



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102329/2017

Held in Dundee on 20-22 May 2019

Employment Judge M Sangster

Mr A Manley

Claimant
Represented by:
Mr M Briggs
Solicitor

Tayside Health Board

Respondent
Represented by:
Ms L Ewart
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claim of unfair dismissal does not succeed and is dismissed.

REASONS

Introduction

1. The claimant presented a complaint of unfair dismissal. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was gross misconduct, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating misconduct as sufficient reason for dismissal and had acted within the band of reasonable responses.

2. The respondent led evidence from four witnesses: Piers McGregor (**PM**), Inpatient Services Manager, Valerie Johnson (**VJ**), Head of Mental Health & Learning Disability In-Patient Services (Tayside), Keith Russell (**KR**), Associate Nurse Director for Mental Health and Learning Disability Services and Daniel Courtney (**DC**), HR Lead for Workforce Planning. The claimant did not give any evidence on his own behalf and did not call any witnesses. A joint set of productions extending to 886 pages was lodged.

Issues to be determined

3. Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of s98(1) or (2) of the Employment Rights Act 1996 (the **ERA**)?
4. Was the claimant's dismissal for that reason fair in all the circumstances, in terms of s98(4) ERA?
5. If the claimant's dismissal was unfair,
- a. if procedurally unfair only, would the claimant have been dismissed in any event (*Polkey v AE Dayton Services Limited* [1987] 3 All ER 974)?
 - b. by his conduct, had the claimant contributed to his dismissal?
6. It was agreed in advance that, if the dismissal was found to be unfair, remedy would not be determined at the hearing.

Findings in Fact

7. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
8. The claimant started working with the respondent on 20 August 1990. From 1993 onwards he was employed by the respondent as a Mental Health Nurse, a role that requires registration with the professional body for nurses, the Nursing and Midwifery Council (**NMC**). He was latterly Band 5 – staff nurse. He worked in the Intensive Psychiatric Care Unit (**IPCU**) at the Carseview Centre in Dundee.

9. The IPCU provides healthcare assessment, care and treatment to individuals who are experiencing an acutely disturbed phase of their severe mental disorder. It is recognised that patients admitted to the IPCU will have behavioural difficulties which will have seriously compromised their physical or psychological well-being, or that of others, and that they cannot be safely assessed or treated in a less restrictive environment. Patients are only admitted to the IPCU if they display a significant risk of aggression, absconding with associated serious risk, suicide or vulnerability in the context of a serious mental health mental disorder. It is anticipated that this might involve a loss of control by the patient and, on occasion, a need for de-escalation of behaviour, and as a last resort, appropriate restraint.
10. The IPCU routinely accept referrals from other adult mental health service clinicians as well as, on occasion, the Child and Adolescent Mental Health Services (**CAMHS**).
11. The respondent provides training on the prevention and management of violence and aggression (**PMVA**) to certain individuals working within the IPCU. The claimant received this training, as well as regular updates thereafter. His last update was in 2015.
12. On 1 June 2016 the respondent commenced an investigation into an allegation that the claimant had assaulted a patient during the course of the previous night shift.
13. The investigation was commenced in accordance with the respondent's Management of Employee Conduct Policy. The investigation was conducted by PM. The claimant was suspended on 3 June 2016, pending the outcome of the investigation.
14. The investigation team took the following steps in investigating the allegation
- a. The four members of staff who were on duty in the IPCU during the shift, including the claimant, were interviewed;

- b. Statements were taken from five other members of staff, who either attended the IPCU when alarms were triggered or were otherwise involved on the night in question;
 - c. A statement was obtained from the patient who it was alleged the claimant had assaulted (**Patient A**);
 - d. John Neill, a trainer in PMVA techniques and Aggression Management Advisor for the respondent, was interviewed to ascertain correct techniques and the content of the training received by the claimant.
15. The claimant attended an investigatory meeting with PM on 16 September 2016. He was informed, in writing, in advance, that the purpose of the meeting was to investigate allegations that, on night duty on 31 May 2016 into 1 June 2016, he had:
- a. practiced inappropriate patient restraint;
 - b. used abusive language towards a patient; and
 - c. assaulted a patient.
16. During the course of the investigatory meeting, the claimant indicated that he had been charged by the police in relation to the incidents and that he had self-reported this to the NMC.
17. At the conclusion of the investigation, PM prepared an Investigatory Report which included the following findings:
- a. Patient A was 16 years old. He was transferred to Carseview on 28 May 2016 from a CAMHS in-patient facility, as he was unmanageable in that facility. This was the second time he had been admitted to the IPCU. The claimant was present when Patient A was admitted. The claimant reported an episode of aggression directed towards him by Patient A during admission, stating that he had virtually no rapport with Patient A and that Patient A was targeting him. To that end, the claimant withdrew himself from contact with Patient A for the remainder of that shift.

