



EMPLOYMENT TRIBUNALS

Claimant: Toyah Leanne Rose

Respondent: Partnerships in Care Limited

Heard at: Nottingham

On: Wednesday 2nd and Thursday 3rd October 2019

Before: Employment Judge Evans (sitting alone)

Representatives

Claimant: Ms Hart of Counsel

Respondent: Mr Wallace of Counsel

JUDGMENT

1. The Respondent unfairly dismissed the Claimant.
2. The Respondent dismissed the Claimant in breach of contract (wrongful dismissal).
3. The Claimant contributed to her dismissal. It is just and equitable to reduce any compensatory award by 25%.
4. The Claimant's basic award is reduced by 25% because it is just and equitable to do so in light of the Claimant's conduct before dismissal.

REASONS

Preamble

1. The Claimant was dismissed summarily with effect from 3 January 2019. She submitted a claim of unfair and wrongful dismissal to the Employment Tribunal on 17 April 2019. The hearing of her claim took place before me in Nottingham on 2 and 3 October 2019 ("the Hearing").
2. The Claimant had prepared a witness statement for herself and gave oral evidence.
3. The Respondent called the following witnesses in the following order:
 - a. Sue Janes, a Regional Director of Nursing and a Hospital

Director/Registered Manager, who had carried out the investigation into the alleged misconduct by the Claimant;

- b. Paul Stanford, the Operations Director within the Respondent's Healthcare division, who took the decision to dismiss the Claimant;
- c. Paul Pritchard, the Managing Director of the Respondent's North region, who heard the Claimant's appeal against her dismissal.

4. Before the Hearing the parties had agreed a bundle between them running to 204 pages. Page 205 was added to the bundle during the Hearing with the consent of both parties. Both representatives provided written closing submissions.

5. Oral submissions concluded at 4.35pm on the second day of the Hearing. I did not therefore have time to reach a decision on the day and so reserved my judgment.

The Issues

6. By the time the Hearing began the parties had agreed that the issues were as set out in a note titled "The Respondent's draft list of issues". This set out the issues as follows:

1) Unfair Dismissal: The Employment Rights Act 1996 ("the 1996 Act"), ss 94 and 98

- a. Did the Respondent have a genuine belief that the Claimant was guilty of misconduct?
- b. If so, did the Respondent have in mind reasonable grounds upon which to sustain that belief?
- c. Did the Respondent carry out as much investigation as was reasonable in all the circumstances?
- d. In all the circumstances, did the Respondent act reasonably in treating the reason as sufficient for dismissing the Claimant?
- e. If the Respondent did dismiss the Claimant unfairly, to what amount of compensation (basic award and compensatory award) is the Claimant entitled? Consideration should be given to:
 - i. Contributory fault; and
 - ii. Where the dismissal is found to have been procedurally unfair, any reductions in accordance with Polkey v AE Dayton Services [1988] ICR 142.

2) Wrongful dismissal: Breach of contract per the Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994, art 3

- a. Were the Claimant's actions such that the Respondent was entitled to treat the Claimant's contract as repudiated?
- b. Did the Respondent dismiss the Claimant in response to the repudiatory breach?

- c. If the Claimant succeeds in her claim, what is the amount of damages to which the Claimant is entitled?

7. It was agreed that, in the event that the Claimant succeeded, there would be a separate hearing at which the amount(s) of compensation/damages for unfair and/or wrongful dismissal would be determined, but that nevertheless I would deal with issues of contributory fault and Polkey at the same time as liability.

8. At the beginning of the Hearing I asked Ms Hart to set out why she contended the Claimant's dismissal was unfair. In summary she said it was because:

- a. The allegations which the Claimant faced had never been set out clearly for her;
- b. Certain evidence had not been disclosed to the Claimant: in particular video evidence and an incident report;
- c. The Respondent had failed to investigate the degree of the risk of harm – the Respondent should have checked if the Claimant would have heard what had gone on in the room next door to the room in which she had been secluded;
- d. The reasons for dismissal set out in the dismissal letter were not based on the evidence;
- e. The Respondent had not taken into account the context in which the incident had happened, that is to say the characteristics of the patient involved and the broader culture at Calverton Hill hospital;
- f. The Respondent had not given due weight to the Claimant's length of service and clear disciplinary record;
- g. The Respondent had treated those involved in the incident inconsistently: the Claimant had been dismissed but Verity Castle (the nurse in charge on the night of the incident) and Sophie Gill (a Health Care Worker) had not been dismissed.

The Law

Unfair dismissal

9. Section 94 of the 1996 Act gives an employee the right not to be unfairly dismissed. Section 98(1) of the 1996 Act provides that, when a Tribunal has to determine whether a dismissal is fair or unfair, it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it was a potentially fair reason is on the employer. A reason for dismissal is a set of facts known to or beliefs held by the employer which cause it to dismiss the employee.

10. If the employer persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses. Section 98(4) applies not only to the actual decision to

dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

11. In considering this question the Tribunal must not put itself in the position of the employer and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the employer. Rather it must decide whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

12. When the reason for the dismissal is misconduct the Tribunal should have regard to the three part test set out in British Home Stores Limited v Burchell [1980] ICR 303. First, the employer must show that it believed the employee was guilty of misconduct. This is relevant to the employer establishing a potentially fair reason for the dismissal under section 98(1) and the burden of proof is on the employer. Secondly, the Tribunal must consider whether the employer had reasonable grounds upon which to sustain its belief in the employee's guilt. Thirdly, the Tribunal must consider whether at the stage at which that belief was formed on those grounds the employer had carried out as much investigation into the matter as was reasonable in the circumstances. The second and third parts of the test are relevant to the question of reasonableness under section 98(4) and the burden of proof in relation to them is neutral.

13. Turning to the issue of Polkey, section 123(1) of the 1996 Act provides:

Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal so far as that loss is attributable to action taken by the employer.

14. Therefore, if a Tribunal finds an unfair dismissal claim to be well founded, it must consider whether the compensatory award should be reduced to reflect the chance that the employee might have been fairly dismissed in any event at a later date or if a fair procedure had been used.

15. Turning to the question of contributory conduct, section 123(6) of the 1996 Act requires a Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that an employee caused or contributed to their dismissal. In addition, section 122(2) requires a Tribunal to reduce the basic award if it considers that it would be just and equitable to do so in light of the employee's conduct prior to dismissal.

Wrongful dismissal

16. At common the right of summary dismissal arises when the employee commits a repudiatory breach of contract. The employer has the option of waiving the breach or of treating the contract as discharged by the breach.

17. The key issue, therefore, in any claim of wrongful dismissal will often be whether the employee's breach of contract was repudiatory: whether it was sufficiently serious to justify dismissal. That depends on the circumstances. If not justified, the dismissal is wrongful, and the employer is liable in damages. There are no hard and fast rules as to the degree of misconduct necessary for behaviour to amount to a repudiatory breach of contract, although dishonesty, serious negligence or wilfully disobeying lawful instructions will often justify

summary dismissal at common law. The Tribunal will consider whether the misconduct has so undermined the trust and confidence inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment.

