EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107324/2019

Held in Glasgow on 12, 13, 16 and 17 December 2019 and 5 and 6 February 2020

Employment Judge M Robison

Mr P Bradford	**Claimant** **Represented by** **Mr P Deans** **Solicitor**
The State Hospital for Scotland	**Respondent** **Represented by** **Mr C Reeve** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim does not succeed and therefore is dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 13 June 2019 claiming unfair dismissal. The respondent lodged a response to that claim, arguing that dismissal in the circumstances was fair.

2. At the hearing, the Tribunal heard first from five witnesses for the respondent, namely Ms Catherine Totten, lead allied health professional who undertook the investigation; Mr Mark Richards, director of nursing and allied health professionals, who conducted the disciplinary hearing; Mr Kenneth Lawton, information, governance and security officer; Mr James Crighton former CEO who commenced the appeal proceedings; and Mr Gary Jenkins, current CEO who conducted the appeal hearing. The Tribunal also heard from the claimant at the February diet.

3. During the hearing, the Tribunal was referred by the parties to a joint file of productions (referred to by page number). Patients are referred to by letter, as they were during the disciplinary process to ensure confidentiality.

Findings in Fact

4. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

5. The claimant, Mr Paul Bradford, commenced employment with the respondent on 3 May 1994 and worked until he was dismissed for gross misconduct effective 4 February 2019, that is for almost 25 years. He was employed initially as a nursing assistant and latterly as a staff nurse located at the State Hospital Carstairs.

6. The respondent is a special health board and one of four high security hospitals in the UK. It provides the national service for Scotland and Northern Ireland for assessment, treatment and care for individuals with mental disorders in conditions of special security.

7. Latterly the claimant worked on Iona 2 ward. This is a ward for intellectually disabled patients.

Relevant policies and procedures

8. The respondent issued a management of employee conduct policy (pages 106 – 132). That policy sets out the procedure for managing conduct. It includes at 5.2.8 the procedure where an employee raises a grievance during the disciplinary process, and states that where they are related, it may be appropriate to deal with both issues concurrently (page 117). This is confirmed in the grievance policy (pages 133-146).

9. Annex B of the conduct policy sets out the investigation process, and states that “a fair, consistent and impartial and thorough investigation will ensure that the facts can be established and will allow managers to make appropriate informed decisions about the next steps” (page 123). With regard to investigatory interviews, it states that “those being interviewed should be encouraged to recall their version of events in their own words with the use of

open, rather than closed, questions being used to gain information, clarify the issues and to check understanding of what has been said".

10. With regard to the preparation of the investigation report, the report writer is required to review and evaluate the evidence, paying particular attention to direct witness evidence, evidence which is inconsistent with documents produced at the time; evidence which is vague, omits significant details or contains inherent contradictions; any bias or influence individual witnesses may have (para 5.1, page 126).

11. The respondent's forensic psychiatric observations policy (page 170 – 178) sets out levels of staff observations of patients as follows: level 1 (general observation) is designed to meet the needs of most patients for most of the time; level 2 (close observations) should be used for patients considered to pose a significant risk to self or others. One or more allocated members of the nursing team are designated to have constant awareness of the specific whereabouts of identified patients through visual observation or hearing. The patient may be permitted by prior agreement of the MDT (multi-disciplinary team) to leave the ward or other clinical area in the company of an escorting member of staff; level 3 (constant observation) is needed for patients at the highest levels of risk of harming themselves or others, who may need to be nursed within arms length or within close proximity of observing staff. The patient must be visually observed by the competent member of staff at all times.

Incident on 5 March 2018

12. On 5 March 2018 there was an incident with Patient B who was not permitted to return to his room as he requested, as a consequence of which the claimant and Victoria Paterson were assaulted.

13. A "datix" incident form was completed (pages 482 – 487) in which it is recorded that the claimant and Victoria Paterson sustained injuries.

14. Patient B was put into seclusion. On the advice of Dr Isobel Campbell, locum consultant forensic psychiatrist, who had consulted staff nurse Graham Crawford, a decision was made to end his seclusion at 5.20 pm that day.

15. Some staff were dissatisfied with the decision to end seclusion so soon, given that the patient had assaulted nursing staff. The claimant in particular raised concerns in regard to how the ending of seclusion had been managed.

