



EMPLOYMENT TRIBUNALS

Claimants

Respondent

Mr I Khan and Mr M Ali

v

**Oxford University Hospitals NHS
Foundation Trust**

Heard at: Reading

On: 16-20 December 2019

Before: Employment Judge Gumbiti-Zimuto

Appearance:

For the Claimant: Mr A McPhail (Counsel)

For the Respondent: Mrs H Winstone (Counsel)

RESERVED JUDGMENT

1. The complaint of unfair dismissal brought by Mr I Khan is well founded and succeeds. The complaint of wrongful dismissal brought by Mr I Khan is not well founded and is dismissed.
2. The complaints of unfair dismissal and wrongful dismissal brought by Mr M Ali are well founded and succeed.

REASONS

1. In claim forms presented on the 31 July 2017 the claimants made complaints of unfair dismissal and wrongful dismissal. The issues to be determined in this hearing were: (i) What was the reason or principal reason for the claimants' dismissal? (ii) Was a fair procedure followed? (iii) Was the sanction of dismissal within the range of reasonable responses? (iv) Were the claimants wrongfully dismissed?
2. There remain to be determined the following further issues which for the reasons previously discussed with the parties have not been finally determined in this judgment: (a) If the dismissal was procedurally unfair, should any award be reduced to take account of the likelihood that the claimants would have been dismissed in any event? (b) If the dismissal was unfair, did the claimant contribute to the dismissal? In the light of the judgment on liability below the parties are at liberty to make further submissions in respect of these issues at the remedy hearing.

3. The claimants gave evidence in support of their own cases and relied on the evidence of Mr Muhammad Abbas, Mr Trevor Gittens, Mr Hassan Mahmud, Mr Fred Mafabi, and Mr Sukhjeet Singh. These witnesses attended and gave evidence in defence of their written statements. The claimants also relied on the written statements of Ms Maria Da Silva, Mr Grzegorz Kulikowski and Mr Aftab Hafiz who did not attend to give evidence in defence of their written statements. While I have noted the contents of these statements, I have principally considered the evidence of the witnesses who attended to give evidence as the basis of my conclusions.
4. The respondent has relied on the evidence of Mr Brian Da Cruz, Ms Luan Kimberley Morley, Mr Jamie Caulfield, Mrs Jo Berry, Mr Mark Neal and Mr Mar Wittich all of whom attended to give evidence in defence of their written statements. Some of the respondents witnesses are no longer employed at the Trust and I consider it appropriate to acknowledge that they have made suitable arrangements to be available to give evidence at the Tribunal and in the some cases have had to attend on occasions when they had not originally been scheduled to attend, I thank them for their flexibility which has meant that the liability hearing was able to be concluded in the time allocated and it was not necessary for the liability hearing to be part heard.
5. I was provided with a trial bundle containing in excess of 360 pages of documents. I was provided with several still photographs and photocopies of frames taken from CCTV footage. I was also shown CCTV footage that is referred to in the written statements of various witnesses who each gave their own commentary on what was taking place at the relevant time while viewing the CCTV footage.
6. I made the following findings of fact.
7. The catering for staff and customers in the canteen at the John Radcliffe Hospital, at the relevant time between November 2016 and April 2017, was outsourced to Aramark Limited. The catering for the patients in the hospital was provided by Carillion Plc as part of a PFI contract. Mr Brain Da Cruz was employed by Aramark Limited. Mr Irfan Khan and Mr Muhammad Ali were both employed by the Oxford University Hospitals NHS Foundation Trust (the respondent) but under the day to day management of Carillion Plc who were responsible for supervising the respondent's employees, under its management, by applying the respondent's applicable policies where necessary including carrying out disciplinary procedures and making recommendations, such as whether to dismiss for gross misconduct. The decision whether to follow the recommendation and carry out the dismissal was a decision for the Respondent.
8. At the time of the relevant events Mr Brain Da Cruz was employed to work in the canteen at the John Radcliffe Hospital catering to staff and visitors.
9. Mr Khan's work involved catering for patients. Mr Da Cruz and Mr Khan would exchange greetings in passing to each other, but they were not friends. Prior to 13 November 2016, Mr Da Cruz did not know Mr Ali but he was familiar with his face and knew he was friends with Mr Khan.

