EMPLOYMENT TRIBUNALS

Claimants: **Mr D Constance**

Respondent: **ISS Mediclean Limited t/a ISS Facility Services, Healthcare**

Heard at: **London East Hearing Centre**

On: **Thursday 26 September 2019**

Before: **Employment Judge John Crosfill**

Representation

Claimant: **Mr Goldborough (Solicitor)**

Respondent: **Elizabeth Grace (Counsel)**

JUDGMENT

The judgment of the Employment Tribunal is that:-

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

2. **The Claimant's claim for payment in lieu of accrued but untaken annual leave is dismissed.**

REASONS

1. The Respondent is a company that provides facilities management services. In September 2015 it took over a contract to provide security services to the Homerton Hospital. It assumed responsibility for the contracts of employment for all of the existing employees of Mitie at the site, including that of the Claimant. The Claimant had worked for Mitie since 2006 as a Security Officer. In 2008 he was promoted and from that point acted as a supervisor.

2. In the early hours of 28 September 2018, the police escorted a woman to the Emergency Department of the Homerton for the purposes of an assessment under the Mental Health Act. Believing her to be settled they left. The woman became agitated

and ultimately assaulted members of the public and staff. A complaint was received from a senior nurse who suggested that the Claimant had failed to offer any sufficient assistance. The matter was investigated and ultimately the Claimant was summarily dismissed by the Respondent with effect from 30 November 2018. It is that dismissal that has given rise to these claims.

The hearing

3. This matter had been listed for a full merits hearing with a time estimate of 1 day. No Judge had been allocated. Fortunately, a case settled and I was able to take on the case by 11:00 am. The parties had agreed a trial bundle and had exchanged witness statements.

4. The Respondent wished to rely upon CCTV evidence which had been viewed by their witnesses during the disciplinary process. At the commencement of the hearing we viewed that CCTV evidence on a laptop provided by the Respondent. The quality of the images was reasonably clear.

5. We spent some time discussing the claims. I asked Mr Goldborough whether there was any claim for notice pay brought as a breach of contract claim as in section 8.1 of the ET1 there was an indication that such a claim was brought. He informed me that there was not. The Claimant indicated that he believed that he was owed 4/5 days holiday pay. We discussed the issues in the unfair dismissal claim. There was no dispute that the Claimant was dismissed and that he had sufficient continuity of service to bring an unfair dismissal claim. The issues that remained were, whether or not the Respondent could show that it had a potentially fair reason for the dismissal, and if it could, whether the dismissal was fair or unfair applying the test in sub-section 98(4) of the Employment Rights Act 1996.

6. After reading the witness statements and documents I heard from:

   6.1. Mr Nicholas Lones, a Compliance Manager, and the individual who took the decision to dismiss the Claimant; and

   6.2. Mr Russell Sherry, a General Manager on the contract the Respondent has with the Princess Royal University Hospital Trust and the person who heard the Claimant's appeal.

   6.3. The Claimant himself.

7. Each witness was cross-examined in the usual way and the hearing was unremarkable. At the conclusion of the evidence both advocates made oral submissions. Counsel for the Respondent had provided written submissions in which she addressed both the law and facts. I shall not set out the competing submissions here but have addressed the arguments before me in my discussions and conclusions below.

8. Unfortunately, by the time that submissions were concluded there was insufficient time for me to give an oral judgment and I reserved my decision.

Findings of Fact

9. The Claimant commenced his employment with Mitie on 16 October 2016 working as a security guard. By 2008 he had been promoted to the role of Security Supervisor which carried with it some minor management responsibility.

10. In 2015 the Claimant's employment transferred to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006. The Claimant believed the Respondent to be less well organised and not as good an employer as Mitie. There was a collective grievance raised by the employees at the Homerton Hospital which was resolved by early 2016. Other than accepting that the Claimant was unhappy at the change, I do not need to make any further findings of fact in that regard.

11. The Claimant completed a number of training courses both while working for Mitie and for the Respondent. Amongst the courses he completed was a course organised by Maybo an organisation that gave instruction in conflict management in a healthcare setting. The Claimant undertook this training in 2012, 2015 and on 4 March 2016. The certificate issued on the latter two occasions made a recommendation that a refresher course in conflict management was undertaken every 2 years with a refresher in physical intervention every 12 months.

