by the acts that I have found proved above.

109. The evidence of the Respondent was that either charge, if proven, would justify dismissal. I find that the matters that I have set out above contributed to the decision to dismiss and were the fault of the Claimant.

110. Having made these findings, there is no need for me to make further findings on whether, as a matter of fact, there was a serious refusal to follow a reasonable management instruction. But to help the Claimant to understand my reasoning more fully, I add the following.

*The refusal allegation*

111. On the evidence, there was no "Major organisational change" as defined by the Managing Change policy. I found that the reference to "*relocation of a service*" in the definition at p.57 was referring to a clinical service, as stated by the Respondent's witnesses. In any event, the Claimant was only providing analysis to one element of the CAG (Women and Children's CAG).

112. I concluded that the consultation that the Claimant had with his manager, informal though it was at meetings and through email, was sufficient to amount to consultation and to satisfy the requirements for Minor organisational change under the Respondent's policy.

113. Given the specific directions given to him to re-locate, repeated over time and by different managers, including when a final written warning was in force, I was

satisfied on a balance of probabilities that the Claimant was guilty of gross misconduct. There was a serious refusal by the Claimant to carry out a reasonable management instruction.

**The Law**

114. A potentially fair reason is one which relates to conduct: see section 98(2)(b) Employment Rights Act 1996 ("ERA").

115. Gross misconduct is conduct which is so serious that it goes to the root of the contract by its very nature. It is conduct which could justify a dismissal even for a first offence.

116. I directed myself to section 98 (4) ERA which provides as follows:

"*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 reasons shown by the employer)*

*(a) depends on whether in the circumstances including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.*

117. The burden of proof on the issue of fairness is neutral. In considering the fairness of a dismissal, the necessary questions for a Tribunal to consider are:

117.1. did the employer have an honest belief that the employee was guilty of misconduct?

117.2. was that belief based on reasonable grounds; and

117.3. was that belief formed on those grounds after such investigation as was reasonable in the circumstances?

(see *BHS -v- Burchell* (1980) ICR 303).

118. I directed myself to the principles which I must apply when applying section 98(4) ERA, which are:

118.1. the Tribunal must not substitute its own view for that of the employer as to what was the right cause to adopt for that employer;

118.2. on the issue of liability the Tribunal must confine itself to the facts found by the employer at the time of the dismissal;

118.3. the Tribunal should ask did the employers action fall within the band of reasonable responses open to an employer in those circumstances.

(see *Foley –v- Post Office* [2000] IRLR 3*).*

119. I reminded myself that the range of reasonable responses test applied not only to the decision to dismiss but also to the procedure by which that decision is reached, including the investigation (see *Sainbury's Plc v Hitt* [2003] ICR 111*).* Reading *Hitt* and *Foley* together, it is clear that the Tribunal must not substitute its own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer.

120. I directed myself that whether a procedural defect is sufficient to undermine the fairness of the dismissal as a whole is a question for the Tribunal. Not every procedural error will do so; the fairness of the whole process should be looked at. In *South Maudsley NHS Foundation Trust -v- Balogan* UKEAT0212/14*,* the EAT held at paragraph 9:

> *"As this Tribunal has said countless times, the crucial thing is the statutory test in section 98(4) namely whether in all the circumstances the employer acted reasonably in treating its reasons for dismissing the employer sufficient. A procedural defect is a factor to be taken into account but the weight to be given to it depends on the circumstances and the mere fact that there has been a procedural defect should not lead to a decision that the dismissal was unfair. The fairness of the whole process needs to be looked at and any procedural issues considered together with the reason for the dismissal, as the two will impact on each other."*

121. Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In *A v B* [2003] IRLR 405, the EAT, with Mr Justice Elias presiding, held that the relevant circumstances include the gravity of the charge and their potential effect on the employee. At paragraph 59, he explained:

> "*A serious allegation of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is being conducted by laymen and not lawyers. Of course even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee, as he should on the evidence directed towards proving the charges against him*."

*Applying Section 123(1) ERA 1996: The Polkey principle*

122. If a Tribunal finds a dismissal unfair on procedural grounds but the employer can show that it might have dismissed the employee if a fair procedure had been followed, the Tribunal may make a percentage reduction in the compensatory award which reflects the likelihood that the Claimant would have been dismissed in any event (see *Polkey-v- Dayton Services* [1988] ICR 442).

*Contributory Fault*

123. Section 123(6) ERA provides that where a Tribunal finds that the dismissal was to any extent caused or contributed to by the action of the Claimant, it shall reduce the amount of the award by such proportion as it considers just and equitable having regard to that finding.