10. Mr Da Cruz states that on 10 November 2016, Mr Khan demanded free food from him and when it was refused Mr Khan called him an "arse licker of the white". Mr Khan in his evidence at the tribunal hearing denied that he had said this to Mr Da Cruz but appeared to accept that on 10 November 2016, Mr Ali had referred to Mr Da Cruz as a "chamcha" and he, Mr Khan, had said "Yes chamcha"¹. Mr Da Cruz and Mr Khan were referring to the same thing but appeared to have different understandings of what was meant by what was said.
11. On the 13 November 2016, in the Aramark Office, Mr Da Cruz claims that he was threatened, insulted and assaulted by Mr Khan in the presence and with the complicity of Mr Ali. Both Mr Khan and Mr Ali have consistently denied that anything like this happened.
12. The alleged assault was reported to MM (who was described as Mr Da Cruz's as his supervisor). Soon after 10.30 Mr Da Cruz reported to MM that he had been physically attacked by Mr Khan and showed MM injuries he claimed to have sustained in the attack. MM, during the respondent's investigation, described Mr Da Cruz as having a red neck, his arm red and scratched, his leg deeply scratched.
13. MM approached Mr Ali and asked him what happened, he said nothing happened but then went on to say that there was a disagreement but denied any physical violence, Mr Khan joined in the conversation and said nothing happened. MM described Mr Khan as speaking in a raised voice, agitated and speaking to Mr Ali in a foreign language. Mr Khan denied this describing himself as a Punjabi speaker and Mr Ali is a Hindi speaker. It was Mr Khan's evidence, not refuted by other evidence but challenged in cross examination, that as a Punjabi speaker he is unable to communicate with Mr Ali as a Hindi speaker.
14. At 10.55 on 13 November 2016, Mr Da Cruz sent a text message to Ms Lisa Johnson, General Manager, informing her that he had been "hit" and "threatened" by "Irfan" (i.e. Mr Khan). As a result of the text message Ms Johnson attended at the John Radcliffe Hospital and after consultation with relevant employees of the respondent it was agreed that Mr Khan would be suspended pending an investigation into the alleged incident.
15. On 14 November 2016 Mr Ali was suspended over the alleged incident.
16. Mr Mark Wittich, Regional Director (Carillion), was copied into an email from Mr Simon Furneaux about the incident on the 13 November 2016 (p127). The following day Mr Wittich spoke briefly to Mr Da Cruz about the incident and ascertained that he was fit to continue at work. Mr Wittich also received a telephone call from Mr Mark Sansom, a director of Aramark, who wanted the "immediate dismissal" of Mr Khan. Mr Wittich referred the incident to HR and requested that they investigate. Mr Wittich asked that Mr Jamie Caulfield carry out an investigation into the incident.

¹ Mr Khan defined a "chamcha" as someone who was quick to criticise or complain about others but fails to look at their own shortcomings.

17. Mr Caulfield was not provided with any written terms of reference, but he was provided, on 16 November 2016, with a copy of the email that Mr Furneaux had sent to Mr Wittich and others reporting the alleged assault on the 13 November 2016 (p127).
18. The purpose of Mr Caulfield's investigation was to ascertain the relevant facts and determine if there was a disciplinary case to answer against either Mr Khan or Mr Ali.
19. Mr Caulfield first interviewed Mr Da Cruz on the 16 November 2016 a record of that interview was made (p129-131). There were two further interviews with Mr Da Cruz on 22 December 2016 and on 9 January 2017. These further meetings were to clarify matters which had arisen in the investigation meetings with other witnesses. Mr Caulfield then went on to meet with MM (22 November 2016), Ms Lisa Johnson (21 November 2016) and Mr Simon Furneaux (18 November 2016).
20. Mr Khan and Mr Ali were invited to attend formal disciplinary investigation meetings with Mr Caulfield.
21. Mr Ali met with Mr Caulfield on the 4 December 2016. Mr Ali was accompanied by a work colleague Mr Grzegorz Kulikowski. During his interview Mr Ali gave his version of events on the 13 November 2016.
22. Mr Khan met with Mr Caulfield on the 9 December 2016. Mr Khan was accompanied by his Trade Union Representative Mr Fred Mafabi. During his interview Mr Khan gave his version of events on the 13 November 2016. Mr Khan also produced copies of a text message that he claimed showed that Mr Da Cruz was breaching his confidentiality by discussing the incident and disciplinary process and produced a covert recording of Mr Da Cruz sitting on the serving counter. Mr Khan suggested that the allegations had been fabricated by Mr Da Cruz because Mr Khan had this footage on camera and that he was fearful that Mr Khan would report this to Mr Da Cruz's manager.
23. As part of his investigation process Mr Caulfield also viewed CCTV footage from a camera (camera 10) which showed a lobby area near the site of the alleged assault (but which did not show the area where the alleged assault took place).
24. Mr Caulfield prepared an investigation report for Mr Khan and an investigation report for Mr Ali. The reports had the same content save for the references to the specific claimants and their job titles in paragraphs 1 and 2. Mr Caulfield states in this witness statement:
 - "40. On the balance of probabilities I found that it was more likely than not that Mr Da Cruz was assaulted as alleged by Mr Khan and that Mr Ali had blocked the door. Mr Da Cruz's version of events was more credible and was supported by CCTV which placed the Claimants at the scene at the alleged time. Further, following the incident Mr Da Cruz reported the incident to a colleague and eye witness accounts from the time said that Mr Da Cruz presented with injuries and these were consistent with the account Of Mr Da Cruz. I did not find Mr Khan's reasoning for Mr Da Cruz having fabricated the story as

credible. Even if Mr Khan had reported Mr Da Cruz to a supervisor it was a minor indiscretion. The fact that Mr Khan and Mr Ali also gave differing accounts was also an important consideration. What Mr Ali said did not accord with the CCTV footage which clearly shows that Mr Khan and Mr Ali are both agitated.