Findings of Fact

18. In making these findings of fact I do not of necessity refer to all of the evidence before me, but I have taken all of it into account.

General background

19. The Claimant's employment with the Respondent began in August 2007. At the date of her dismissal she had completed 11.5 years' employment and had a clear disciplinary record. Throughout her employment the Claimant was employed as a Healthcare Worker (referred to as "HCA"). She was employed at the Calverton Hill hospital ("the hospital"). This is a 64-bed hospital providing care within a medium secure environment for male and female patients over the age of 18 with mental illnesses and/or personality disorders.

20. The events which gave rise to the Claimant's dismissal took place on the night of 7/8 November 2018. They involved Ms Y, a 35 year old female patient on the Clumber ward where the Claimant worked. Ms Y was admitted to the hospital under the Mental Health Act in 2015. She has a learning disability, has a personality disorder, is on the autistic spectrum, and suffers from hyperkinetic disorder and temporal lobe epilepsy. Ms Y has been violent to both staff and patients during her stay at the hospital.

The events of 7/8 November 2018

21. On the night of 7/8 November 2018 Ms Y was being cared for "with 2:1 observations" (i.e. two members of staff were present with her) in a room attached to a "designated seclusion suite". This was because part of Ms Y's care plan involves her being "secluded" (i.e. placed alone in a seclusion suite) to protect staff and other patients from her when that is necessary. These arrangements reflected the fact that Ms Y was a challenging and potentially dangerous patient for staff to deal with.

22. Shortly after midnight the two staff with Ms Y called for help because of the behaviours she was exhibiting. This resulted in up to a further 7 employees, including the Claimant, being present in the room with the patient. A decision was taken to "seclude" Ms Y (i.e. move her to the designated seclusion suite). Ms Y would not move to the seclusion suite. The incident escalated and the staff present, including the Claimant, used restraint techniques to move Ms Y to the seclusion suite.

23. The nurse who was responsible for the decision to seclude Ms Y and who was in charge from the time of that decision until Ms Y was secluded was Verity Castle. The other employees involved were the Claimant, Rosie Yearl (an HCA), Sophie Gill (an HCA), Brittany Stevenson (an HCA), Regis Manyana (an HCA), Anthony Plumridge (a bank HCA), Ciara Boyle (an agency HCA) and Joseph Manjengwa (a bank registered nurse).

24. Ms Castle had concerns about how one of the HCAs, Mr Anthony Plumridge, had behaved during the period when restraint techniques were being used to move Ms Y to the seclusion suite. Specifically, she was concerned that

Mr Plumridge had put his hands around Ms Y's neck. She discussed her concerns with the Claimant who expressed the opinion that they should be reported. Ms Castle then reported her concerns to Michael Clayton, the Ward Manager. As a result of this CCTV footage of 7/8 November ("the CCTV footage") was reviewed by Mr Clayton. He was concerned by what he saw generally on the CCTV footage and this was drawn to the attention of Dr Ann Simmonds, the hospital's Director.

25. Dr Simmonds was extremely concerned by what she saw on the CCTV footage. She decided a variety of actions were necessary including a safeguarding referral, a report to the police and the consideration of disciplinary action against the employees involved.

The disciplinary process

26. The Claimant was suspended by a letter of 8 November 2018 (page 66). The letter said that during the investigation:

... we will be making investigations into allegations regarding your conduct in the workplace:

Abuse, violence or serious threat of such against persons whilst on Partnerships in Care business, or ill treatment or discourtesy to colleagues, clients or residents and their relatives and other colleagues.

27. No further details were given.

28. The Respondent was naturally anxious that its internal investigation into the events of 7/8 November should not conflict or interfere with the police's investigation. There was contact between the Respondent and the police. None of the witnesses had any direct knowledge of this but from emails in the bundle (pages 95 to 103) it is clear that by 26 November 2018 the Respondent was satisfied that the police had no objection to it conducting disciplinary hearings whilst the police investigation was ongoing. As an aside, it is worth noting that the police investigation did not result in criminal charges being brought against the Claimant.

29. On 12 November 2018 (page 71) the Respondent wrote to the Claimant inviting her to an investigatory meeting on 14 November 2018. The letter stated:

As you are aware a number of serious allegations have been raised regarding your conduct in the workplace:

- *Abuse, violence or serious threat of such against persons whilst on Priory business, or ill treatment or discourtesy to colleagues, clients or residents and their relatives and other colleagues.*

30. No further details were given.

31. The investigatory meeting was conducted by Ms Janes on 14 November 2018 (page 90). The Claimant was not shown the CCTV footage of the events of 7/8 November involving Ms Y. Ms Janes asked the Claimant questions which resulted in her narrating her recollection of the events of 7/8 November involving Ms Y. She provided her recollections of the period when restraint was used. She explained that afterwards Ms Castle had raised with her a concern in relation to Mr Plumridge and that she had told Ms Castle "she had to raise it and document it". When asked "If people were dancing and laughing then how would you feel

about that?" she is recorded as having answered "inappropriate". She said "I don't recall" when asked if she had seen "any of that take place". She did, however, remember saying to Ms Stevenson "you look a bit green" when Ms Stevenson was close to the bottom of Ms Y.

32. When asked what she thought about the incident she said "it could have been avoided". When asked "how?" she answered "Gone down the IM/PRM route. I think that's the only way but that isn't my call". She explained that was Ms Castle's call. When asked "looking back again, would you say that that is a normal incident and how it was managed was normal" she replied "It depends who is managing. I mean we do have very messy restraints at times. It isn't always very textbook like training. There has been worst [sic] if I am honest."

33. During the investigatory meeting no specific factual allegations were put to the Claimant about how she had behaved during the events of 7/8 November, despite the fact that Ms Janes had viewed the CCTV footage. For example, at no point during the investigatory meeting did Ms Janes say to the Claimant "Having viewed the CCTV footage you can be seeing doing/not doing the following [details]. Please can you explain why you did/did not do [details]". Consequently I find that, although the Claimant understood that she was being investigated in relation to the events of 7/8 November involving Ms Y, she did not at the conclusion of the investigatory meeting understand what (if any) specific allegations were made against her.

34. Ms Janes interviewed ten people in total (all the employees involved in the events of 7/8 November as set out above and, also, Mr Clayton and Ray Towey, the Night Manager). She then produced a management report (page 105) ("the Report"). The Report briefly summarises the evidence that Ms Janes had collected (pages 106 to 109). The Claimant is mentioned briefly on a number of occasions: placing the duvet in the seclusion room (at 00.33), laughing (at 00.44), talking and laughing (at 00.47) and then, at 01.14, as being one of five employees who, following Ms Y's seclusion, was "laughing, cheering, throwing their arms up in the air and appear to be re-enacting the incident".

