EMPLOYMENT TRIBUNALS

Claimant: Mr David Robinson

Respondent: Northumberland Tyne & Wear NHS Trust Foundation Trust

HELD AT: HMCTS Tribunal Centre, Newcastle **ON:** 25 and 26 March 2019

BEFORE: Employment Judge Buckley

JUDGMENT having been sent to the parties on 11 April 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a claim for unfair dismissal. The issues for me to decide are:

1.1 What was the reason for dismissal?

1.2 Was the claimant dismissed for a potentially fair reason i.e. conduct (use of inappropriate techniques during a physical restraint)?

1.3 Did the respondent have a genuine belief in that conduct?

1.4 Was that belief based on reasonable grounds?

1.5 Had the respondent carried out as much investigation as was reasonable in the circumstances?

1.6 Did the decision to dismiss fall within the band of reasonable responses?

1.7 Did the respondent adopt a procedure that a reasonable employer could have adopted?

1.8 If the dismissal was unfair:

1.8.1 What is the percentage chance that the C would have been dismissed fairly in any event?

1.8.2 Should any reduction be made on the grounds of contributory fault?

Findings of fact

2. The basic facts were mainly not in dispute. The claimant has been employed by the respondent as a nursing assistant since 25 November 2002. He has worked at the Milford Unit, which provides specialist inpatient services for adults with autism spectrum disorders since 2016. He has received training, with annual updates, in what is referred to in this decision as PMVA 'Positive Management of Violence and Aggression'. His most recent update training was on 23 May 2017.

3. There was an incident on 23 May 2017 where the claimant restrained a patient, referred to in this judgment as DN. This incident was recorded on CCTV. Stephanie Clelland, a Clinical Nurse Lead viewed the incident on CCTV footage. I find that Ms Clelland was authorised to view the footage by Miss McIntyre on the basis of the notes in the bundle.

4. Ms Clelland raised concerns with the ward manager Pamela McIntyre on 28 July 2017, but this was not acted upon.

5. Ms Clelland raised it with Sheree Mcartney, the Clinical Nurse Manager on 25 August 2017. A decision was taken to treat this as a potential disciplinary matter and the claimant was suspended on the same date pending an investigation.

6. The matter was reported to the Local Authority and to the Police. The police later decided to take no action and confirmed this to the respondent on 6 November 2017. The claimant surmises that this was because they concluded that he was acting in self-defence but there is no evidence before the tribunal of their reason for deciding to take no action. On 21 November 2017 the local authority gave the respondent approval to conduct their own investigation.

7. Ms Stewart was appointed the investigating officer in January 2018. She undertook investigatory meetings with the claimant and other members of staff including the other staff who were at work with the claimant on 23 May 2017 and a PMVA trainer Mr Philip Trueman. Ms Stewart intended to interview Ms Clelland as well but did not because she was on sick leave.

8. The investigatory meeting with the claimant took place on 24 January 2018 and an investigatory report was produced.

9. The disciplinary hearing took place on 30 May 2018. Philip Trueman was called as a witness. The hearing was adjourned and reconvened on 4 June 2018 at which meeting the claimant was told that a decision had been taken to dismiss him. This was confirmed in writing by letter dated 8 June 2018.

10. The reasons for dismissal are set out in the letter of 8 June 2018. The respondent concluded that the claimant had used inappropriate techniques during a physical restraint. The reasons for this belief are set out in that letter.

11. The claimant appealed and an appeal hearing took place on 30 August 2018. At the appeal hearing the claimant produced a large number of character references from former colleagues. The decision to dismiss was upheld.

12. Having considered the evidence of the claimant and the respondent's witnesses I find that there was no collusion between the respondent and the claimant's union representative.

Application of the law to the facts.

13. I deal firstly with a discrete issue raised by the claimant. The claimant has raised complaints about his union representation during the disciplinary process. Mere complaints about there competence cannot affect the fairness of the dismissal, If there was evidence, that on the balance of probabilities that there had been collusion between the union representative and the respondent that would affect the fairness of the dismissal, but there is insufficient evidence before me to find that that has taken place.

What was the reason for dismissal?

14. I accept Ms Wakefield's evidence that she was not aware of any 'whistleblowing' by the claimant. There is no evidence to contradict her evidence on this point. This cannot have formed part of her reason for dismissal and I accept that the reason for dismissal was a potentially fair reason i.e. conduct: the use of inappropriate techniques during a physical restraint.

Did the respondent have a genuine belief in that conduct?

15. I have rejected the assertion of an ulterior motive, and it is clear from the documentary and oral evidence that the respondent genuinely believed in the alleged conduct.

Had the R carried out as much investigation as was reasonable in the circumstances?