41. In my report I confirmed that there was a case to answer and that we needed to proceed to a formal disciplinary hearing. I noted that it may be necessary to dismiss on the grounds of gross misconduct under the recommendations section of my report as assault or physical violence is one Of the defined behaviours which the Trust considers to be Gross Misconduct, see page 318. Whilst I indicated that it may be necessary to dismiss I appreciated that this was not my decision to make in my capacity as Investigating Officer and the matter was referred to Jo Berry to hold a disciplinary hearing. I was not involved in determining the disciplinary findings or sanctions.”
25. Mrs Jo Berry was asked by HR to be the case manager and chair the disciplinary hearings for Mr Khan and Mr Ali. To prepare for the disciplinary hearing she reviewed the investigation reports and watched the CCTV footage. Mr Khan and Mr Ali were invited to attend formal disciplinary hearings which took place on the 21 February 2017 (Mr Khan) and 25 February 2017 (Mr Ali). Mr Khan faced an allegation stated to be “assault or attempted assault or physical violence”. The allegation against Mr Ali was “a serious neglect of duty and responsibility”.
26. At each disciplinary hearing Mr Caulfield presented his investigation findings. Mr Khan attended the disciplinary hearing accompanied by Mr Mafabi, his Trade Union Representative.
27. Mr Khan's version of events was that Mr Da Cruz was the one who was harassing him. During the disciplinary hearing, Mr Khan produced photographs taken from CCTV which he alleged showed Mr Da Cruz serving at the till in the Canteen. Mr Khan contended that the photographs showed Mr Da Cruz with no injuries. Mrs Berry concluded that the black and white photographs were unclear; that the origin of the photographs was also unclear as Mr Khan, who was suspended at the time, had not requested the CCTV or any pictures from either Mrs Berry herself, HR or Mr Caulfield; the photographs were not date or time stamped; Mrs Berry was unable to verify when they were taken or even if it was Mr Da Cruz in the photographs. Mrs Berry *“did not accept the pictures as relevant evidence as Mr Khan could not provide the above information”*.²
28. Mr Ali's formal disciplinary hearing took place on the 25 February 2017. He was accompanied by Mr Kulikowski.

² Paragraph 13 Mrs Berry's witness statement

29. Mr Ali was given the opportunity to present his version of events at the disciplinary hearing.

30. Following the disciplinary hearings Mrs Berry asked that Mr Caulfield carry out an interview with Mr Sukhjeet Singh. The interview took place on the 2 March 2017. Notes of the meeting were taken and forwarded to Mr Singh for his agreement on the 6 March 2017. Mr Singh did not return the notes to Mr Caulfield until 9 March 2017. On the 9 March 2017 Mr Caulfield sent to Ms Amy Jaggars, HR Advisor, a copy of the notes of the interview with Mr Singh together with his email showing agreement to the notes. From the evidence presented at the tribunal hearing there is no indication of when, if ever, this final version of Mr Singh's statement was sent to Mrs Berry.

31. Mrs Berry in her witness statement says:

19. I was aware that I was required to decide, on the balance of probabilities, whether Mr Khan and Mr Ali were guilty of the alleged offences. I took into account the statements provided during the investigation, the investigation report, the representations made by Mr Khan and Mr Ali during the disciplinary hearings and subsequent enquiries made to Mr Singh. In my view it was very clear from the body language of both Mr Khan and Mr Ali that it was not "business as usual" as had been suggested. Having considered all of the evidence I genuinely believed that it was more likely than not that Mr Khan had assaulted Mr Da Cruz and that Mr Ali had facilitated this by securing the door, preventing Mr Da Cruz from leaving or being assisted. Once I had reached this conclusion I then moved on to consider what the appropriate sanction would be.

20. I Specifically considered whether a final written warning may be appropriate for either Mr Khan and/or Mr Ali. However, I had to also take into account the message which this would send to Mr Da Cruz and other staff. It would essentially say that assaults are acceptable in the work place. Mr Khan and Mr Ali's conduct clearly amounted to gross misconduct under the disciplinary policy and the only suitable sanction in the circumstances was to dismiss for gross misconduct, without notice, as physical assault and violence towards colleagues cannot be tolerated.

32. Mrs Berry recommended dismissal of the claimants to the respondent.

33. The decision to dismiss the claimants was made by Mr Mark Neal. On the 3 March 2017 Ms Jaggars, wrote in an email to Mr Eoin Spellman, that following the disciplinary hearings both Mr Khan and Mr Ali "the chair of the hearing has concluded that both [Mr] Khan and [Mr] Ali should be dismissed on the grounds of gross misconduct". On 8 March 2017 Mr Neal wrote to Mr Khan and Mr Ali "to confirm the outcome of the disciplinary hearing". Mr Neal wrote that the panel had found the allegation of assault or attempted assault or physical violence "on balance ... to be proven". The letter continues:

“In view of this, the panel have confirmed that their decision is to dismiss you without notice...”

I have reviewed the information appertaining to the case, and the decision made by the panel. I can confirm that I am in agreement with the decision, and as the designated Trust senior manager with authority to dismiss, I am ratifying the decision to dismiss you from the Trust without notice...”