12. Shortly after midnight on 28 September 2018 the Claimant was working as a supervisor at the Hospital. As was routine he received a request from a fellow security guard, Mr Alcan Cucuk, who was working in the Emergency Department that he cover his position whilst he took a food break. Mr Cucuk explained that he had been asked to attend a patient brought in to the department by the police for a mental health assessment. She had been placed in a cubicle and the police had left.

13. It was not in dispute that at various times after the Claimant arrived in the department the patient had left her cubicle, wandered around the department. Ultimately, she assaulted staff members and members of the public. She was restrained, the police were called and she was admitted into a secure mental health ward shortly after 1:00am.

14. At 04:18am on 28 September 2019, the Senior Charge Nurse, Nhlizlywenhle Bhebhe, sent an e-mail to Rahat Ahmed, the Trust Security Manager in the following terms:

> *"We had an incident tonight when a mental health patient assaulted relatives, security, police and myself while awaiting a mental health assessment. The patient was eventually sectioned and admitted to the east wing.*
>
> *I am however very concerned as the security guard who was with the patient could have helped to prevent most of the assaults. He was distant and would not even engage when the patient was punching staff, his own security colleagues and especially the relative. He appeared not to want to assist with the patient and for whatever reason allowed harm to come to others when he could have prevented it."*

15. The Senior Charge Nurses' complaint was escalated to the Respondent and an investigation was started by Marcio Nunes the Operations Director. On 5 October 2018 Marcio Nunes wrote to the Claimant inviting him to attend an investigatory meeting. The letter fairly described the complaint that had been made. A meeting was initially scheduled for 12 October 2018. I infer from the e-mail statements that were produced and sent to Marcio Nunes that he also asked the Claimant's two colleagues, Aikan

Kucuk (who replied on 4 October 2018) and Anjonde Hibbert (who replied on 25 October 2018), to comment upon what had occurred.

16. The investigatory meeting was postponed when the Claimant failed to attend. Nothing turns on the reason why the Claimant did not attend. The meeting finally took place on 1 November 2018. I find that that meeting was effectively derailed. The notes of the meeting disclose that the Claimant appeared unsure of the purpose of the meeting. I find it hard to see why as the invitation letters were clearly written. Marcio Nunes attempted to go through the complaint that had been made but the Claimant said that he did not want to go through the complaint 'right now' and suggested that he was referred to HR. Marcio Nunes saw that as a refusal to engage, which is a harsh response but not without foundation. He decided there and then that the matter would proceed to a disciplinary hearing. The Claimant was asked to return to work. This led to a further disagreement as unusually the Claimant asked why he was expected to do so with an investigation pending. After what appears to have been a heated discussion the Claimant was ultimately suspended pending the disciplinary hearing. I find that the Claimant was difficult during this meeting and afterwards but that Marcio Nunes was somewhat abrupt and did little to de-escalate the situation.

17. The Claimant was sent an invitation to a disciplinary hearing by a letter dated 12 November 2018. He was informed that the meeting would be conducted by Nick Lones. He was informed of his right to be accompanied. The allegation against him was said to be a breach of two rules of conduct. The letter set these out as follows:

Section 4 Standard of Work

- *Employees must work to specified and approved methods*
- *Employees must meet quality standards and achieve the right levels of output*

Section 5 General

- *Any grossly negligent act or omission including negligently leaving clients actually or potentially without proper service*

18. The Claimant had been told that he would be given an opportunity to view the CCTV footage that the Respondent had obtained before the disciplinary meeting. This had led to a further misunderstanding. The Claimant envisaged that this would be a separate occasion whereas the Respondent made the footage available at the start of the disciplinary hearing. In fact, the letter of 12 November 2018 says that the opportunity would be given 'prior' to the hearing. The most natural reading is that that would be immediately before as no other arrangements are suggested. The letter warns that where the allegations amount to gross misconduct then the continued employment is at risk.

19. The letter included the e-mail with the original complaint, the two e-mails from the Claimant's colleagues and the notes of the investigatory meeting. The meeting was fixed for 16 November 2018.