16. The only criticism of the investigation is that there is no statement from Ms Clelland. Firstly I accept that she was on sick leave. However if her statement had been necessary, then a reasonable respondent would have had to wait for at least a reasonable period for her to return. I therefore need to consider if her evidence was required for a reasonable investigation.

17. Ms Clelland viewed the CCTV and made the complaint, which appears initially not to have been acted upon. Given that the investigation included interviews with staff who were there on the night, the claimant, and the CCTV itself, Ms Clelland's evidence as to what the CCTV showed or her opinion on it is not necessary.

18. She may have been able to give some information on why the complaint was not acted upon and why, therefore, she had had to raise it again, however the interviewing officer spoke to Pamela McIntyre and Steven Douglas (the staff to whom it was initially reported) and their evidence as to why no action was taken was therefore available to the respondent. I find that it was therefore reasonable to proceed without a statement from Ms Clelland.

19. Taking this into account and looking at investigation as a whole I conclude that the investigation was reasonable in the circumstances.

Was the belief based on reasonable grounds?

20. There were a number of issues for the disciplinary officer to consider, beginning with the question of what the claimant did on the 23 Mar 2017.

21. There were three sources of evidence on this. The evidence of the claimant, the CCTV evidence and the evidence of other members of staff on duty that night. The conflicts of fact included: Was the claimant's hand on DN's neck or on his clavicle?; Was the claimant's knee on DN's arm or forming a bridge over DN's arm?

22. The panel considered both the claimant's evidence and the CCTV footage and stills. Their decision was to reject the claimant's evidence and decide that the claimant's hand was on DN's neck and that his knee was on DN's arm. This was upheld on appeal.

23. I have heard the claimant's evidence and seen the CCTV. I find it was open to the Respondent to reach that conclusion on the basis of the CCTV evidence. Whether or not I would have reached the same conclusion is irrelevant to an unfair dismissal claim.

24. The claimant asked at the appeal, if he could be allowed to manually demonstrate the positions that he says he adopted. This may be more relevant to procedural fairness, but it is convenient to deal with here. In an ideal world, it would not have taken much time and it would perhaps have left the claimant more satisfied if he had been allowed to demonstrate.

25. However, the respondent was already aware of, and considered, the claimant's version of events. Although some employers might have allowed it, I do not think that it was a decision that fell outside the band of reasonable responses: A reasonable employer could have legitimately concluded that an oral explanation was enough, particularly at the appeal stage, on the basis that the demonstration would not add to their understanding of the claimant's version of events. It was reasonable for them to reach their conclusions on the basis of the CCTV and the oral evidence.

26. Even if I had concluded that this particular procedural decision was not within the band of reasonable responses, Looking at the process of a whole I would not have found that it rendered the process unfair, the claimant had had the opportunity to state his case orally and it is clear that the respondent understood and had properly considered his version of events.

27. There was no dispute that the claimant had raised his arm as he approached DN, to point at a bedroom door. He accepted that he flexed DN's wrists, to stop him nipping/digging his nails into him.

28. Having reached a conclusion as to what the claimant did, the respondent had to decide the second issue: were these appropriate techniques?

29. The disciplinary officer heard evidence from Mr Trueman. His statement at p186 states that he was employed as a skills trainer since 2011. Before that he was a ward based staff nurse and trained PMVA part-time since 2008. He is a senior tutor. Even though Mr Trueman may not have current ward experience I accept that it was reasonable for the respondent to rely on his evidence as to the appropriateness of the techniques.

30. Mr Trueman's evidence was that the claimant's actions were outside those taught in PMVA training and carried an increased risk of injury to the patient. This included in particular putting his arm around DN'S neck and putting his knee on DN's arm. His evidence was that flexing a patient's wrist does not manage movement, it causes pain and was a technique no longer taught in training. He stated that staff are made aware of the dangers of using flexion because it causes pain and can make a situation worse. Mr Trueman does not state in terms that the claimant used unreasonable force, but this is the effect of his evidence: his view was that the claimant used techniques that he had not been taught to use, and that carried an increased risk of injury and caused pain.

31. As set out above, the claimant denied using some of the techniques and therefore, understandably, did not offer an explanation as to why he thought they were appropriate in the circumstances.