34. Mr Neal in his witness statement lists the minutes of the investigation meeting with Mr Singh among the documents he considered before his decision to dismiss the claimants was made.
35. Mr Khan and Mr Ali both appealed the decision to dismiss. They provided grounds of appeal under various headings (see p227 re Mr Khan and 232 Re Mr Ali). The appeals were listed to take place one after the other on the 25 April 2017. The chair of the appeal panel was Mr Wittich. Prior to the appeal Mr Wittich was give an appeal pack in respect of Mr Khan (p250) and another appeal pack in respect of Mr Ali (p259). Mr Khan was again accompanied by Mr Mafabi. Mr Ali attended his appeal hearing accompanied by Mrs Kulikowski. Mr Berry attended the appeal hearings and presented her findings from the disciplinary hearing.
36. The appeal panel was satisfied on balance of probabilities that “Mr Khan had assaulted Mr Da Cruz as alleged and that Mr Ali had been involved in the assault by securing the door as alleged, therefore preventing Mr Da Cruz from leaving or seeking assistance”. The panel considered that the sanction of dismissal was appropriate in both cases and dismissed both appeals. In letters dated 3 May 2017 the claimants were notified of the outcome of the appeal.
37. Section 98 of the Employment Rights Act 1996 ("ERA") provides that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show- the reason (or, if there was more than one, the principal reason) for the dismissal, and that it is a reason falling within subsection (2). The conduct of an employee is a reason falling within the subsection.
38. Where an employer has shown a potentially fair reason 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.
39. The Respondent must show that it believed the claimant was guilty of misconduct; it had reasonable grounds upon which to sustain the belief; and

at the stage which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances of the case. It is not necessary that the tribunal itself would have shared the same view of those circumstances.³

40. After considering the investigatory and disciplinary process, the tribunal has to consider the reasonableness of the employer's decision to dismiss and (not substituting its own decision as to what was the right course to adopt for that of the employer) must decide whether the Claimant's dismissal "fell within a band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair"⁴. The burden is neutral at this stage: the tribunal has to make its decision based upon the evidence of the claimant and respondent with neither having the burden of proving reasonableness.
41. The range of reasonable responses approach applies to the conduct of investigations, in order to determine whether they are reasonable in all the circumstances, as much as it applies to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.⁵
42. The employer should not act on the basis of mere suspicion: it must have a genuine belief that the employee is guilty, based on reasonable grounds, after having carried out as much investigation into the matter as was reasonable in all the circumstances. The ACAS Code states that 'a fair disciplinary process should always be followed before dismissing for gross misconduct' (para 23). The level of inquiry the employer should conduct into the employee's (suspected) misconduct will depend on the particular circumstances, including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee: "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase."⁶ How far an employer should go will depend on the circumstances of the case, including the amount of time involved, the expense and the consequences for the employee of being dismissed.
43. The gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. Serious criminal allegations must always be carefully investigated and the

³ British Home Stores Limited v Burchell [1978] IRLR 379

⁴ Iceland Frozen Foods v Jones [1982] IRLR 439

⁵ Sainsbury Supermarkets Limited v Hitt [2003] IRLR 23

⁶ ILEA -v- Gravett [1988] IRLR 497

investigator should put as much focus on evidence that may point towards innocence as on that which points towards guilt. This is particularly so where the employee has been suspended and cannot communicate with witnesses.⁷ The claimant's also referred me to various passages from the Court of Appeal judgment in Salford Royal NHS Foundation Trust -v- Roldan [2010] ICR 1457, including the *following*: "*where ... the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other. Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and to disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant.*"⁸

44. Wrongful dismissal: A dismissal by the employer in breach of contract will give rise to an action for wrongful dismissal at common law. Dismissal without notice is wrongful unless the employer can show that summary dismissal was justified because of the employee's repudiatory breach of contract. There must be shown, on the balance of probabilities, to have been an *actual* repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct.

Mr Khan

Unfair dismissal:

45. In determining whether the dismissal of Mr Khan was fair or unfair, it is for the respondent to show the reason for the dismissal. Before making her recommendation that Mr Khan should be dismissed Mrs Berry had considered the evidence and "*genuinely believed that it was more likely than not that Mr Khan had assaulted Mr Da Cruz*".
46. Mrs Berry stated that she was aware of rumours that some people were scared and intimidated by Mr Khan (including his own line manager). Mrs Berry was clear that this was not her experience of Mr Khan, with whom she interacted daily, her experience was that he was a good employee who had been in his job for over 10 years. Her evidence is that she was not influenced by such rumours, I accept her evidence that she did not have a predetermined view of Mr Khan before she made the decision to recommend dismissal and that she came to that conclusion having heard the evidence she heard. The reason that Mrs Berry dismissed the claimant was because of his conduct, based on her belief that Mr Khan assaulted Mr Da Cruz. That is a potentially fair reason within section 98 (2) ERA.