- 5 b. On 31 May 2016, there were four inpatients in the IPCU, with six vacant beds. Four members of staff were on duty on the night shift, including the claimant. The others were Emily May Barlow (**EMB**), designated nurse in charge and PMVA trained, Staff Nurse Lisa Walker (**LW**) (also PMVA trained) and Healthcare Assistant, Gregor Stewart (**GS**) (not PMVA trained).
- c. It was noted on handover to the nightshift that Patient A was at risk for aggression, harm to self and unpredictable behaviour.
- 10 d. At around 10.30pm, Patient A reported thoughts of a suicidal nature. Shortly thereafter he was found to have, unsuccessfully, tried to act on these thoughts. As a result, he was placed under constant 1:1 observation and confined his room, with risk items removed. GS conducted the 1:1 supervision initially. At around 11.30pm, Patient A left his room, followed by GS (who was not trained in PMVA techniques) to
15 find a nurse to ask if he could have a cigarette break. He met the claimant and LW, who indicated that he should return to his room. They attempted to guide him back to his room, but he became very agitated, attempting to push past them. This resulted in a struggle and PMVA techniques being used to secure control of Patient A's hands and arms. During the
20 course of that the claimant was bitten on the arm by Patient A. The claimant verbalised that he was being bitten and one witness, GS, stated that the claimant shouted, *'he is fucking biting me.'* Another witness reported the claimant shouting *'you fucking cunt'* at Patient A. The claimant denied he had sworn at Patient A, but accepted he may have
25 sworn in the presence of the patient, in passing comment on the situation.
- e. Alarms were activated, resulting in staff members from other wards attending the IPCU. Patient A was manoeuvred back into his room and restrained there using PMVA techniques. It was noted by several
30 witnesses that Patient A was directing verbal aggression towards the claimant at this point, stating that the claimant was applying PMVA techniques with too much pressure. As a result, EMB directed that

another member of staff take over the PMVA hold from the claimant. Witnesses noted that Patient A calmed down when the claimant left the room, as a result of the claimant leaving and medication.

- 5 f. The claimant attended the treatment room to wash the area of the bite injury and advised EMB and Gail White (**GW**), Senior Mental Health Nurse for Carseview, of his injury. He was reviewed by the attending doctor, who telephoned to arrange for the claimant to attend the A&E department. Whilst the risk of contamination was considered low, this was part of workplace protocol. EMB and GW were aware of that the
- 10 claimant required to attend A&E and considered they had sufficient staffing levels to allow him to do so.
- g. At around midnight, the claimant went to directly outside Patient A's bedroom and informed other colleagues, in a voice loud enough for Patient A to hear, that he needed to go to A&E. Witnesses described this
- 15 as unnecessary and stated that the claimant ought to have been aware, by that point, that his presence would agitate Patient A and was not therapeutic for the patient.
- h. Patient A then came to the door of his room and attempted to lunge at the claimant. He was restrained as a result and the claimant participated
- 20 in that restraint. Staff from other wards also attended as a result of alarms being triggered.
- i. Four witnesses noted that during the second restraint, while Patient A was lying restrained and face down on the floor, the claimant had his knee in the back of Patient A's neck. The claimant was asked to move
- 25 his knee by Gregor Stewart, a Healthcare Assistant, and did so. Witnesses stated that PMVA training prohibited applying any pressure to the neck area as it could cause significant injury and/or asphyxia. John Neill, the PMVA trainer stated that *'the thoracic rectangle is a no go area and there should be no downward pressure on the chest, back and*
- 30 *abdominal area. This is to prevent positional asphyxiation. It is also important that the neck is protected and no pressure is put on it.'* He

went on to explain that the application of the application of a knee to the back of the head when a patient was on the floor would not be justified on the balance of threat to staff/others by the patient versus harm to the patient. The claimant denied that his knee had been in contact with Patient A's neck.

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j. Witnesses stated that the claimant seemed angry during the second restraint at the time and reported him shouting '*you fucking bit me*' to Patient A during the restraint. EMB stated that this was done in a '*loud, sarcastic and aggressive*' tone. EMB asked the claimant to stop participating in the restraint and to leave the room. The claimant stated that he may have sworn, but could not recall doing so.