35. The Report then discusses the evidence (pages 108 to 110). It identifies a number of failures: (1) Ms Yearl asking Ms Y to enter seclusion when she was not authorised to do that; (2) Ms Castle failing as the nurse in charge to carry out her own assessment of whether seclusion was required and failing to attempt other less restrictive interventions; (3) seclusion being used when the evidence did not "indicate that the patient was displaying acute behavioural disturbance that required seclusion"; (4) the behaviour of staff prior to the restraint – in particular the fact that 6 to 9 of them were present and pulling her duvet away – which "showed little or no care, respect or dignity for the patient"; (5) actions and comments made by "members of staff" that are "inappropriate, unprofessional and show no regard for patient care"; (6) Mr Plumridge placing his hands around the throat of Ms Y which was not an approved or taught technique; (7) the failure of Ms Castle to "give direction in how to manage the situation; (8) Ms Castle's failure to report or take any action regarding the "unprofessional and inappropriate behaviour displayed during the incident by" Mr Plumridge, Ms Stevenson, the Claimant, Mr Yearl and Ms Gill. Further Ms Castle displaying some of the same behaviour "joining in laughing immediately after [Ms Y] was secluded and within earing [sic] distance of the patient".

36. Overall, I find that the Report contains very little specific information about the Claimant's actions on 7/11 November. The factual information concerning her actions does not go significantly beyond that set out in paragraph 34 above and

the explanation of why she was at fault does not really go beyond the criticisms at (4), (5) and (8) above in paragraph 35, none of which relate exclusively to the Claimant and which are, in the main, vague, generalised and lacking in detail. The consequence of this was that when the Claimant was subsequently provided with the Report it did not provide her with factual details of the allegations against her.

37. Ms Janes recommended that formal disciplinary action should be taken against Ms Castle, Mr Yearl, Ms Gill, Ms Stevenson and the Claimant, that informal action should be taken against Mr Manyana, that Mr Plumridge should be removed from the bank of bank staff, and that Mr Manjengwa should not be used again without further training.

38. On 12 December 2018 the Respondent wrote to the Claimant setting out disciplinary charges against her (page 151). The letter stated:

Having now completed that investigation, the allegations are as follows:

Gross Misconduct – Inappropriate behaviour and serious safeguarding concerns towards a patient.

39. No further details were contained in the letter.

40. The disciplinary hearing took place on 19 December 2018 and was conducted by Ms Stanford. In light of the contents of the Report and the lack of detail in the various letters sent to the Claimant, I find that at the beginning of the disciplinary hearing Claimant was unaware of any specific factual allegations against her. Further, because the Respondent had not disclosed the CCTV evidence to her, she was not in a position to form her own view of what precise allegations she might be facing.

41. Ms Stanford did not set out any specific factual allegations faced by the Claimant at the beginning of the hearing. That is to say she did not identify exactly what was said to comprise the “inappropriate behaviour” or “serious safeguarding concerns towards a patient”. During the disciplinary hearing Ms Stanford, who had watched the CCTV evidence, asked the Claimant a number of questions concerning the events of 7/8 November involving Ms Y. A number of specific questions concerning particular comments or actions by members of staff generally were put to the Claimant (page 157). One of these resulted in the Claimant referring to her “you look a bit green” comment. The only specific allegation put to her concerning the events of 7/8 November was “everyone in that room, including yourself appear to be celebrating”. The Claimant replied “I personally don’t remember that, but I will say that we were congratulating each other for completing the seclusion and no one got injured.” There was a discussion about whether that was appropriate. Later on, the Claimant is asked why she did not raise any concerns about what had happened. Her explanation is “I was just explaining to Alex, this incident is nothing in comparison to some of incidents I have witnessed or been involved in. I’m struggling to understand why I’m here in this position because of that restraint”. (Page 158/159). The Claimant did not as such say convey the impression that she felt that anything she had done on the 7/8 November 2018 merited significant disciplinary action.

42. Following the disciplinary hearing, Ms Stanford took the decision to summarily dismissed the Claimant. She wrote to the claimant on 21 December 2018 (page 161). The letter contained the following conclusions in relation to factual findings included in the Report, albeit they are not completely verbatim

(the Report's findings of fact are between quotation marks):

“the restraint of the patient is from 00.53 to 01.14 when she is secluded. The restraint commences on the bed but continues on the floor. The patient is in prone position twice but is quickly turned into supine. The patient struggles against staff and grabs female staff breasts and kicks out. The patient is unclothed throughout the majority of this restraint.”

During and after the restraint you are present whilst inappropriate comments, actions and gestures were made. Whilst I appreciate you stated you did not witness them all, you also state that this incident was nothing compared to others you have been involved/witnessed and therefore were shocked to be suspended. These comments cause me grave concerns and there is no evidence they were reported to anyone by TR.

“Conclusion of the seclusion, the room door is closed. HCA's RY, BS, TR, SG and CN VC are all outside the seclusion room which is within earshot of the patient and are laughing, cheering, throwing their arms up in the air and appear to be re-enacting the incident.” You personally confirmed this had happened as I had witnessed via CCTV. Your explanation that this is completed regular [sic] to celebrate staff's success is also of a serious concern.

43. The letter went on to conclude:

Having given consideration to the evidence available to me I can confirm that I'm upholding the allegation that your actions whilst dealing with the restraint incident with a vulnerable patient and that your conduct put the patient at significant risk breaching HR 04.2 v11 – Disciplinary Procedure.

44. The dismissal letter does not explain in detail what Ms Stanford concluded the Claimant had done (or not done) which amounted to gross misconduct. It suggests that the factual basis for dismissal is primarily that (1) the Claimant was present whilst others behaved inappropriately during and after the period of restraint but did not seem to regard their behaviour as inappropriate; (2) the Claimant was present and participated in a celebration and re-enactment of the seclusion following its completion.

45. Ms Stanford dealt with her reasons for dismissing the Claimant at paragraphs 25 and 26 of her witness statement. They can reasonably be summarised as Ms Stanford having found: (1) the Claimant had made an inappropriate comment (“you look a bit green”); (2) the Claimant had been present and would have been likely to have seen some of the inappropriate and unprofessional behaviour; (3) she had not reported any of the inappropriate or unprofessional behaviour; (4) she had celebrated the completion of the seclusion. In addition, Ms Stanford had concerns about the attitude of the Claimant to what had occurred, in particular her suggestion that she had seen worse.

46. Ms Stanford's oral evidence was broadly consistent with her witness statement. However, as a result of cross examination, and answers to questions that I asked, it became plain that Ms Stanford's concerns in relation to the claimant during the restraint period were not really about anything the Claimant did but rather were about what others had done in her presence.

47. I find that Ms Stanford's reasons for dismissing the Claimant was her belief that the Claimant had conducted herself as follows:

- a. She had been present when others had behaved inappropriately during the restraint period, would have seen at least some of this behaviour, and yet had not reported their behaviour afterwards;
- b. She had herself made an inappropriate comment during the restraint period (the "you look a bit green" comment);
- c. She had been present when others had celebrated the completion of the seclusion of Ms Y and had re-enacted parts of it, and had herself joined in the celebration;
- d. She had concerns about the Claimant's attitude, in particular because: (1) she had suggested that the restraint of Ms Y had not been worse than others she had seen; and (2) she had suggested that celebrating seclusions was normal.