⁷ A v B [2003] IRLR 405

⁸ At paragraph 73

47. Mrs Berry had reasonable grounds upon which to sustain the belief that Mr Khan had assaulted Mr Da Cruz. Mrs Berry had the statements of Mr Da Cruz, MM, Ms Johnson, Mr Furneaux which were produced during the investigation. She also had the investigation report and the representations made by Mr Khan and Mr Ali during the disciplinary hearings.
48. While Mrs Berry states that she had details of the subsequent enquiries made to Mr Singh it is not clear how she could have done having regard to the timing of events that the evidence has shown. Mr Singh spoke to Mr Caulfield on 2 March 2017. Mrs Berry made her decision to recommend dismissal on the 3 March 2017⁹. Mr Singh was asked to approve a copy of his interview with Mr Caulfield on 6 March 2017 and on 9 March 2017 he approved his interview and the final approved interview was sent to HR. There is no explanation from the evidence of how Mrs Berry could have known about the content of the interview with Mr Singh before making the decision to recommend dismissal. While it is possible that Mr Caulfield spoke to Mrs Berry or gave her a draft unapproved version of the interview with Mr Singh that is not the evidence that has been given by any witness (Mr Caulfield's evidence was that he did not think that he had spoken to Mrs Berry before the 9 March 2017 and he was unaware that the recommendation to dismiss had been sent on the 3 March or that the dismissal letter was sent on the 8 March 2017). In any event even if that was the case, it would mean that Mrs Berry did not have sight of the final draft before making her recommendation.
49. From viewing the CCTV footage Mrs Berry formed the view that "it was very clear from the body language of both Mr Khan and Mr Ali that it was not "business as usual" as had been suggested." The CCTV footage does not show the incident, but it does show the presence of the main protagonists before and after the alleged assault. I accept that it is possible for a person with a knowledge of the working environment to form a view of the CCTV as to the body language of the people shown especially when considering what they say was happening at the time. Different people however may well be capable of forming different views about the CCTV footage. I take into account that Mrs Berry stated that she looked at the CCTV footage several times.
50. A consideration of all of the evidence could lead a person to genuinely believe that Mr Khan had assaulted Mr Da Cruz. The evidence of Mr Da Cruz, if believed, supports the assault. This is the conclusion that was arrived at by Mrs Berry and supported by Mr Neal.
51. The main thrust of the claimant's case however has been based on the contention that there was a failure to carry out a reasonable investigation, this applies to the case of Mr Ali as well as it does to the case of Mr Khan. The respondent, at the stage which it formed the belief that the claimant was guilty

⁹ The letter of dismissal was sent to the claimant on the 8 March 2017.

of the assault, must have carried out as much investigation into the matter as was reasonable in the circumstances of the case.

52. I remind myself that the conduct of investigations must be reasonable in all the circumstances, and that the level of inquiry the employer should conduct into the employee's (suspected) misconduct will depend on the particular circumstances, including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee.
53. I agree with the claimants that at the heart, this case involved a core dispute of fact. The accounts of Mr Da Cruz and those of Mr Khan and Mr Ali were diametrically opposed. There was no CCTV in the office where the assault is alleged to have taken place and no one else witnessed the assault. The claimants make a number of criticisms of the investigation.
54. The claimants contend that witnesses were not interviewed. Mr Ali stated that he informed Mr Caulfield of the names of people who could back his account. While this is disputed by Mr Caulfield, I accept that even if the claimants both did not point to various witnesses who could have been interviewed, the CCTV at the key time showed a number of people who it might be appropriate to speak to. In his evidence Mr Caulfield accepted that he could have identified other people to speak to from the CCTV however he stated that he asked who else he should interview. Mr Caulfield denied that he was given names of people to interview by Mr Ali or Mr Kulikowski. In my view it would have been open to Mr Caulfield to form a judgment as to whom he should speak to and whom he need not speak to, he would have to show that decision was reasonable in the circumstances. On this specific issue I note that the evidence of all the witnesses in this case has been affected by the fact that the relevant events took place between November 2016 and April 2017 and memories have faded in respect of many details including Mr Caulfield when explaining his actions and reasons for his actions..
55. I am satisfied that Mr Caulfield was conscientious in the performance of his duties as an investigator. I am also of the view that while it would have been possible for Mr Caulfield to speak to other people in the course of his initial investigations, it was not unreasonable to adopt the approach that he did inviting the claimants to identify any other persons he should speak to. I am satisfied that Mr Caulfield is being true to his recollection of events when he says that he was not given any names to speak to.
56. The claimants criticise the failure of Mr Caulfield to investigate whether Mr Ali was present at work on the 10 November 2016 as he alleged. This was not checked. The incident on the 10 November 2016 was not a reason for dismissing the claimant, however the inaccuracy of Mr Da Cruz's evidence on this issue placed a significant question mark over his credibility. While I agree that if Mr da Cruz had identified the wrong Mr Ali as being present on the 10 November 2016 it would cast doubt on the reliability of his recollection. However, in my view this is not crucial in this case because the credibility of

Mr Da Cruz's account of events on the 13 November 2016 did not rely solely on Mr Da Cruz's account of events. There was other significant evidence, including the involvement of MM, who received a complaint about the incident soon after it allegedly occurred and who saw the injuries alleged to have been inflicted on Mr Da Cruz which appeared to her recently inflicted.