Report of incident on 6 March 2018

16. On 7 March 2018, at 13.42, John MacFarlane, senior charge nurse (SCN) completed a "datix" incident form (pages 181 – 183) which recorded an incident which was said to have taken place on 7 March 2018 at 7.10 am as follows, *"I was approached this morning by nursing staff in Iona 2 concerned for the welfare of housekeeper Mary McDougall who was extremely upset and in tears. During my meeting with Mary she stated that she was extremely upset that she observed a patient being assaulted by another patient and that staff did nothing but allowed this to happen and when it did there was no consequences or actions to this behaviour. This alleged behaviour was later supported by the patient who assaulted the alleged victim, by the victim and by another patient".* This was identified as a major category risk and the incident was to be subject to an employee conduct investigation. The staff identified as having been present at the time of this incident were the claimant and Michael Phillips, nursing assistant.

17. John MacFarlane subsequently produced a typed up and signed statement regarding *"an incident which took place in Iona 2 on Tuesday 6 March 2018"* dated 18 March 2018 (pages 194-195). He stated that he had been unaware of any incident on 6 March and no incident had been recorded on RIO (electronic patient records) but that on the morning of 7 March he was advised by Siobhan Lunney that the housekeeper Mary McDougall was upset and he invited her into his office when she advised of the assault that she had witnessed. He states that he then spoke to A and asked if he had participated in any inappropriate behaviours yesterday and he immediately told him that he had slapped B in response to Paul Bradford and Victoria Paterson having been assaulted the previous day. A stated that nothing happened to him which surprised him. He said that had told Victoria Paterson that he was going to assault B and she said good; and this surprised him because normally he would have been restrained or possibly secluded for such behaviours. He

states that he then asked patient B who confirmed that he had been slapped because he had assaulted Paul and Victoria the day before. This was in the presence of Paul and Michael who had done nothing which surprised him. In the statement he stated *"He was clear in his answers with no obvious signs of delusional ideation present during this interaction. He offered no further comments, complaints or concerns"*. He also stated that he was later approached by patient C who stated he had witnessed the assault and was concerned that staff, Paul Bradford and Michael Phillips had done nothing, which he could not understand.

18. Mary McDougall, the housekeeper who reported the incident, produced a typewritten statement dated 8 March 2018 and headed up *"statement regarding events that took place within Iona 2 on Tuesday 6 March at 10.15 hrs approx."*, which she signed on 22 March 2018 which stated as follows (page 189):

"I was within the dining room in Iona 2 washing the floor when I observed [patient A] slapping [patient B] across the face and he proceeded to say, "that's for Victoria". At the time B was sitting on the couch with N/A Phillips (MP) who had appeared to bend down and pick up a newspaper at this point. A then proceeded to walk back over to where he had previously been standing and stood beside S/N Bradford (PB) once more who was sitting on the couch. B then gestured to MP as if to say are you not going to do anything about this, staff just continued to sit about. Patients D and E were in the day area and Patient C was walking up and down as well at this point. I then went up the back of the ward and I assumed that staff would come and speak to me about it, however they never. I was scared, anxious and upset and didn't know what to do as I had never encountered this before. I finished my shift and went home. I returned to work the following day within Iona 2, Wednesday 7th of March. I had been unable to sleep and couldn't get the events of yesterday out of my mind and knew that I would have to speak to someone about it. I proceeded to speak to N/A C. Houston (CH) as she could see I was upset in the morning and she advised me to speak to SCN J McFarlane (JF). I then spoke to S/N S Luney (SL) about the incident yesterday and she informed me that she couldn't sleep also and that 3 patients had informed her that patient A had assaulted

Patient B yesterday however she was unsure whether this had occurred or not? I proceeded to inform her that it definitely had happened and that I had witnessed it. SL stated that JF would have to be informed regarding this and S/N N Walters (NW) and S/N G Crawford (GC) proceeded to speak to JF in his office. JF then asked to speak to me about what had happened and I told him as per above".