48. Following her dismissal, the Claimant appealed. Details of her appeal were set out in a letter dated 8 January 2019 (page 166). The appeal was heard by Mr Pritchard at an appeal hearing on 18 January 2019 (page 172). Mr Pritchard rejected the appeal by a letter dated 4 February 2019 (page 178). The approach of Mr Pritchard was to address systematically the points which he understood the Claimant to have raised. He did not himself reach any fresh decision about the general underlying merits of the decision to dismiss. Consequently, at the conclusion of the appeal process the Respondent's reasons for dismissing the Claimant remained those of Ms Stanford.

The reasons for the non-disclosure of the CCTV footage

49. The Claimant was not shown the CCTV footage at any point prior to the conclusion of the disciplinary procedure. The evidence of the Respondent in relation to why it had not shown the Claimant the CCTV footage was confused and inconsistent.

50. The evidence of Ms Janes was that she believed, as a result of a conversation that she had had with Ms Gent, an HR business partner, that the police had told the Respondent that it could not show the Claimant the CCTV footage because that might in some way interfere with the criminal investigation which was at that point ongoing. However Ms Janes had made no further enquiries: she had simply relied upon what Ms Gent had told her.

51. It was notable that the emails contained in the hearing bundle did not include any email recording a clear instruction from the police that the CCTV footage could not be shown to the Claimant or other employees facing disciplinary action.

52. The evidence of Ms Stanford in relation to this issue was slightly different. In her witness statement she referred to the instruction which she believed had been given by the police but also said that she did not think the Claimant should be shown the CCTV footage because "the patient had been humiliated enough" and was unable to give her personal consent to it being viewed. It is notable that in the letter of dismissal, she does not in fact refer to any restriction imposed by the police, but rather states that the Claimant was not shown the CCTV footage because that would have been "a breach of the dignity and respect of the patient

involved in this incident”.

53. Ms Stanford explained in her oral evidence that she had gained her understanding that the police would not consent to the Claimant viewing the CCTV footage as a result of the conversation with Claire Cosgrove, the director of clinical services. She did not know from whom Ms Cosgrove had got her information and made no further enquiries herself.

54. I find that Ms Janes and Ms Stanford understood as a result of internal communications that the police had indicated that the CCTV footage should not be shown to the Claimant. However, I find that neither of them had any detailed knowledge of what the police had or had not said and made no significant enquiries about this. I find that this was because neither of them had any real concerns about not showing the CCTV footage to the Claimant. In particular, Ms Stanford was clearly of the view that it should not be shown to the Claimant in any event because of her concerns for the patient’s dignity.

55. I find that neither Ms Janes nor Ms Stanford gave any careful thought to how the non-disclosure of the CCTV footage affected the Respondent’s ability to carry out a fair investigation (given that the CCTV footage was silent) or the ability of the Claimant to answer the disciplinary charges.

The treatment of others involved

56. The initial disciplinary treatment of the other employees involved in the events of 7/8 November 2019 was as follows. Ms Castle, Ms Yearl, Ms Gill and Ms Stevenson were all dismissed. Informal action was taken against Mr Manyana. No action was taken against Ms Boyle.

57. Of the non-employees, Mr Plumridge was removed from the bank of HCAs, and it was decided that Mr Manjengwa, who was a locum nurse, would not be used again without first receiving training in the use of seclusion and additional supervision.

58. On appeal, Ms Gill had her sanction reduced to action short of dismissal because Mr Pritchard believed that she was an employee with only very short service who lacked experience and training. Ms Castle had her sanction reduced to a demotion coupled with a transfer to a different hospital. This was because Mr Pritchard believed she had demonstrated insight into what happened, had been promoted too quickly to Charge Nurse, and could be relied upon to conduct herself appropriately in future. In the event, however, Ms Castle declined to accept the demotion and transfer and so remained dismissed.

The contract of employment and the Respondent’s procedures

The Claimant’s contract of employment

59. The Claimant’s contract of employment (page 34) placed her under an obligation to:

Act in a responsible and professional manner whilst discharging your duties. Honesty and politeness in dealing with others are essential requirements of employees.

The Respondent’s disciplinary procedure

60. The Respondent’s disciplinary procedure was at page 39. At section 1.3 it

set out possible justifications for disciplinary action. These include:

Aggressive behaviour, assault, or serious threat of such, whilst at work. Ill-treatment of, or discourtesy to colleagues, patients, clients, service users (child or adult) and their relatives.

61. At section 5.1 it sets out a non-exhaustive list of matters which may amount to gross misconduct. These include:

Abuse, violence or serious threat of such against persons whilst on Partnerships in Care business, or ill-treatment or discourtesy to colleagues, clients or residents and their relatives and other colleagues.

Prevention and Management of Disturbed/Violent behaviour

62. This policy provides guidance in relation to the prevention and management of disturbed and/or violent behaviour. It makes clear that:

- a. the hospital aims to “provide high-quality care, which emphasises preservation of the patient’s rights and dignity”;
- b. physical intervention should take place only “in circumstances where there is a real possibility of harm to the person or to colleagues, the public or others if no action is undertaken” (section 2.1);
- c. “physical intervention is only ever used as a last resort. It is not to be used until all other approaches have failed and/or violence is imminent” (section 2.3);
- d. “most disturbed/violent behaviour can be prevented by the use of de-escalation techniques and skilful observation of the patient, which should emphasise the need to engage the therapeutically” (section 8.2);
- e. the NICE guidance emphasises “force applied must be both necessary and proportionate in the circumstances of the specific situation and applied for the shortest possible time”.

The Seclusion Policy

63. This policy provides guidance on when a patient may be secluded. It makes plain that seclusion is a last resort (section 1.4) and that if there is a need for physical restraint to move a patient to a seclusion suite:

This must always be reasonable and proportionate to the risks presented and carried out in accordance with PMVA policy. [Section 1.8]

Factual findings relevant to contribution and the wrongful dismissal claim

64. Before setting out findings in relation to how the Claimant conducted herself on the night of 7/8 November, it is appropriate to bear in mind the views of Ms Janes and Ms Stanford of what the CCTV footage showed. Both of them are highly experienced in the field of mental ill-health. Ms Janes is a qualified nurse and has worked her way up through the ranks of the Respondent. Ms Stanford also has considerable relevant experience, having worked as a Healthcare Assistant earlier in her career, and having been employed as a hospital director

of the Respondent in May 2015.

65. Ms Janes' views are set out most clearly in the Report and I have summarised its findings above. In her oral evidence she summarised the behaviour of the Claimant which gave rise to her concerns as "laughing and showing little regard for the patient's dignity, joining in with other members of staff to laugh and make fun of the incident afterwards".

66. Ms Stanford's view are set out most clearly in paragraph 21 of her witness statement where she states:

In my view the patient had her dignity/respect stripped and in what appears to have been a potentially avoidable situation was placed in a situation that increased her distress, disempowered her and ultimately created a safeguarding situation that then required a number of staff being involved.

67. Although I conclude below that there were significant defects in the way that Ms Janes and Ms Stanford conducted the process leading up to the Claimant's dismissal, I find that their concerns about the Claimant's conduct were genuine as were their concerns generally about the events of 7/8 November involving Ms Y. However they were also formed without any careful analysis of the evidence insofar as it related specifically to the Claimant, as preferred to other employees.