32. He did however provide a specific explanation for why he flexed DN's wrist - to prevent him from 'nipping'. He also gave a general explanation for why his conduct overall had not been inappropriate, in essence that:
    i. He had been concerned that DN might attach PM again, and was attempting to verbally de-escalate
    ii. He deliberately went alone, because he thought more people would intimidate the patient
    iii. He had raised his arm to point at PM's door
    iv. He had been reacting to the patient 'throwing a punch'
    v. He had not been given specific PMVA training on dealing with patients with broken arms
    vi. The message he had received from training was that you did what you could to maintain control
    vii. He had been scared that the patient would bite him, particularly because the claimant had been bitten before, and this patient had bitten before
    viii. He had done what he thought was best in the circumstances

33. Mr Trueman dealt specifically with some of these points in his evidence as follows:

i. Standing where the pacing patient was trying to walk would not de-escalate the situation.

ii. It was a mistake to stand where DN was trying to walk and to raise his arm while in that position. Staff are taught to think about distance and positioning of arms and feet.
iii. The claimant could and should have used his break away skills to disengage until other staff can assist
iv. He accepted that there was no specific PMVA training on dealing with patients with broken arms. It would be too risky to attempt PMVA alone on a patient with a broken limb.
v. They covered last resort scenarios and severe examples, however people have an idea of what they should do but when they are put in a difficult situation they can react differently and do what is natural like flinch or back away.

34. On the basis of the evidence before the respondent the disciplinary officer concluded that the techniques adopted were inappropriate. The disciplinary outcome letter shows each of the points raised by the claimant above were considered, and the panels conclusions on each one set out in some detail. The panel concluded, for example:

i. By taking the decision to approach DN the claimant put himself in a threatening situation
ii. The panel had concerns that the claimant acted alone despite working in a team and were concerned that he did not discuss a plan or strategy with the team
iii. The panel had concerns that by approaching patient DN in the way he did this escalated the situation
iv. The panel concluded that the restraint used was unnecessary and contrary to taught techniques
v. The panel accepted that the claimant had not been advised on how to approach a restraint with DN considering his previous injury and that this may have caused anxiety
vi. The disciplinary officer appreciated that the claimant's previous experience of being bitten would have made him nervous about the possibility of it happening again

35. I accept that on the basis of the evidence before the respondent, including Mr Trueman's evidence and the evidence given by the claimant, the disciplinary officer was entitled to conclude that the techniques were inappropriate for the reasons it set out in the letter.

36. The fact that the police decided to take no action does not prevent the respondent from reasonably reaching this conclusion, They are applying a different test.

Did the decision to dismiss fall within the band of reasonable responses?

37. Having considered whether the techniques adopted were inappropriate, the respondent had to consider what the appropriate sanction would be. The disciplinary officer concluded that dismissal was the appropriate sanction. The disciplinary outcome letter shows that she took the following factors in particular into account:

I. taking account of the claimant's evidence that firstly he had had done the best he could in the circumstances, secondly that he had reverted back to old

teaching and thirdly that he did not think PMVA as currently taught was enough because it taught 'holds only', the panel concluded that it was not persuaded that the claimant would use approved techniques in the future. It is not necessary for me to decide if the disciplinary officer did or did not use the words 'I do not believe you'. That was her conclusion in any event, whatever words she used.

II. That the claimant did not discuss a plan or strategy with the team and acted alone.

III. The panel stated that it had given very careful consideration to the claimant's length of service and character. I accept that this was the case.

IV. Further the panel stated that it had considered the mitigation put forward by he claimant. The contents of the letter shows that this was the case.

38. The outcome letter then refers to the respondent's policies to support its conclusion that this amounts to gross misconduct. In summary, the disciplinary policy provides that ill treatment of patients is gross misconduct. The safeguarding adults at risk policy states that abuse includes the inappropriate use of restraint, and that it is the impact, not the intent, that is relevant when deciding if an act is abuse.

39. The letter concludes that the actions and behaviour were so serious that it constituted gross misconduct.

40. In the light of the wording of those policies, and the respondent's reasoning set out above I accept that it was within the band of reasonable responses to decide to dismiss the claimant for using inappropriate techniques during a restraint.

41. It is not within my remit to decide if it would have been better, or fairer, to give the claimant a second chance. It is not relevant for me to consider whether or not I would have reached a different conclusion.

Did the respondent adopt a procedure that a reasonable employer could have adopted?

42. At the appeal hearing Mr Robinson produced a large number of character references which the appeal panel refused to take account of. Again, in an ideal world, perhaps the respondent should just have agreed to read the references. Unless something is clearly irrelevant, or will cause delay, my view is that it is usually better to allow it in.

43. However that is not the test I must apply. I find that a reasonable employer could have legitimately concluded, as the appeal panel did, that the claimant's character was not 'under question and therefore it would make no difference at this stage': the disciplinary panel had taken into consideration the claimant's character and that he had a clean service record.

44. Even if I had concluded that this particular procedural decision was not within the band of reasonable responses, looking at the process of a whole I would not have found that it rendered the process unfair: the disciplinary panel had proceeded on the basis that the claimant was of good character in any event.

45. For those reasons the claim for unfair dismissal fails.

Employment Judge **Buckley**

1 May 2019