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k. Four witnesses stated that, as he was leaving the room, the claimant stood on the back of each of the calves of Patient A, who was still restrained and lying face down on the floor at that time. This caused Patient A to cry out. In his statement, Patient A stated that this '*made him want to die more if other people want to hurt me too. It has made me feel worse.*' The claimant accepted that he did stand on the back of both Patient A's calves/legs, but said it was not intentional. Others in the room stated that they felt this was deliberate. The claimant did not apologise.

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l. The claimant then attended A&E. On his return, he was asked not to participate in observations on Patient A. Patient A subsequently reported the incident during the second restraint to the police.

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18. By letter dated 14 November 2016, the claimant was invited to a disciplinary hearing on 1 December 2016, to discuss allegations of gross misconduct, namely that '*whilst on night duty on the 31st May 2016 into 1st June 2016 that you:*

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a. *Practiced inappropriate prevention and management of violence and aggression skills and techniques.*

b. *Used abusive language towards a patient.*

c. Allegedly assaulted a patient.

d. You have further advised that you have been charged by the Police relating to events of that shift.

e. You have further advised that you have reported this matter to the Nursing & Midwifery Council.'

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19. The claimant was informed that he would receive the management statement prior to the disciplinary hearing. He was also informed of his right to be accompanied and that, if substantiated, the allegations could result in his dismissal. The disciplinary hearing was subsequently rescheduled on a number of occasions and ultimately commenced on 1 March 2017.

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20. The management statement of case was provided to the claimant in advance of the disciplinary hearing. This consisted of the Investigatory Report, all the statements taken during the investigation and 38 further appendices, including the relevant policies and procedures. It ran to 239 pages.

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21. The claimant also produced a statement of case prior to the disciplinary hearing. This consisted of a response to the allegations, a reflective statement, character references and supervision records.

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22. The disciplinary hearing took place over 5 days in March and April 2017. The panel consisted of VJ, Imogen Scott, HR Business Advisor to provide HR support, and KR as Nurse Advisor. The claimant was accompanied by his full time official, Maureen Dickson (**MD**).

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23. The management case, which was effectively the Investigatory Report, was read by PM and witnesses were then called. The management side called eight witnesses. The claimant called two witnesses. Each witness gave evidence and was then cross examined by the other side.

24. When being questioned by KR during the disciplinary hearing the claimant stated as follows:

- a. That he had let himself, Patient A and his colleagues down on the evening in question;
- b. That he breached professional boundaries;
- c. That elements of his actions were not in the interests of patient safety –
5 such as standing on Patient A's legs and returning to the area of conflict;
- d. That he felt hurt and aggrieved, was angry towards Patient A and felt entitled to be angry;
- e. That he had lost control;
- f. That he accepted the account of colleagues who said he had sworn at
10 Patient A;
- g. That patients are vulnerable during restraint and often feel very scared as they can't move and have no control;
- h. That he accepted the account of others who said that he had kneeled on Patient A's head and neck area during the restraint;
- 15 i. That he deliberately stood on each of Patient A's legs when leaving the room, when there were other alternatives for exiting without doing so;
- j. That his actions caused Patient A harm, upset, distress and in a state of fear. He acknowledged that Patient A had stated that the claimant's actions '*made me want to die more, if other people want to hurt me too. This made me feel worse.*' He understood that the impact on Patient A
20 was dreadful: he had been in restraint before in that manner, thought this was how it was going to be going forward and felt he was in danger at Carseview;
- k. That the impact of his actions on colleagues was also dreadful, as some
25 of them would have lost the ability to trust him and to trust his fitness to be safe around vulnerable people.

l. That the public would view his actions appallingly and that may undermine people's perception of nursing. That he was a public servant for vulnerable people and was meant to look after people, not hurt them.

m. That his actions were not in line with the NMC Code.