68. Turning to the CCTV footage, in his closing written submissions Mr Wallace identified a number of incidents shown in the footage which he said showed misconduct by the Claimant. This is, of course, exactly what the Respondent failed to do during the course of the disciplinary procedure. I make the following findings in relation to these incidents and what the CCTV footage shows generally (the timings in bold refer to the timings shown on the CCTV footage in the top right-hand corner):

The restraint period

- a. **01:18:40**: The Claimant enters the room as Verity Castle leaves, with Sophie Gill remaining present. She has her hands in her coat pockets, puts her feet up on a chair opposite and engages in conversation to her left (Ms Y is to her right). The CCTV footage does not suggest any attempt to engage with the patient. Ms Yearl who leaves the room had been sitting in a similar fashion when the Claimant entered. This may be poor professional practice by the Claimant but it is not misconduct.
- b. **01:31:50 to 01:32:50**: Ms Castle, the nurse in charge, arrives at 01:31:11. Ms Yearl and Ms Gill are already in the room. Ms Stevenson enters the room followed by the Claimant. Ms Gill goes to get rubber gloves for those present, apparently at the direction of Ms Castle. The five employees now present all put the gloves on. I find that this is at the instruction of Ms Castle. The Claimant is simply present. By this point Ms Castle has taken a decision to seclude the patient. There is no misconduct by the Claimant here.
- c. **01:35:19 to 01:35:56**: by 01:35:19 there are 8 employees in the room. They are crowded around the bed in a way which even the most uninformed observer can see is threatening to Ms Y who is

lying in the bed. Ms Stevenson puts her foot on the bed, assuming a dominant position. Mr Plumridge offers his hand to Ms Y and is trying to persuade her to move into the seclusion suite. She remains lying down and is clearly upset. Again Ms Castle is clearly in charge and the Claimant is simply present. There is no misconduct by the Claimant here.

- d. 01:39:58 to 01:40:33:** at 01:40:18 Mr Plumridge takes Ms Y's duvet and then her pillow from her bed (she is sitting up with her back to the wall). He hands these to the Claimant (via Ms Yearl in the case of the pillow) who places them in the seclusion suite. I accept the Claimant's evidence that it was Ms Castle who had instructed Mr Plumridge to remove these items (and it is indeed the case that Ms Castle is present and in charge). I find the purpose of this was to ensure that Ms Y had her bedding in the seclusion suite when she was moved there. There is no misconduct by the Claimant here.
- e. 01:45:30 to 01:45:34:** at 01:44 Ms Y has removed her clothes because she believes that when she does this people will not make physical contact with her. The duvet is returned to her to cover her nakedness at 01:45:40. The Respondent contends that at 01:45:30 Ms Yearl gestures towards her own groin and she and the Claimant exchange a joke. The Claimant did not accept that this was what the CCTV footage showed. I find that the footage does show Ms Yearl make a grabbing gesture towards her own groin as part of some kind of joke and the Claimant laughing. I find that this was inappropriate levity given that they are two out of the nine employees dealing with a very tense situation: Ms Y is sitting naked on her bed refusing to move to the seclusion suite. This is misconduct by the Claimant.
- f. 01:53:30 to 01:54:20:** at 01:53:30 Ms Y is sitting on the bed covered from the waist down only by the duvet. Mr Manjengwa and Mr Plumridge are standing over her, trying to persuade her to move to the seclusion suite. Ms Y is clearly distressed. She aims a blow at Mr Manjengwa at 01:53:34 and misses. Mr Plumridge moves to restrain her right forearm. She resists and then the employees present descend on her to restrain her. A melee ensues. When matters calm a little, the Claimant is restraining Ms Y's right leg and then at 01:54:15 pushes her forehead back down.
- g.** I find that the moment of physical intervention is quite clearly caused by Mr Plumridge moving to restrain Ms Y after the blow she aimed at Mr Manjengwa (which missed). I find she aimed that blow when Mr Manjengwa was standing over her (she is sitting on the bed naked above the waist) at a distance of less than half a metre with a further three people immediately around the bed and another five people less than two metres away.
- h.** In light of the views of Ms Janes and Ms Stanford of what occurs, I find that the initiation of the restraint is quite clearly in breach of the Prevention and Management of Disturbed/Violent behaviour policy which states that "force applied must be both necessary and proportionate in the circumstances of the specific situation and applied for the shortest possible time". It was not necessary in these circumstances because it is perfectly clear that if those

present had retreated from the bed Ms Y would have remained where she was. She would not have moved to attack Mr Manjengwa. On any sensible view of what the CCTV footage shows she lashes out once because she is distressed and is being crowded in her own bed by nine people. The use of force was equally not proportionate in the circumstances of the specific situation. However I also find that neither the decision to seclude nor the decision to use force was taken by the Claimant. Ms Castle was present when both decisions were taken and was responsible for them. Nevertheless, the Claimant's involvement is a breach of the Prevention and Management of Disturbed/Violent Behaviour policy and the Seclusion Policy.

- i. **01:58:19:** the restraint is continuing although by now Ms Y is on the floor. By 01:58:00 Ms Stevenson is kneeling behind Ms Y (who is lying naked on her right side) and is leaning over Ms Y to restrain her. Ms Stevenson's head is in close proximity to Ms Y's buttocks. I find that at this point: (1) Ms Stevenson pretends to heave; (2) the Claimant makes a joke of this by saying "mate you are looking a bit green" and laughs; (3) in response to that joke Mr Plumridge pushes Ms Stevenson's head down momentarily (so bringing it closer to the buttocks/flank of Ms Y who is naked); and (4) the Claimant "shares a laugh" with Mr Plumridge and Ms Stevenson in relation to this. This is misconduct by the Claimant.
- j. **01:58:59:** the restraint is continuing. Ms Y is in the prone position (i.e. face down). The Claimant is restraining her left arm. Ms Y remains prone for 1.5 minutes before being rolled over into a supine position (i.e. face up). There is no misconduct by the Claimant here.
- k. **02:00:57:** Ms Gill puts a bean bag onto Ms Y's lower legs and throws herself on top to restrain her. I find that the Claimant will not have seen this happen as it happened as she was concentrating on her restraint of Ms Y's right arm. There is no misconduct by the Claimant here.
- l. **02:05:50 – 02:06:10:** The Respondent contends that the Claimant stood on Ms Y's feet. In fact I find that she was trying to position her own foot so as to prevent Ms Y's foot slipping along the floor when an attempt is made to sit her up from the supine position in which she is lying. There is no misconduct by the Claimant here.
- m. **02:11:16 – 02:11:30:** The Respondent contends that whilst kneeling over and restraining Ms Y's left arm the Claimant laughs and jokes with Ms Gill. I find that is indeed what is happening – the Claimant seems to be laughing at a joke that Ms Gill is making about Mr Manjengwa's head which she touches. I find (as the Claimant explained) that they are joking about the fact that Ms Y tried to grab Mr Manjengwa by the hair but in fact his head is shaved. This is minor misconduct by the Claimant.
- n. **02:14:42:** Ms Y is finally bundled through the door of the seclusion suite which is quickly closed behind her. The restraint has lasted for just over 20 minutes.