19. By letter dated 9 March 2018, the claimant was advised that he was suspended from duty (page 184-185) in regard to following terms of reference: "It is alleged that on 6th March 2018, patient A assaulted fellow patient B in the day room of Iona 2 in the direct presence of staff nurse Paul Bradford and nursing assistant Michael Phillips. It is alleged that these staff members did not respond to this alleged assault. Under the auspices of the State Hospital management of employee conduct policy the investigating officer should: examine the actions of staff nurse Paul Bradford and nursing assistant Michael Phillips in response to this alleged incident; examine clinical record keeping and incident reporting related to this alleged incident; examine the role of wider members of nursing team in response to this alleged incident". The investigator was stated to be Catherine Totten, lead AHP/OT (with human resources support from Linda McWilliams, head of human resources) who was to report findings of the management investigation back to Mark Richards, director of nursing and allied health professions.

Investigation

20. By letter dated 13 March 2018 (page 187), the claimant was asked to attend a fact-finding interview to decide whether formal disciplinary proceedings should be taken. He was advised that he could be accompanied by a trade union representative. He was asked to bring any information or documentation which might be of assistance to the investigation; and he was asked to submit a statement with any information he had relating to the incident, and that he had the right to consult his trade union representative regarding the content of the statement. The claimant did not provide a statement on the advice of his trade union representative.

21. On 14 March 2018, Catherine Totten interviewed Patient A in the presence of an advocacy worker, and a nurse due to observational levels required, and wrote up a note (page 190) of the discussion which Patient A signed, which stated that, “Patient B assaulted a staff member Victoria. The next day you told Victoria you would get the patient back. Victoria told you not to as you were doing well. In the day room you punched Patient B in the face. Staff members Paul Bradford and Michael Phillips were present. You walked away. Both staff members did nothing or said nothing to you”.

22. On 14 March 2018, patient B was also interviewed by Catherine Totten, in the company of an advocacy worker and a senior charge nurse, however the interview was terminated because the patient was distressed and unable to respond to questions and left the room. An attempt was made to resume the interview on 20 March 2018 when the patient confirmed the assault but again became distressed and was unable to sign the statement.

23. On 14 March 2018, Catherine Totten interviewed Patient C in the presence of an advocacy worker and wrote up a note (page 191) of the discussion, “I was in the day room when I saw Patient A punch Patient B in the face. He kicked him in the shin too. Staff in the day room were Paul Bradford Michael Phillips and Victoria. Brian McAteer was in the office and Kerry (keyworker) was in the surgery. Paul, Michael and Victoria saw the assault and said or did nothing. I told patient A he shouldn’t have done that and he told me to shut the fuck up. He said he would punch me too”.

24. On 15 March 2018, Catherine Totten interviewed student nurse Emma Docherty in the presence of Marlene Irvine practice education facilitator and typed up a note of the interview (page 192) in which she stated that she was in Iona 2 on the morning of 6 March 2018 when she heard A say to B he was going to get him back and shouldn’t be assaulting staff; she recalled hearing staff redirecting A from B. She did not see A assault B but did remember seeing A standing over B and staff in the vicinity observing. When she signed the note on 21 March 2018, she added “atmosphere was tense that morning both with patients and staff”.

25. On 21 March 2018, Brian McAteer provided a type statement which he signed. He was the nurse in charge on the morning of 6 March but was not informed of any incident. He first became aware of it when SCN McFarlane telephoned him at home on the morning of 7 March.

26. On 22 March 2018, Catherine Totten, accompanied by Linda McWilliams who took notes, interviewed Mary McDougall (197-199), Victoria Paterson (200 – 202), and Michael Phillips (203-205).

27. On 22 March 2018, Catherine Totten also interviewed the claimant. He was accompanied by his union rep from Unison, Tom Hair, and Linda McWilliams attended and took notes (pages 206 – 210). The claimant subsequently submitted signed notes dated 4 May 2018 which included 38 comments in regard to the version of the notes taken by Linda McWilliams (pages 255-259).

28. The claimant's position in general was that he was not aware of the incident having occurred; that could be explained by the fact that he could have been out of the day room at the time when it was alleged that the assault took place; and that pushing and shoving among patients was not unusual.