57. The claimants point out that there were inconsistencies in the evidence of Mr Da Cruz that were not checked. These were that Mr Da Cruz had gone to find MM after Mr Khan left (contradicted by the accounts of the claimants) and about the background to his relationship with Mr Khan. It is further pointed out that the motive alleged was not checked. It was the claimants' account that Mr Da Cruz was lying to achieve dismissal of Mr Khan. It is further stated that there was a failure by Mr Caulfield to explore Mr Ali's assertion that Mr Furneaux had rejected his original witness statement. A Text message was produced suggesting that there had been a breach of confidentiality by the Mr Da Cruz which was not explored by Mr Caulfield.
58. The claimants criticise the failure to explore the CCTV to see whether the injuries the claimant complained of were present or absent before and after the alleged assault. This criticism has to be considered alongside the fact that there were witnesses to Mr Da Cruz's injuries and his demeanour soon after the alleged assault.
59. It is further said that Mr Caulfield failed to check, or present to Mrs Berry, the length of service of the claimants or their records; and that Mrs Berry did not have any information about the disciplinary record of Mr Da Cruz. Mr Da Cruz's record per se is not likely to have been relevant to a decision about whether he was assaulted or not. For example, it was not alleged that he had a history of making false allegations or otherwise acting vindictively towards fellow employees. Mrs Berry was aware of Mr Khan's length of service and had access to his record as well as she had access to that of Mr Ali.
60. It is said that Mr Caulfield failed to adopt an even handed approach and seek exculpatory evidence. This criticism in my view is not well made in the circumstances of this case. The claimants, who have been represented by solicitors since around about the time of the appeal, in my view have not produced evidence which support such a conclusion. The criticism of the investigation report being unbalanced is in my view not made out the report could have contained other information, but it was drafted by Mr Caulfield in the way that it was following a reasonable investigation.
61. Following the production of the disciplinary investigation report and before the disciplinary hearing the claimants contend that further investigations could have been made and should have been made.
62. I make the general observation about the criticisms levelled against Mr Caulfield that in a dismissal based on conduct, it is sufficient for the employer to have a genuine belief that the employee has behaved in the manner alleged, to have reasonable grounds for that belief, and to have conducted an

investigation which is fair and proportionate to the employer's capacity and resources. The employer has to act fairly, but fairness does not require a forensic or quasi-judicial investigation, for which the employer is unlikely in any event to be qualified, and for which he, she or it may lack the means.¹⁰

63. While Mrs Berry made the recommendation to dismiss, the effective decision to dismiss was taken by Mr Neal. Mr Neal reviewed the evidence presented to him by Mrs Berry and upheld the decision based on the conclusions arrived at by Mrs Berry. In view of the arrangements in place between the respondent and Carillion PLC this was a reasonable way to proceed.
64. The claimants rely on a number of matters to show that in any event the procedure was such as to render the dismissal unfair. The investigator was not given terms of reference (in breach of the written procedure). However, the allegation in this case was clear. There is in my view no unfairness to the claimants in the lack of written terms of reference. The claimants contend that Mr Caulfield went beyond his remit and reached conclusions which he then in essence placed into the Report, and which he revealed again to Mrs Berry during the disciplinary hearing when asked by Mrs Berry for his view of the CCTV. Having heard evidence from Mrs Berry and Mr Caulfield I am satisfied that there was no misunderstanding of the role that Mr Caulfield was required to perform and the role of Mrs Berry. There was no unfairness which arose from this. Mrs Berry made up her own mind about the evidence and did not defer to the view of Mr Caulfield.
65. The claimants contend that the decision on dismissals was reached whilst Mr Caulfield was still investigating, i.e. Mr Singh's interview and that Mrs Berry did not have the notes from Mr Singh's interview. In any event, it is said, Mrs Berry at most had the first set of Mr Singh's interview notes, before they had been checked, and amended, by Mr Singh. This criticism it appears to me to be a valid one. There was some significance to the interview with Mr Singh it was a matter that Mrs Berry had required Mr Caulfield to pursue. It should have been given proper consideration by Mrs Berry or at the very least she should have been in position to explain how the chronology which appears in this case came about where the decision is made before the investigation is complete. For this reason and this reason alone the dismissal of Mr Khan is unfair.
66. But for my conclusion that the dismissal was procedurally unfair I would have to consider the reasonableness of the respondent's decision to dismiss and decide whether the Claimant's dismissal "fell within a band of reasonable responses which a reasonable employer might have adopted. I am satisfied in this case that in the case of Mr Khan it did. The conclusion that was arrived at by the respondent was that Mr Khan had assaulted Mr Da Cruz. The alleged circumstances of the assault as accepted by the respondent are properly capable of being considered gross misconduct and dismissal is within the range of responses of a reasonable employer.