Events outside the seclusion suite

- o. 02:14:45 – 02:15:10 - Following Ms Y being secluded:** in the immediate aftermath the Claimant is securing the door. Mr Manjengwa is otherwise engaged. The other employees are clearly celebrating the completion of the seclusion. They are laughing and gesticulating with relief. Ms Yearl holds her arms aloft in celebration as does Ms Stevenson. The Claimant having turned around from locking the door sees some of this and is clearly laughing herself. Ms Gill hugs Mr Plumridge. It is clear (although the CCTV footage has no soundtrack) that a considerable amount of noise is being made. This is inappropriate behaviour by the Claimant.
- p. 02:16:20 – 02:16:27:** The Claimant smiles when Ms Gills apparently illustrates how she was grabbed by Ms Y during the restraint. This is marginally inappropriate behaviour by the Claimant.
- q. 02:17:17 – 02:17:24:** The Claimant mimes a pushing motion to Ms Yearl, Ms Gill and Ms Stevenson who are in the room. She appears to be referring back to something that happened during the restraint. This is marginally inappropriate behaviour by the Claimant.
- r. 02:17:32 – 02:17:43:** The Respondent contends that the Claimant laughed as Ms Gill re-enacted how Ms Y had moved. However I find that in fact Ms Gill is showing how she herself was pinned in a corner of the room during the period of restraint. This is not inappropriate behaviour by the Claimant other than that such discussions should not have taken place just outside the seclusion suite.
- s. 02:18:33 – 02:18:36:** The Claimant laughs at something Ms Gill has said whilst walking about the room. This is marginally inappropriate behaviour by the Claimant.
- t. 02:19:07 – 02:19:09:** The Claimant makes a “V” sign to Mr Plumridge. This is inappropriate behaviour by the Claimant.
- u. 02:20:16 – 02:20:24:** The Claimant laughs heartily whilst sitting perhaps one metre from the door of the seclusion suite. This is inappropriate behaviour by the Claimant.
- v. 02:21:24 – 02:21:32:** Ms Yearl apparently re-enacts something that transpired during the restraint or does some other imitation and the Claimant laughs. Again she is sitting perhaps one metre from the door of the seclusion suite. This is inappropriate behaviour by the Claimant.
- w. 02:22:49 – 02:22:58:** The Claimant laughs loudly at something one of the other employees has said. Again she is sitting perhaps one metre from the door of the seclusion suite. This is inappropriate behaviour by the Claimant.
- x. 02:24:56 - 02:25:03:** Ms Castle is looking through the window of the seclusion suite at Ms Y. She seems to speak in the direction of Ms Gill who makes a striking motion, possibly towards her own arm. Ms Castle then looks at the Claimant who does make a striking

action towards her own arm. The explanation of the Claimant for this which I accept is that she and Ms Gill were telling Ms Castle what Ms Y had done towards the beginning of the incident leading to the restraint and seclusion. This is not inappropriate behaviour by the Claimant other than that such discussions should not have taken place just outside the seclusion suite.

69. I make the following finding of fact about what Ms Y would have been able to hear, once in the seclusion suite. Evidence about this was lacking because it was not an issue that the Respondent had investigated. However I note that the seclusion suite was fitted with an intercom and so clearly (and indeed this can be seen from the video) the seclusion room door was sufficiently solid to reduce significantly the passage of sound from one side of it to the other. In light of this I find on the balance of probabilities that Ms Y would have been able to hear the noise made by the staff immediately after she was secluded (so the item dealt with as taking place at 02:14:45 – 02:15:10) because it is apparent from the CCTV footage that a number of people are marking significant noise but would not have heard sufficiently clearly anything between then at 02:25:03. That is to say Ms Y would have been aware of some noise outside the door but would have not directly related that to the events leading up to her seclusion. She would not have been aware of what the employees were talking about and clearly she would not have been able to see their physical movements etc.

Conclusions

Unfair dismissal

Did the Respondent have a genuine belief that the Claimant was guilty of misconduct?

70. Yes. Ms Stanford *believed* that the Claimant had committed acts amounting to gross misconduct as set out at paragraph 47 above. That reason was a potentially fair reason because it related to the Claimant's conduct.

71. It should be noted that Ms Hart in her written closing submissions stated "C does not dispute that R had a genuine belief sufficient to establish reason under ERA 1996 s.98(2)".

If so, did the Respondent have in mind reasonable grounds upon which to sustain that belief?

72. Ms Stanford did, for the following reasons. What Ms Stanford believed was that:

- a. *The Claimant had been present when others had behaved inappropriately during the restraint period, would have seen at least some of this behaviour, and yet had not reported their behaviour afterwards.* The CCTV footage amounted to reasonable grounds for this given that it was not in dispute that the Claimant had not reported what had occurred.
- b. *The Claimant had herself made an inappropriate comment during the restraint period (the "you look a bit green" comment).* The Claimant had admitted this.
- c. *The Claimant had been present when others had celebrated the*

completion of the seclusion of Ms Y and had re-enacted parts of it, and had herself joined in the celebration. The CCTV footage amounted to reasonable grounds for this belief.

- d. *Ms Stanford had concerns about the Claimant's attitude, in particular because: (1) she had suggested that the restraint of Ms Y had not been worse than others she had seen; and (2) she had suggested that celebrating seclusions was normal.* As to (1), this was indeed what the Claimant had said in the disciplinary hearing so Ms Stanford had reasonable grounds for this belief. As to (2), the Claimant did say that (page 158, third entry down), but the significance of that is very limited given what she said earlier in the interview ("I will say that we were congratulating each other for completing the seclusion and no-one got injured.").

73. Taking matters in the round, Ms Stanford did have reasonable grounds for her belief that the Claimant was guilty of that misconduct. However I have found below that a reasonable investigation was not carried out and her ultimate conclusions might well have been very different if it had been.

Did the Respondent carry out as much investigation as was reasonable in all the circumstances?

74. No. This is a matter which results in the dismissal being unfair. A reasonable investigation required that the CCTV footage was shown to the Claimant so that she was given an opportunity to comment on it. This was particularly important because there was no soundtrack and so an analysis of the CCTV footage required assumptions and guess work. The Respondent's failings in this regard were illustrated by the Claimant's oral evidence at the Hearing. For example, the Claimant was asked questions in cross-examination about the matters described at paragraph 68.x above after she had been shown the relevant part of the CCTV footage. She was able to provide an answer which suggested that there was in fact no misconduct.

75. This was a breach of the ACAS Code of Practice, paragraph 4 of which requires employers to "carry out any **necessary** investigations, to establish the facts of the case" [emphasis added].

76. The Claimant also contended that the Respondent should have investigated by carrying out tests whether Ms Y would actually have been able to hear the "celebrations" and subsequent events in the room outside the seclusion suite. The Respondent accepted that there had been no such tests. I find that a reasonable investigation in circumstances where the future careers of a number of employees were potentially at stake did indeed require some investigation of this for the following reasons:

- a. It is obvious from the way in which the Claimant and other employees are behaving immediately after Ms Y was secluded that they are briefly making a significant amount of noise. In light of what the footage showed, it was reasonable for Ms Stanford to conclude in light of her general experience of seclusion suites that on the balance of probabilities Ms Y would have heard the noise made in the first 25 seconds following her seclusion without conducting further investigations.