- 5 25. The panel adjourned to consider the evidence and their conclusions. They reached unanimous conclusions in relation to each allegation. Those conclusions were documented by VJ. Her note stated as follows

'Allegation 1 – Practiced inappropriate PMVA skills and techniques

10 *On the balance of probability and consideration of the evidence presented you did have your knee on the shoulder/neck area of the patient for an unspecified period of time. This is based upon witness statements and your own recollection of events over the course of the hearing. This is not a technique or skill that is taught or advocated in NHS Tayside Prevention and Management of Violence and Aggression Training.*

15 ***Allegation 2 - Used abusive language towards a patient***

20 *On the balance of probability and upon consideration of the evidence presented you did use abusive language to the patient based upon witness accounts. You stated you cannot remember using abusive language but do not refute the witness testament of colleagues and stated during the hearing that you probably did swear at the patient.*

Allegation 3 – Allegedly assaulted a patient

The panel heard that you admitted to knowingly standing on a patient's calves to exit a room when alternative options to exit the room without standing on the patients calves were available to you.

25 *Your actions caused the patient physical harm and considerable emotional distress, the patient was left in a state of fear that they might be about to suffer bodily injury and you acknowledged the profound impact your actions had on the patient.*

You described that your actions and decisions were made at a time when you had lost control, were angry, felt entitled to be angry and believed the patient had targeted you.

5 *Your actions, by your own admission, occurred at a time the patient was vulnerable, took advantage of their vulnerability and were not in line with professional boundaries or your duty of care to the patient. You acknowledged that your actions were not in line with professional standards of practice and behaviour for nurses and midwives set out in the Nursing and Midwifery Council Code. You acknowledged that your behaviour fell short of the standards*
10 *expected by the public, healthcare professionals and would have a detrimental impact on the public trust and confidence in the nursing profession.*

Allegations 4 & 5 – these are statements of fact and are removed.

15 *It is the view of the Panel that there has been an irreparable breakdown in trust and confidence between employer/employee and the alleged actions have the potential to negatively impact on the reputation of NHS Tayside's ability to deliver safe patient centred care for vulnerable individuals with mental health problems.*

20 *The decision of the Disciplinary panel is therefore that you are summarily dismissed by reason of gross misconduct. The panel have taken cognisance of your exemplary record up to this incident and have agreed that you will receive 12 weeks payment in lieu of notice with effect from 28 April 2017 as well as payment for any accrued annual leave.'*

26. The panel reconvened on 28 April to inform the claimant in person of this outcome.

25 27. A letter confirming the panel's decision, containing the above rationale, was prepared and sent to the claimant on 2 May 2017.

28. The claimant was informed of his right to appeal. He exercised this right. His grounds of appeal were that the sanction was too high and that alternatives to dismissal were not considered. An appeal hearing took place on 10 November

2017. The appeal panel comprised Evelyn Devine, Head of Health HSCP, Carol Miller, HR Business Advisor and Jim Foulis, Associate Director of Nursing. The claimant was again accompanied by MD. At the stage 1 appeal hearing, VJ attended to present the management case and PM and KR attended as witnesses. MD presented the claimant's case and called one witness.

29. The appeal panel adjourned to consider their conclusions. Evelyn Devine wrote to the claimant on 23 November 2017 to confirm his appeal had been unsuccessful. The letter stated that the appeal panel *'felt there was a clear intent to harm without sufficient mitigation presented to help rationalise this. You admitted that you caused harm to a patient and you knowingly made a decision to stand on the patient's legs. The panel felt that they had not seen a deep acknowledgement of the harm or the depth of reflection, understanding and learning by yourself to assure them that an incident of this nature would not reoccur.'*

30. The claimant exercised a further right of appeal, with that appeal hearing taking place on 13 March 2018. That appeal panel comprised Robert Packham, Chief Officer, Sarah Dickie, Associate Nurse Director and Ashley Waterston, HR Business Advisor. Evelyn Divine presented the management case and called Jim Foulis and VJ as witnesses. MD presented the claimant's case. The appeal panel adjourned to consider their conclusions.

31. Robert Packham wrote to the claimant on 19 March 2018 to confirm his appeal had been unsuccessful. The letter confirmed as follows

'Following questions, the panel checked that neither you nor your representative disputed the allegations made against you. As a result, the panel concluded that the allegations were substantiated. The panel checked that you were content that the process had followed the principles of the Employee Conduct Policy. You and Maureen confirmed that you had no concerns about the management of the process.'