20. In advance of the meeting Mr Lones viewed the CCTV and reviewed the complaint and the comments from the Claimant's colleagues. The meeting took place as arranged. The Claimant did not bring any companion. Mr Lones was accompanied by an advisor from HR and a notetaker. At the outset of the meeting the Claimant was offered the opportunity to watch the CCTV but inexplicably declined to do so. The notes

of the meeting record that the Claimant was asked for his explanation of the events of 28 September 2018. The Claimant provided a short summary of the events focussing on the closing events during which the patient was restrained. He is recorded as accepting that he had not intervened and stating that he had to consider his own safety. He said that he was not going to get physically involved. I find that the fact that the Claimant had not viewed the CCTV meant that he was not recalling the entirety of the events. That explains why he did not give as full an explanation as he later did in his witness statement. Mr Lones did understand the Claimant to be criticising the police for leaving the patient unattended in the first place.

21. Mr Lones considered what the Claimant had said and weighed it against the other evidence. The CCTV showed the Claimant sitting in a wheelchair when the patient was in her cubicle. When she left, apparently looking for the bathroom, Mr Lones considered that the Claimant's actions in just sitting where he was were unprofessional. Whilst the Claimant had said he was drinking a vitamin supplement drink he considered that that did not excuse the inactivity.

22. Mr Lones considered that the Claimant had failed to be pro-active and when the patient was wandering around the Emergency Department including walking into treatment rooms the Claimant ought to have done more. The CCTV shows others attempting to persuade the patient to return to her cubicle.

23. Mr Lones ultimately agreed with the assessment of the Senior Charge Nurse that had the Claimant been more proactive it was possible that the later assaults could have been prevented. He considered giving the Claimant a warning and demoting him but took into account the fact that he considered that the Claimant had shown no remorse for his actions. As such he felt that there was a danger of repetition if the Claimant remained in his employment. He took the decision to dismiss the Claimant without notice of payment in lieu of notice. That decision was confirmed in a letter dated 29 November 2018. The Claimant was informed of his right to appeal that decision.

24. In his letter dated 5 December 2018 the Claimant set out the basis for his appeal. He suggested that his health and safety during his employment had been placed at a very high risk and effectively ignored by the Respondent. He suggested that the Respondent had been biased and selective in dealing with the allegations against him and had come to a wrong decision. He said that the decision had been reached on the basis of lies told against him. He suggested that the head nurses statement was inaccurate. He suggested that he had never had specific training in how to manage patients with mental disabilities behaving in an aggressive manner. He said he had no certification in this area. He complained that the CCTV footage did not show the final incident during which he was involved in restraining the patient and further complained that numerous people seen on CCTV had not made a statement.

25. The Claimant was invited to an appeal meeting to take place on 2 January 2019 at 11:00am. The appeal was to be conducted by Russell Sherry. In advance of that meeting having considered the documentation, Russell Sherry sought the views of the Security Supervisor, Gary Payne, with whom he worked with the Princess Royal Hospital. Gary Payne expressed a strong view that the decision to dismiss the Claimant was correct. He acknowledged the problem raised by the Claimant of the police leaving mental health patients in the emergency department saying that he had experienced the same issue. In his view the fact that there was an ongoing problem provided no justification for failing to deal with the consequences.

26. The appeal took place as planned; the Claimant attended without any companion. There were notes taken of the appeal which record close to the outset the Claimant saying "Well I don't want to be here as I do not work for ISS as I am not a staff any more. I just want to move on with my life". I found that Russell Sherry did his best to encourage the Claimant to put forward the grounds of appeal that he wished to rely upon. At one stage he gave the Claimant a break at the same time providing a copy of the disciplinary process in order that he might understand the purpose of an appeal. Unfortunately, the Claimant did not fully engage with process of though he did manage to repeat his contentions that he did not wish to put his life at risk.

27. At the conclusion of the meeting Russell Sherry announced that he was not upholding the appeal. He considered that the Claimant had put forward no reason or evidence to show that the original decision was wrong.

Unfair dismissal

28. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed, the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

> *"98 General.*
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it –*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) relates to the conduct of the employee*
>
> *(c) is that the employee was redundant, or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
>
> *(3) ...*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

29. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': ***Thomson v Alloa Motor Co Ltd*** **[1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable ***JP Morgan Securities plc v Ktorza*** **UKEAT/0311/16**.

30. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points ***Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129**.

31. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

32. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23**.

33. In terms of the reasonableness of the investigation and the procedure that was followed, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee ***A v B*** **[2003] IRLR 405**. ***A v B*** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not. However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions ***CRO Ports London Ltd v Mr P Wiltshire*** **UKEAT/0344/14/DM**.

34. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

Discussion and Conclusions – Unfair dismissal

35. As set out above, where it is accepted by the employer that the employee has sufficient continuity of service to present a claim of unfair dismissal, and where it is accepted that there was a dismissal, the employer bears the burden of showing that the principal reason for the dismissal was for a potentially fair reason. In the present case The Respondent says that the reasons for the dismissal were those set out in the letter of dismissal and amounted to "conduct".

36. I am satisfied that the reason that Nick Lones dismissed the Claimant was that he genuinely believed that the Claimant had been grossly negligent in failing to intervene earlier than he did in the early hours of 28 September 2018. I am satisfied that this falls within the definition of conduct for the purposes of section 98 of the Employment Rights Act 1996.

37. I must ask myself whether Nick Lones' belief was formed on reasonable grounds. I was reminded by Ms Grace on a number of occasions that in applying the test of fairness under section 98(4) of the Employment Rights Act 1996 that I must not substitute my view for that of the Respondent. I accept that is the case, it is not for me to review the evidence and come to my own conclusion but to ask whether the factual conclusions of Nick Lones were reasonable. I consider that it was reasonable to have regard to the content of the complaint by the Senior Charge Nurse. The fact that individual singled out the Claimant for criticism within hours of the events did provide a reason for believing that the Claimant's actions fell short of what could be reasonably expected. The short statements from the Claimant's colleagues contained no express criticism of the Claimant. On the other hand, they do draw attention to the fact that, other than when the patient is finally restrained, it is them rather than the Claimant who took action in respect of the Patient. In that regard they are entirely consistent with the e-mail of the Senior Charge Nurse.

38. Nick Lones had the CCTV evidence before him when making his decision. It is clear from the dismissal letter and from the evidence before me that it was that evidence which was uppermost in his mind when he took the decision to dismiss the Claimant. That evidence showed that the events unfolded over approximately one hour. Given that many of the key events are captured on CCTV I do not consider it unreasonable for Nick Lones to have placed considerable weight on what he was able to watch on the CCTV footage.

39. It was not unreasonable of Nick Lones to criticise the Claimant for remaining seated for the early part of the incident with a drink in his hand in a wheelchair. The CCTV footage shows the Claimant taking little action whilst the patient freely moves around the Emergency Department including some areas where she should not go. It is fair to record that the Claimant does move to prevent the patient leaving through the ambulance entrance at one stage. However, the Claimant then remains by that entrance whilst the patient continues to move around the Emergency Department followed by a member of the nursing staff and a friend clearly in a state of some agitation. The Claimant did nothing to assist at that stage. It is not for me to substitute my view of that evidence. I have concluded that there was a reasonable basis for Nick Lones concluding that the Senior Charge Nurse was entirely correct to suggest that the

Claimant failed to be proactive in circumstances where had he been so he could or might have prevented a later assault.

40. The Claimant has argued that he had insufficient training to deal with the situation. He has suggested that it was improper to physically intervene unless he had a different security licence; he suggested that it was necessary to have a Door Supervisor License. Whilst that argument was advanced on his behalf before me, I was not shown any legislative or regulatory requirement that that is actually the case. Neither party referred me to the Private Security Industry Act 2001 which is the relevant legislation. I am judging the fairness of the dismissal at the time the decision was taken and whilst I accept the Claimant complained of a lack of training, he did not expressly suggest that it was unlawful for him to intervene because he did not have the requisite licence. On the evidence before me, whatever the true legal position, I find that the Respondent did not act unreasonably in assuming that the Claimant did have the appropriate licence. He had worked as a security guard for many years at the hospital. Neither his employers believe that any other form of licence was required. It would be extraordinary if two large companies tendering for public sector work had improperly supplied unlicensed security staff as the Claimant now suggests. During the meetings the Claimant put forward no evidence to suggest that he was not licensed to intervene.

41. The Claimant makes a valid point that his physical restraint training had not been updated as regularly as recommended by the training provider. The Respondent told me and I accept (noting that Mitie used the same training) that the Maybo training was the appropriate training for both conflict resolution and physical restraint. During the disciplinary process the argument that the Claimant advances was not that he had not had refresher training as often as Maybo suggested but was that he said he had been told that that training did not cover dealing with people with mental health issues. Nick Lones did not accept that that was the case.