- b. However, given that the Respondent relied on the Claimant's

conduct generally following the seclusion (i.e. it did not regard the “celebration” as having occurred only between 02:14:45 and 02:15:10), a reasonable investigation did require some investigation of what Ms Y would (or might) have been able to hear between 02:15:10 and 02:25:03, particularly given the presence of an intercom. There was no such investigation.

In all the circumstances, did the Respondent act reasonably in treating the reason as sufficient for dismissing the Claimant

77. No. There are a number of reasons for this.

Procedural failings

78. There were various procedural failings (in addition to the investigative failure set out above) which made the dismissal unfair.

79. **Failure to inform the Claimant of the factual basis for the allegations against her:** This is a matter which in and of itself made the dismissal unfair. The ACAS Code of Practice provides that before a disciplinary meeting the employee should be notified that there is a disciplinary case to answer and that the “notification should contain sufficient information about the alleged misconduct or poor performance... to enable the employee to prepare to answer the case at a disciplinary meeting” (paragraph 9). Further, “at the [disciplinary meeting] the employer should explain the complaint against the employee and go through the evidence that has been gathered” (paragraph 12). The reasons for these provisions in the ACAS Code are obvious: a fair procedure requires that the employee should understand the detail of the allegations made against them so that they can respond to them.

80. However, at no point did the Respondent clearly identify to the Claimant the factual allegations which she had to answer. They were set out in the vaguest of terms before the investigatory meeting and the disciplinary hearing as I have set out above. They were not explained in any more detail at the disciplinary hearing itself. It was particularly important in this case that the factual allegations which the Claimant faced were made clear given that the events of 7/8 November involving Ms Y were fast paced and, due to nine people being involved, potentially confusing. The fact that the allegations were set out differently over time (the way that they were set out in the letter inviting the Claimant to the investigation meeting was different to the way they are set out in the charge letter) made such clear identification of the factual allegations all the more necessary.

81. The consequences of the failure to set out clearly the factual allegations against the Claimant also included a confusion on the part of Ms Stanford about what she was meant to be considering. The dismissal letter does not set out clearly or exhaustively what I have found above (as the result of her written and oral evidence) to have been her reasons for dismissal. It sets out only part of them. I reject Ms Hart’s contention that her evidence to the Tribunal was a *post facto* justification or rationalisation of her decision. However if the Respondent had clearly set out in the charge letter at page 62 the factual allegations underlying the charge that the Claimant had been guilty of “inappropriate behaviour and serious safeguarding concerns towards a patient”, Ms Stanford would have been clear about the factual allegations in respect of which she needed to make findings of fact, when in fact quite clearly she was not.

82. The failure to set out clearly the factual basis of the allegations against the Claimant in and of itself made the dismissal unfair.

83. **Failure to disclose the CCTV footage:** Further and separately, this is a matter which in and of itself made the dismissal unfair. Whilst I accept that there may be circumstances in which it is reasonable for an employer to dismiss an employee in reliance on CCTV footage which has not been shown to the employee, such circumstances did not arise in this case. I so conclude for the following reasons:

- a. The failure of the Respondent to disclose the CCTV evidence to the Claimant despite Ms Stanford relying on it in her decision to dismiss created an unfairness in the process. Ms Stanford could (and did) draw detailed conclusions about what the silent CCTV footage showed but the Claimant had no opportunity to provide detailed explanations;
- b. There was no reasonable explanation for that failure. I do not accept that the police imposed a clear restriction on the use of the footage in the disciplinary proceedings because the evidence produced in relation to this issue is confused and so unsatisfactory for the reasons I have set out above. Further, if there were such a restriction imposed, any reasonable employer would have at least considered whether it should pause the internal disciplinary proceedings, but the Respondent did not do that;
- c. I also do not accept that the footage could not be shown to the Claimant during the course of disciplinary proceedings because to do so would offend the right of Ms Y to respect for her dignity. Clearly it is footage of the utmost sensitivity but, given that the Respondent was relying on it to pursue a misconduct case against the Claimant, Ms Y's dignity would not have been violated any more than it already had been by the Claimant being given access to the footage in a highly controlled environment;
- d. The unfairness created was all the greater because the Respondent did not even provide the Claimant with a detailed description of what it was said she had done wrong, which could have been prepared by reference to the CCTV footage without giving the Claimant access to it.

84. I do not, however, conclude that the Respondent's failure to disclose the incident report prepared by Ms Castle (page 65KK) was a procedural failure sufficient to make the dismissal unfair. This is because the report was brief (under a page long), did not contain any materials which would have been of significant assistance to the Claimant in her defence, and was not relied upon by Ms Stanford in reaching her decision to dismiss.

Other matters alleged to have made the dismissal unfair

85. **Whether the reasons for dismissal were based on the evidence:** I have set out above what the reasons for dismissal were and the evidence relevant to them which Ms Stanford had at her disposal. The reasons for dismissal were based on that evidence, but as set out above there were investigative shortcomings which meant that evidence which should have been available to Ms Stanford was not.

86. **Context of incident: the characteristics of the patient and the culture at the hospital:** the Claimant's contention is, in effect, that any reasonable employer giving appropriate weight to the characteristics of Ms Y and the culture at the hospital, would have concluded that the misconduct of which the Claimant had been found guilty did not warrant dismissal for gross misconduct.
87. The Claimant, whilst not the most senior employee on duty on the relevant night, was very experienced and had indeed worked as a trainer. She worked in a highly regulated business. She had little scope to argue that she had behaved inappropriately because she was infected by a culture which lacked proper standards.
88. However, the misconduct as set out above of which Ms Stanford had found the Claimant guilty all occurred after Ms Castle (who was both more qualified than the Claimant and more senior than her) had taken a decision to seclude Ms Y and after Ms Castle had authorised the use of force to seclude Ms Y. Ms Y had a history of violence and of making threats. The footage of the restraint period is distressing to watch, and it was doubtless an extremely stressful period for all those involved, above all for Ms Y, but also for the employees. Further, once Ms Castle had taken the decisions to seclude and use physical force (both of which Ms Stanford quite clearly regarded as wrong), the restraint period was not only stressful but also dangerous for the other employees, given the history of violence of Ms Y, and that is self-evidently so from the CCTV footage. Indeed, several of the employees involved suffered some physical violence during the restraint period. This can be seen from the CCTV but also in the report of Ms Castle which was available to Ms Stanford (page 65KK). This makes plain that:
- a. Ms Y "grabbed hold" of Ms Stevenson's hair and right nipple;
 - b. Ms Y "grabbed hold" of the Claimant's left nipple and "began to dig her nails in";
 - c. Ms Y attempted to "bite, pull hair, and grab clothing, as well as kicking out at staff"; and
 - d. Ms Y attempted to "urinate on staff" and then "spat at staff"
89. In all these circumstances, I find that no reasonable employer would have dismissed the Claimant for the matters set out at paragraph 47 as Ms Stanford did taking into account that:
- a. The trigger for the extremely difficult restraint and seclusion were decisions by Ms Castle, for which the Claimant had no responsibility.
 - b. The restraint period was stressful and, to a degree violent, for the Claimant. The extent to which she could reasonably be criticised for the "you look a bit green" comment was consequently limited.
 - c. The criticisms of Ms Stanford of the action of the Claimant herself during the restraint are very limited indeed.
 - d. The Claimant was not in charge before, during or after the restraint period. It was Ms Castle who had by far the greater responsibility to make any report that was necessary afterwards. This is reflected in

the way that Ms Castle liaised with the Claimant about what should be done in relation to Mr Plumridge and Ms Castle did indeed then make a report, the Claimant having advised her to do just that.