¹⁰ Santamera v Express Cargo Forwarding [2003] IRLR 273

67. The claimants contend that the dismissal was unfair, and the respondent cannot rely on the appeal in this case to render the dismissal fair. They say that such defects as there were in the disciplinary hearing were not cured by the appeal. The significant defect in my view arises from the consideration of the evidence of Mr Singh at the disciplinary hearing stage.
68. Mr Wittich in the appeal had available to him the evidence of Mr Singh but the claimants say that Mr Wittich fundamentally misunderstood the significance of the evidence given by Mr Singh in the context of what the claimants were saying. Having heard the responses that were given to the cross examination of Mr Wittich by counsel for the claimants I am not satisfied that Mr Wittich did misunderstand the implications of the points that were being made in respect of Mr Singh's evidence. The conclusion that was reached by Mr Wittich in respect of Mr Singh's evidence was that Mr Singh's evidence was "contrary to the claimants' evidence and supported Mr Da Cruz's allegations". There appeared to me to be a complete failure to grasp that what Mr Singh stated did support what the claimants were saying. Mr Wittich appeared to consider that Mr Singh was being relied on to provide exculpatory evidence in respect of the assault itself (i.e. that he was present at or about the scene when the incident took place) when he was not and was speaking to events that took place after the assault had taken place in a way that was consistent with the claimants' account. Mr Wittich thus fails to correct any defect that may arise from the failure to consider the evidence of Mr Singh.
69. Mr Wittich was not previously uninvolved. He had heard Mr Da Cruz's account on the day after the alleged incident and it is said that he should have removed himself as appeal officer. I am not satisfied that this complaint is justified having regard to the circumstances of this case. In his interaction with Mr Da Cruz, Mr Wittich was concerned with his duty of care to an employee and not concerned with the rights and wrongs of the disciplinary process. The extent of his prior involvement did not mean that he should not have been involved in the appeal. His prior involvement was not tainted in such a way as to render his involvement in the appeal process itself unfair.
70. It is said that Mr Wittich did not hear from witnesses at Mr Ali's appeal hearing and that in Mr Khan's appeal he did not explore matters sufficiently with the witnesses who he heard from. I consider these criticisms not to be well made. There was nothing to prevent either claimant presenting such matters as they desired in the appeal.
71. The criticism of Mr Wittich in failing to arrange, or carry out himself, any further investigations, which he should have done is again unjustified. It was open to the claimants to lead the way in respect of further investigations. By the appeal stage the claimants had the CCTV footage, knew who had been spoken to and who had not been spoken to. They had also been able to get statements from witnesses some of whom attended the appeal. Mr Wittich's approach was reasonable.

72. My conclusion is that the claimant Mr Khan was unfairly dismissed because the procedure that the respondent followed fell below that which was fair in all the circumstances.

Wrongful dismissal:

73. Mr Da Cruz has given a clear and consistent account of the assault that he alleged Mr Khan carried out on him. He reported the incident soon after it occurred to MM. MM witnessed what looked like recent injuries. Mr Da Cruz was questioned during the hearing before me about what appeared to be injuries which were present before the alleged assault. He accepted that he had sustained some other injuries which were old and unrelated to the assault that appeared near the site of what he said were the injuries sustained in the assault. In his cross examination he was clear that he had sustained injuries witnessed by others, about which there was no suggestion that they existed before the alleged assault (i.e. neck injuries).

74. I accept the evidence which was given by Mr Da Cruz in respect of what happened to him. I am satisfied that his account has been consistent in respect of what Mr Khan did to him. I am satisfied that a number of other employees were able to witness injuries. While the CCTV footage does not assist me in concluding one way or the other whether the alleged assault took place it does not provide me with anything that indicates that the account given by Mr Da Cruz was false. I find on balance of probabilities Mr Khan assaulted Mr Da Cruz.

75. Dismissal without notice is wrongful unless the employer can show that summary dismissal was justified because of the employee's repudiatory breach of contract. There must be shown, on the balance of probabilities, to have been an *actual* repudiation of the contract by the employee. By assaulting Mr Da Cruz, I am satisfied that Mr Khan committed a repudiatory breach of contract justifying his dismissal without notice.

Mr Ali

Unfair dismissal:

76. Much of what has been said about Mr Khan applies to Mr Ali in respect of the procedure followed and for the same reasons that the dismissal of Mr Khan was procedurally unfair the dismissal of Mr Ali was procedurally unfair.

77. However, I am also satisfied that in Mr Ali's case his dismissal was unfair because having regard to the apparent circumstances it is unclear what the specific conduct of Mr Khan was found to be guilty of and whether in the light of that the sanction of dismissal was within the band of reasonable responses.

78. The allegation found against Mr Ali was that he had facilitated the assault of Mr Da Cruz by securing the door, preventing Mr Da Cruz from leaving or being assisted. This was not how Mr Da Cruz put the case against Mr Ali initially. The case against Mr Ali appears to have developed.