## Submissions

124. I heard oral submissions. The Claimant had prepared a set of submissions which he read from, which no doubt assisted him and the Tribunal because it kept his submissions concise.

125. The fact that I do not deal with a particular submission is not evidence that I have not taken it into account. I have taken into account all the submissions.

## Conclusions

126. Applying my findings of fact to the issues agreed by the parties and applying the law set out above, I have reached the following conclusions.

*Issue 1: Was the Claimant dismissed for a potentially fair reason?*

127. The principal reason for dismissal was a reason relating to the conduct of the employee, namely the two allegations which the disciplinary Panel found proved. The relevant findings of fact are set out above, particularly in paragraphs 49-62.

*Issue 2: Was the decision to dismiss fair?*

128. From the findings of fact, I have concluded that the decision to dismiss was procedurally fair. In particular:

128.1. The investigation in respect of each allegation was well within the band of reasonableness open to this employer in the circumstances. The Claimant has not suggested any other witness or documentary evidence, which was exculpatory in nature, which was not obtained.

128.2. The Claimant had a fair disciplinary hearing before an impartial tribunal. He had the chance to cross-examine witnesses and to put his case.

128.3. The evidence produced by the investigations provided reasonable grounds for the belief that the Claimant was guilty of gross misconduct.

128.4. There was a fair appeal, which reviewed the evidence in going through the grounds of appeal.

129. I have made findings on the specific allegations of unfairness highlighted at the start of this set of Reasons. It should be apparent that I rejected the Claimant's arguments. For the avoidance of doubt:

129.1. It is true that the Respondent did not interview the Claimant prior to making the decision to hold a disciplinary hearing, and did not invite him to make a written statement. I heard no evidence that the Claimant was unable to voluntarily file a written statement nor did the Claimant provide medical evidence that he could not attend an interview (as opposed to attend work), nor did he attend at Occupational Health for such an assessment to be made. Moreover, in a case where there were two allegations, each amounting to gross misconduct. I concluded that it was reasonable for this employer to seek an interview with the Claimant. It was not appropriate to invite him to provide a written statement in this case. In conclusion, the approach of proceeding to complete the investigation report and recommendation was reasonable in the circumstances of this case, considering fairness to all parties.

129.2. I have explained above why the disciplinary Panel preferred the evidence of Ms. Aziz, which corroborated much of the evidence of Mr. Omigie.

129.3. The Respondent maintained the impartiality of Ms. Cooper-James throughout the investigation. By the time that she presented the management case, the investigation was complete. She was mainly stating the evidence produced by it. In any event, the Claimant did not object to her role at the time and could point to nothing which disadvantaged him. Although it was not the usual procedure, the change in the role of Ms. Cooper-James, for only part of the hearing, had no adverse effect on the fairness of the dismissal.

129.4. I have concluded that the Claimant was not assaulted by Mr. Omigie. Moreover, the Claimant had the opportunity to put his case at the disciplinary hearing. In addition, he was afforded the opportunity to do so prior to the disciplinary hearing, but failed to attend meetings and Occupational Health appointments.

129.5. The disciplinary Panel was entitled to assess the evidence that it had in front of them. It was entitled to prefer the evidence of Ms. Hendon. In any event, it had reasonable grounds for its decision by its own reading of the evidence and relevant documents, including the Managing Change policy. The disciplinary Panel had reasonable grounds to conclude that formal consultation was not required.

*Issue 3: Was the decision to dismiss reasonable in all the circumstances*

130. From the findings of fact, I have concluded that the decision to dismiss was well within the band of reasonableness open to this employer. I will not repeat the relevant findings, which include those set out at paragraphs 56-64 above.

131. In this case, the employer had found two acts of gross misconduct proven, and no real mitigation. Moreover, the second of these acts amounted to an assault on two other members of staff, in an incident started by the Claimant. It is difficult to envisage how the Respondent could trust this Claimant in the future given the lack of remorse, the lack of insight and the absence of mitigation in this case. The decision to dismiss was manifestly reasonable taking into account all the

circumstances of this case, including the nature of this employer (a national health service).

*Issues 5-7: Breach of contract*

132. Given the findings of fact set out above, at paragraphs 86-113, the Respondent was entitled to dismiss the Claimant summarily. He is not entitled to his notice pay.

*Contributory Fault*

133. For the avoidance of doubt, given the findings of facts set out above, if the unfair dismissal claim had succeeded, it would have been just and equitable to reduce both the Basic and the Compensatory awards by 100%.

**Summary**

134. The complaints of unfair dismissal and breach of contract are not upheld. The Claim is dismissed.

Employment Judge Ross

18 January 2019