- e. The Claimant's participation in the post-restraint "celebration" is limited. Indeed, so far as the Claimant is concerned, the use of the word "celebration" is highly questionable. Objectively viewed, although the behaviour is as set out above inappropriate, the CCTV footage suggests above all that the Claimant is relieved that a difficult and violent restraint has concluded. She displays relief. The extent of the display may be unprofessional and its location unwise, but the context must be born carefully in mind. Further, given the absence of investigation in relation to the transmission of noise between the seclusion suite and the room outside, the Respondent could only reasonably have concluded that Ms Y heard noise in part generated by the Claimant in the first 25 seconds after the seclusion was completed.

90. I therefore conclude that these are matters which, quite apart from the investigative and other procedural failures set out above, make the dismissal unfair, taking into account also that the Claimant had considerable service and a clear disciplinary record.

91. **Inconsistent treatment:** This issue does not arise in light of my conclusion that the dismissal was substantively unfair for the reasons set out in the previous section of this decision. However, if I had concluded that in principle dismissal was within the band of reasonable responses as a sanction, I would have concluded that the dismissal was unfair because of the unjustified disparity between the treatment of the Claimant and Ms Castle.

92. I have set out above in paragraph 58 above the Respondent's reasons for upholding the appeals of Ms Gill and Ms Castle. I conclude that those reasons were a sufficient basis for the Respondent to have acted reasonably in distinguishing between Ms Gill and the Claimant.

93. However, further and separately to my conclusions above, I conclude that those reasons were not a sufficient basis for the Respondent to be found to have acted reasonably in distinguishing between the Claimant and Ms Castle and that this is also a matter which renders the dismissal unfair. Ms Castle was senior to the Claimant. Any reasonable employer would have concluded that she was more culpable than the Claimant because:

- a. She took the decision to seclude the Claimant which the Report found to have been wrongly taken (and was in breach of the Seclusion Policy);
- b. She authorised the use of force to effect the seclusion which the Report clearly regarded as unnecessary;
- c. She was in charge and present throughout the period of restraint;
- d. She had (as the Report stated) participated in the celebration to a limited extent after the seclusion;
- e. She made no report of the incident generally. The concerns she raised were directed at the behaviour of Mr Plumridge only.

Polkey Issues

94. My conclusions above are that the dismissal was substantively as well as procedurally unfair. In those circumstances, I conclude that there is no sensible basis for me to conclude that the Claimant might have been dismissed or left the Respondent's employment at a later date in any event.
95. However, in case I am wrong about the dismissal being substantively unfair, these are what my conclusions would have been if I had found the unfairness to be only procedural. I would have concluded that a fair procedure would have involved identifying and putting to the Claimant specific factual allegations. I would have concluded that a fair investigation would have involved showing the Claimant the CCTV footage and obtaining her detailed comments on the specific factual allegations. I would have concluded that in these circumstances the Respondent would have applied its collective mind carefully to exactly what the Claimant (as preferred to other employees present) might be said to have done wrong and that in those circumstances there would have been a 1 in 3 chance of it having reached a decision to dismiss the Claimant.
96. I have reached the figure of 1 in 3 taking into account that I concluded that at no point did the Respondent undertake a careful analysis of the evidence set against specific allegations. Rather Ms Stanford let her understandable dismay with what had occurred generally cloud her judgment.

Contribution

97. On the balance of probabilities I conclude that the Claimant was guilty of blameworthy conduct which contributed to her dismissal in light of Ms Stanford's reasons for dismissing her. That blameworthy conduct was:
- a. Being present when others had behaved inappropriately and having made no report (although her culpability in this respect is very limited, given that she was not the employee who was in charge);
 - b. Making the "you are looking a bit green" comment and then sharing a laugh with Mr Plumridge during the restraint period;
 - c. Her conduct in what has been termed the post seclusion "celebration".
98. It is clear that this blameworthy conduct caused or contributed to the Claimant's dismissal. It is also conduct that means that it is just and equitable to reduce the Claimant's basic award. In all the circumstances I conclude that it is just and equitable to reduce both the compensatory award and the basic award by 25%.

Wrongful dismissal

Were the Claimant's actions such that the Respondent was entitled to treat the Claimant's contract as repudiated?

99. I have set out above the conduct for which Ms Stanford dismissed the Claimant. Neither Ms Stanford's dismissal letter nor her witness statement identified any particular policy which she considered had been breached –

there is a rather vague reference in the dismissal letter to “HR04.2 v11 Disciplinary Procedure”. I conclude that the conduct for which Ms Stanford dismissed the Claimant did not amount to gross misconduct as set out in section 5.1 of the Disciplinary Procedure (page 43) and was not otherwise a repudiatory breach of contract.

100. This is because (1) being present whether others had behaved inappropriately during the restraint period, having seen some of the behaviour and having made no report when she was not in charge; (2) the “you look a bit green” comment; and (3) her behaviour post-restraint when seen in the context of a difficult and violent seclusion precipitated by the decision of a more senior employee were simply not serious enough to be regarded individually or cumulatively to a repudiatory breach of contract.

101. In my findings of fact above in relation to the video evidence I have identified other behaviours by the Claimant which I found amounted to misconduct during the restraint period. However, I have concluded that they were not part of the reasons for Ms Stanford’s decision to dismiss – which I have set out above. I have so concluded because it was clear to me that Ms Stanford had simply not carried a careful forensic examination of the CCTV footage. If she had, she would have made clear findings about what the Claimant could be seen to do on the CCTV footage, but she did not do this either in the dismissal letter or in her evidence.

102. However, taken in context, and bearing in mind the provisions of the contract of employment, disciplinary procedure, Prevention and Management of Disturbed/Violent behaviour policy and the Seclusion Policy, I conclude that the other items of misconduct which can be seen on the CCTV footage but on which Ms Stanford did not rely, do not amount to gross misconduct either. In short this is because the context was that it was Ms Castle who took the decision to seclude and Ms Castle who took the decision to use force. In these circumstances, the fact that the Claimant’s involvement in the seclusion may have put her in breach of the terms of the policies is insufficient for her involvement to amount to gross misconduct.

103. The Claimant was therefore wrongfully dismissed.

Did the Respondent dismiss the Claimant in response to the repudiatory breach?

104. This issue does not arise because there was no repudiatory breach.

105. The issue of remedy for both the unfair dismissal and wrongful dismissal claims will be decided at a further hearing.

Employment Judge Evans
Date: 16 November 2019
JUDGMENT SENT TO THE PARTIES ON
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FOR THE TRIBUNAL OFFICE