Under conclusions, the following was stated

5 *'You have not disputed the allegations made against you throughout the process. Taking into account the conscious decision that you made to step on and not around the patient's legs causing harm and distress the panel had no alternative than to conclude that your actions resulted in the irreparable breakdown of trust required between an employer and their employee. For these reasons the panel are not able to uphold your appeal, concluding that the evidence against you is clear. By your own admission, you failed in your duty as an experienced Registered Mental Health Nurse. You responded inappropriately, in contravention of NHS Tayside policy and out with the code*
10 *of professional conduct. By your own admission, you subjected him to potential and/or actual harm through the choices you made.'*

32. The claimant exercised a final right of appeal, with that appeal hearing taking place on 15 August 2018. That appeal panel comprised Munwar Hussain, Non-Executive Board Member, Charles Sinclair, Associate Nurse Director and DC.
15 VJ presented the management case and called PM, KR, Evelyn Devine and Robert Packham as witnesses. MD presented the claimant's case. The claimant's grounds of appeal remained that the decision to dismissal was too harsh and that alternative sanctions should have been considered. The appeal panel adjourned to consider their conclusions.

20 33. Munwar Hussain wrote to the claimant on 23 August 2018 to confirm his appeal had been unsuccessful. The letter stated that *'the appeal panel concluded that your actions were assault and therefore dismissal was the most appropriate sanction'*. The letter confirmed that there was no further right of appeal.

25 34. The claimant attended a hearing before the Nursing & Midwifery Council from 28-31 August and 22-23 October 2018. He admitted at that hearing that he had used inappropriate language towards Patient A and that he had deliberately stood on Patient A's leg. The allegation that he had inappropriately knelt on Patient A's shoulder/base of neck area was found not proved. The panel concluded that the claimant's actions *'did fall significantly short of the standards expected of a registered nurse, and that your actions amounted to a breach of the Code....The panel appreciated that breaches of the Code do not*
30 *automatically result in a finding of misconduct. However, the panel was of the*

view that your actions did fall seriously short of the conduct and standards expected of a nurse and amounted to misconduct...The panel noted that your actions had caused actual harm to Patient A both physically and emotionally. Whilst the panel was informed that this was a one-off incident, it considered that your actions have brought the profession into disrepute and your colleagues were shocked by your behaviour. The panel found that your actions had fallen seriously short of what the public would expect from a registered nurse. The panel also considered that by deliberately standing on Patient A's leg and using inappropriate language towards Patient A you breached a fundamental tenet of the profession'

Relevant Law

35. S94 ERA provides that an employee has the right not to be unfairly dismissed.

36. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) ERA.

37. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the employer):-

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

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

38. Where an employee has been dismissed for misconduct, **British Home Stores v Burchell** [1978] IRLR 379, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

- i. whether the respondent genuinely believed the individual to be guilty of misconduct;
- ii. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and
- iii. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

39. In determining whether the employer acted reasonably, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (**Iceland Frozen Foods Limited v Jones** [1982] IRLR 439).

Submissions

Respondent's submissions

40. Ms Ewart, for the respondent, provided a written submission. She highlighted that the claimant had decided not to give any evidence to the Tribunal, at the last minute, and requested inferences be drawn from this. She asked the Tribunal to find that the respondent's witnesses were both credible and reliable.

41. She referred to the Burchell tests. She stated that there had been a thorough, fair and even-handed investigation and that no issues had been raised about the fairness of the investigation process, either at the disciplinary hearing or before the Tribunal. She stated that the respondent acted reasonably in treating

the claimant's conduct as a sufficient reason for dismissal and that this was within the band of reasonable responses available to a hypothetical employer dismissing the claimant.

- 5 42. In the event that the dismissal was found to be unfair, there should be reductions to compensation on the basis of Polkey and contribution. Reductions of 100% are appropriate.

Claimant's submissions

- 10 43. Mr Briggs, for the claimant, stated that there was no dispute with the law and not much by way of factual dispute between the parties. He accepted that the respondent had discharged the burden in relation to s98(1) & (2) ERA, but stated that there was a dispute in relation to s98(4) ERA.

- 15 44. He stated that it was clear from the evidence of all the witnesses that the principal reason for dismissal was allegation 3, the alleged assault by standing on Patient A's legs. He indicated that it had never been the claimant's position that he didn't do anything wrong – his position was that a reasonable employer wouldn't have dismissed in circumstances of a one-off incident, given the claimant's 20 years of service and clear record. There was no real consideration of alternatives, other than dismissal.

- 20 45. In relation to the evidence of the respondent's witnesses, he indicated that all witnesses other than DC had been guarded and evasive and their responses indicated that they were not being open or honest.

46. In relation contribution, he suggested that this should be in the region of 5% for allegations 1 & 2 and around 30% for allegation 3.