79. The first reports about the incident was to MM. In her evidence to Mr Caulfield she makes no mention of Mr Ali's role in the assault but refers to his presence printing menus before the alleged assault, and his involvement with her after the assault has been reported to her. The next report is by Mr Da Cruz in his text to Ms Johnson. The text reads *"Hi this is to inform you about the incident happened at work place that Irfan enters in the office n hit me and there was another guy with him also he threatened me saying ill show you out."* The reference to *"another guy"* is to Mr Ali. The text is equivocal and on one reading may suggest that Mr Ali threatened Mr Da Cruz. However, this is not so as it is clear from other evidence given by Mr Da Cruz that the *"hit"* and *"threatened me"* are both references to actions by Mr Khan.
80. Mr Da Cruz is interviewed by Mr Caulfield on three occasions. In the first interview Mr Ali's role is described as *"barged" into the office* with Mr Khan in a manner that was *"aggressive"*. Mr Ali is said to have stood by the office door and observed the entire incident and did not intervene. Mr Da Cruz stated that he was intimidated by Mr Ali's actions. In his second interview with Mr Caulfield, Mr Da Cruz does not expand on the role of Mr Ali. At the third interview Mr Da Cruz was asked about the role of Mr Ali. His response included the following: *"[Mr Ali] slams the door and was very vicious and stands behind [Mr Khan] ... [Mr Ali] was very aggressive, [Mr Da Cruz] was scared of him – he slammed the door and so [Mr Da Cruz] couldn't call for help. I [Mr Ali] was not involved he wouldn't have shut the door and he would have tried to intervene during the incident."* Mr Da Cruz also further states that Mr Ali is *"terrifying"* without adding any further description of his actions.
81. In his investigation report Mr Caulfield's conclusions in respect of Mr Ali were that *"the CCTV footage contradicts"* his statements and that *"the CCTV also captures [Mr Khan and Mr Ali] having frequent discussions after the alleged event giving the impression of collusion and suggesting something more significant than a calm verbal exchange has occurred."*
82. In her witness statement Mrs Berry states: *"15. The allegation against Mr Ali was different. It was not alleged that he had assaulted Mr Da Cruz but it was alleged that Mr Ali had facilitated the assault by securing the door which prevented Mr Da Cruz from escaping or seeking assistance and to prevent witnesses observing the assault."* Mrs Berry's conclusions in respect of Mr Ali were as follows: *"19. I was aware that I was required to decide, on the balance of probabilities, whether Mr Khan and Mr Ali were guilty of the alleged offences. ... In my view it was very clear from the body language of both Mr Khan and Mr Ali that it was not "business as usual" as had been suggested. Having considered all of the evidence I genuinely believed that it was more likely than not that Mr Khan had assaulted Mr Da Cruz and that Mr Ali had facilitated this by securing the door, preventing Mr Da Cruz from leaving or being assisted..."*
83. Mrs Berry's rationale for her decision was not set out until she made a statement for the appeal. In her statement for the appeal she stated that: *"The CCTV footage contradicts Mr Ali statements as they are seen having frequent*

discussions after the alleged event giving the impression of collusion and suggesting that something more significant than a calm, verbal exchange occurred."

84. During the course of questioning Mrs Berry made it clear that she considered that there was a positive duty on the part of Mr Ali to prevent the assault. It is said on the behalf of Mr Ali, that his contract does not place on him any such positive duty; and even if it did so in any way: Was there a breach of that positive duty that is by itself gross misconduct warranting dismissal?
85. I am satisfied that as part of his of employment the claimant is required in the course of his employment to "treat everyone with dignity and respect" and that a failure to do so would amount to conduct which is a breach of contract. Egregious conduct of such a nature is capable of being a repudiatory breach of contract justifying dismissal. The listed examples of gross misconducted in appendix 3 of the respondent's disciplinary procedures includes "a serious neglect of duty and responsibility" which in an appropriate case could encapsulate the type conduct alleged in this case.
86. I have considered whether what Mrs Berry found as Mr Ali's conduct proved gross misconduct. I am of the view that it is not clear that the conduct of Mr Ali was necessarily gross misconduct. The alleged conduct as found by Mrs Berry and Mr Neal is not sufficiently clear for me to understand why they considered that the conduct of Mr Ali was gross misconduct. An unchivalrous bystander is not in the same position as someone who encourages or does acts that facilitate the assault. From the material that appears to have been before Mrs Berry she appears to have made the conclusion that Mr Ali account of the event was not true, but does not appear to have gone on to decide what it is he did that in fact facilitated the assault beyond his mere presence which in my view would not without more justify a conclusion that there was gross misconduct.
87. The dismissal of Mr Ali is unfair for the additional reason that it has not been shown that the respondent found that Mr Ali was guilty of conduct which justified dismissal.

Wrongful dismissal:

88. In his evidence to me Mr Da Cruz stated that: *"Mr Ali didn't say anything, he was looking at me and closed the door and stood in front of the door, still not saying anything. ... The entire time this happening Mr Ali was standing guarding the door. He did not say anything."* The evidence that has been produced before me does not lead me to conclude on the balance of probabilities that Mr Ali was anything other present and behaved in a manner that lacked chivalry. I am not satisfied that his presence was shown by the evidence of Mr Da Cruz to have gone so far as to facilitate the assault. Mr Da Cruz's immediate report of the offence was absent reference to Mr Ali and it was only much later during his third interview with Mr Caulfield that Mr Da Cruz began to illustrate conduct that showed anything beyond presence at and witness to the assault perpetrated by Mr Khan.

89. Mr Ali was dismissed without notice. The respondent has not shown that summary dismissal was justified because of Mr Ali's repudiatory breach of contract. The respondent has not shown, on the balance of probabilities, that Mr Ali's conduct was an *actual* repudiation of the contract. Mr Ali's complaint of wrongful dismissal is well founded.

Remedy

90. A remedy hearing shall take place on **2 and 3 June 2020**. To the extent that any further disclosure is required to take place before the remedy hearing the parties are to disclose all relevant documents by **14 February 2020**.

91. The claimants are to send to the respondent a statement of loss or schedule of loss to arrive no later than **13 March 2020**.

92. If any party wishes to rely on any witness evidence (including the claimants) at the remedy hearing such evidence must either have been already provided to the other parties before the liability hearing took place or be sent to the other parties no later than **13 March 2020**.

93. The parties are to exchange any skeleton arguments on remedy with each other and provide a copy to the Tribunal by **26 May 2020**.

Employment Judge Gumbiti-Zimuto

Date: 30 December 2019

Sent to the parties on: ...07.01.20.....

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For the Tribunals Office

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