42. I asked the Respondent's witnesses what their understanding was of the right of a security guard to prevent a person delivered by the police to the hospital for a mental health assessment from leaving after the police had departed. I was surprised to learn that the Respondent did not know what the legal position was. I consider that unsatisfactory. That said, I recognise the dangers of being diverted from the facts of this case. The Claimant was not dismissed because he refused or neglected to prevent the patient leaving. He was disciplined because he had not intervened when the patient was freely roaming the Emergency Department in a disturbed and aggressive state and had not intervened promptly after assaults had taken place. It is clearly within the powers of any citizen to intervene to prevent a trespass and to act in defence of another person. These are matters which the Claimant could be reasonably expected to understand as being central to his role as a security guard. I do not consider Nick Lones acted unreasonably in expecting the Claimant to understand that despite the fact that his training had not been refreshed in one respect as often as the provider recommended.

43. The Claimant had argued that a decision whether or not to intervene was a matter for his professional judgment. Mr Lones accepted that. If the Respondent had dismissed the Claimant for a minor error of judgment in a fast moving situation then this would have been a powerful point. The facts of this case were that the events unfolded slowly. The Claimant was not dismissed for making a decision in the heat of the moment but dismissed for failing to take any reasonable action over a period of time as the situation escalated. The evidence before Mr Lones was that the Claimant's 2 junior colleagues had been proactive as had the Senior Charge Nurse and members of the

public. It was not unreasonable to find that the Claimant's actions fell well outside any latitude allowed for matters of reasonable judgment.

44. Nick Lones said that a factor in his decision was the lack of remorse demonstrated by the Claimant. Having considered the interview notes I find that Nick Lones was entitled to conclude that there was a lack of remorse. The Claimant's repeated assertions that he was not prepared to risk any injury to himself when others were being assaulted seems entirely at odds with his responsibilities as a security guard. At no time did he acknowledge any failure on his part. Such a lack of insight is a matter which an employer might properly regard as important. Mr Lones was also alive to the reaction of the Respondent's client. It was not unreasonable for him to have regard for that. Plainly the Senior Charge Nurse considered that the service that had been provided was well below par.

45. The ACAS code suggests that warnings are usually appropriate where misconduct is found but recognises that dismissal might be appropriate even for the first act of misconduct if it amounted to 'gross misconduct'. The core role of a security guard in the Claimant's situation is to maintain order and prevent the sort of events that transpired in the Emergency Department in the early hours of 28 September 2018. I consider that the Respondent could quite properly view the failure of the Claimant to act to amount to gross misconduct and/or gross negligence.

46. I find that the process followed by the Respondent was fair and reasonable. Not every person present at the scene was interviewed. It was not unreasonable to rely upon the CCTV evidence as an alternative to interviewing nurses and members of the public. As I found above, the Claimant had an opportunity to discuss the evidence but did not always avail himself of those opportunities. I consider that each of the Respondent's witnesses approached the disciplinary meetings with an open mind. In particular, Mr Sherry went out of his way to encourage the Claimant to participate in the appeal process. It is unfortunate that the Claimant did not do so. The process that was followed met all of the requirements of the relevant ACAS code.

47. As set out above, it is not for me to say whether or not I would have dismissed the Claimant but to ask whether the decision and process taken as a whole fell within the band of reasonable responses. I consider that notwithstanding the fact that the Claimant was placed in a difficult situation the decision of the Respondent to dismiss him is one which was open to a reasonable employer.

48. Applying the law set out above, I conclude that the dismissal was fair and the claim for unfair dismissal fails and is dismissed.

49. The Claimant had suggested that he had not been provided with a statement of basic terms and conditions that satisfied Section 1 of the Employment Rights Act 1996. In fact the bundle contained a statement provided by Mitie which provided all material terms required by Section 1. The effect of TUPE is that anything done by Mitie is deemed to have been done by the Respondent. As such, the obligation was complied with. For completeness the change in the identity of the employer is also confirmed in writing. This was not a claim which was actively pursued but reference was made to the additional compensation available under Section 38 of the Employment Act 2002. This is not a freestanding complaint and, as I have dismissed the other claims, I could make no separate award in respect of any failure had there been one.

50. The complaint that there had been a failure to pay holiday pay was not referred to other than in the opening discussion. No evidence was presented that there had been any failure to pay accrued holiday pay. The letter of dismissal states that all outstanding sums would be paid. I have no evidence that would suggest that that was not done. For these reasons I dismiss the claim for holiday pay.

Employment Judge John Crosfill

14 November 2019