Discussion & Decision

- 25 47. The Tribunal noted that the claimant conceded that the respondent had discharged the burden under s98(1) ERA and shown the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2). The Tribunal agreed with this concession and accepted that the reason for dismissal was the claimant's

conduct – a potentially fair reason under s98(2)(b). No other reason has been asserted.

48. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason is shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

49. The Tribunal referred to the case of ***British Home Stores v Burchell***. The Tribunal was mindful that it should not consider whether the claimant had in fact committed the conduct in question, as alleged, but rather whether the respondent genuinely believed he had and whether the respondent had reasonable grounds for that belief, having carried out a reasonable investigation.

Did the disciplinary panel have a genuine belief?

50. The Tribunal concluded that the disciplinary panel did have a genuine belief that the claimant had committed the gross misconduct detailed in the dismissal letter.

Did the disciplinary panel have reasonable grounds for their belief?

51. The Tribunal considered each aspect of the reasons for dismissal in turn

a. **Practiced inappropriate PMVA skills and techniques.** Four witnesses stated that the claimant did have his knee on the shoulder/neck area of patient two during the second restraint. The witnesses stated that they felt this was inappropriate, given their training – to the extent that one witness, a Healthcare Assistant, asked the claimant, a Staff Nurse, to move his knee. During the disciplinary hearing, the claimant accepted the account of these witnesses. There was evidence from the witnesses, in particular John Neill, that this was not in accordance with PVMA skills and techniques taught during training. The disciplinary panel accordingly had reasonable grounds for their belief that the claimant had practiced inappropriate PMVA skills and techniques.

b. **Used abusive language towards a patient.** Three witnesses stated they heard the claimant swearing at Patient A during the second restraint in an inappropriate manner. They indicate that he was shouting '*you fucking bit me*'. EMB stated that this was done in a loud, sarcastic and aggressive tone, whilst the claimant was restraining Patient A. During the disciplinary hearing, the claimant accepted the account of these witnesses and also indicated that at the time he was angry, felt entitled to be angry and had lost control. The disciplinary panel accordingly had reasonable grounds for their belief that the claimant had used abusive language towards a patient.

c. **Assaulted a patient.** Four witnesses reported that the claimant stood on Patient A's legs. The claimant accepted during the investigation that he had stood on the back of each of the calves of Patient A, as he was leaving the room, but stated that this was not deliberate. During the disciplinary hearing, the claimant confirmed that he had done so knowingly and deliberately. This was done when Patient A, who was 16 years old was restrained and unable to move, lying face down on the floor and at a time when the claimant accepted he had lost control, was angry and felt entitled to be angry. There was evidence that claimant's actions had a profound impact on Patient A: it caused him emotional distress, physical harm and left him in a state of fear. The disciplinary

panel accordingly had reasonable grounds for their belief that the claimant had assaulted a patient.

52. Having reached these findings, the finding that the claimant's conduct amounted to gross misconduct, was open to the disciplinary panel in the circumstances and fell within the band of reasonable responses.

53. Having reached the conclusion that the claimant had committed gross misconduct by his actions, the disciplinary panel concluded that the claimant should be summarily dismissed. They felt that, given the admitted conduct, which they felt fell short of the standards set out in the NMC Code and breached the claimant's duty of care to Patient A, as well as the potential negative impact on the NHS Tayside's reputation, that they had no trust and confidence in him going forward and this resulted in an irreparable break down in trust and confidence. That conclusion fell within the band of reasonable responses open to the disciplinary panel in the circumstances.

15 *Was there a reasonable investigation?*

54. The respondent conducted a thorough investigation. They interviewed all the individuals who were on duty that evening, as well as Patient A and the PMVA trainer. There were no further steps which should, reasonably, have been undertaken.

20 *Procedure*

55. The respondent investigated the allegations. The claimant was invited to a disciplinary hearing and provided with a copy of the investigation report completed by PM and all appendices. He was given the opportunity to respond to the allegations at the disciplinary hearing and provided with three levels of appeal. He was informed of his right to be accompanied at all stages. The respondent followed their internal Management of Employee Conduct Policy in doing so.

56. The Tribunal find that the procedure adopted by the respondent was fair and reasonable in the circumstances.

Conclusions re s98(4)

57. For the reasons stated above the Tribunal conclude that the respondent acted reasonably in treating the claimant's conduct as a sufficient reason for dismissal.

5 58. For these reasons, the claim of unfair dismissal is dismissed.

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40	Employment Judge:	Mel Sangster
	Date of Judgment:	11 June 2019
	Date sent to parties:	12 June 2019