29. The claimant was noted by Catherine Totten as saying in regard to 6 March *"any time he was in the dayroom Michael was with A. He could see A that he was unhappy about Victoria she had a black eye. The patients always make threats but I had said to Michael that we needed to keep an eye on them. A was in the day room because he couldn't get a placement. Paul added that in Iona 2 there is always shoving and pushing from the patients. He said that he asked Kerrie to put in the RIO notes that A was making threats and he told JM he was making threats".*

30. The claimant is also noted has having stated that *"he had requested to go to Iona 2, he values his job and had made vast changes to the patient care in the ward; he added not all the staff were happy about this; some had lied to him and he seen this as a driver for change. He stated that there was a group of staff that didn't like him, not long ago there had been a letter sent in that accused him of dragging a patient about a room. He added I knew that wouldn't*

be the end of it. Some people just don't like change". The union rep advised that not everyone gets on with Paul and some people dislike him.

31. By letter dated 29 March 2018 (page 211), Dr Isobel Campbell, locum consultant forensic psychiatrist, provided a statement for the investigation in which she explained her decision to end seclusion of patient B on 5 March; her understanding that staff had been upset and confrontational in regard to the decision to end seclusion; and the fact that she was informed of the incident on return on 7 March.

32. On 3 April 2018, Catherine Totten interviewed John McFarlane. She was accompanied by Linda McWilliams who took notes, which were signed by John McFarlane on 28 April 2018 who made minor amendments (pages 214-217). He advised that staff were not happy about the decision to end seclusion of Patient B on 5 March 2018, which they thought was too soon, stating that the claimant was disgruntled and it was mainly him who was doing the talking. John McFarlane stated that "*what came across was that they felt there was no consequences for the staff assault the previous day".*

33. John McFarlane said that although he had spoken to patient C he had thought he may just have wanted to be part of what was going on. Of patient A he said that he *"had a good relationship with staff, he was credible and was quite proud of himself. He said he done it because B had assaulted Victoria. He felt it was his business to get involved".*

34. When asked if he was shocked, he was recorded as saying that*, "Michael does his job well and Victoria is the same. Paul is always an advocate for the patients so he was surprised Paul was involved".* In response to a question from Linda McWilliam if he believed that the incident happened, he stated that he believed that it could have happened but he could not be certain. He said that *"if patients had said this happened there is a good chance it had. They wouldn't think to make up elaborate lies. Patients know the consequences of their behaviour. He added that he didn't think this was a conspiracy from the patients they were not capable of this".* He advised that there had been changes to A's behaviour and that he was very distressed. Catherine Totten asked if patients or staff could have wanted Paul and Michael off the ward; the answer recorded was

that *"he didn't think people would make up stories like this. He didn't think this was a deliberate plan to set them up".*

35. On 4 April 2018, Catherine Totten interviewed Bryan McAteer. He was asked about the observations levels of A and B given the circumstances and he stated that a higher level of vigilance was not required.

36. On 4 April 2018, Catherine Totten also interviewed Kerrie Anne Hughes, staff nurse and Jonathan Carlin, nursing assistant (accompanied by their POA rep) and Stephen Dale, nursing assistant, in the presence of Linda McWilliams who took notes (page 221 - 228) which were subsequently signed by staff.

37. On 11 April 2018, Catherine Totten interviewed Dr Isobel Campbell, accompanied by Linda McWilliams who took notes (page 229 – 231) which she signed on 17 May 2018. Isobel Campbell stated that she had subsequently spoken to A and B about this and that A was quite perturbed and preoccupied with mixed feelings about what happened noting that the claimant was his key worker. She stated that A was agitated and fearful of reprisal. He had a broken CD to protect himself. B, who has a learning disability and is autistic, was traumatized by what happened and his mental state has deteriorated, he is now on antipsychotic medication. She said that the whole atmosphere on the ward had changed and that autistic and LD patients don't like change. She added that when she spoke to the patients, B was more fragmented but on the 2nd interview with him she was able to confirm what happened. A told her he was surprised there were no repercussions. There are Adult Support and Protection measures in place for both patients as a result of this incident. She stated that in her view the incident had happened.

38. On 11 April 2018, Catherine Totten interviewed Siobhan Lunney in the presence of Linda McWilliam who took notes (pages 232 – 234). She was accompanied by her POA rep. She stated that on the day in question the patients had mentioned the assault but staff did not know if it was true. She agreed with others on the MDT that it had happened, given the impact on the patients.

39. On 16 April 2018, Catherine Totten interviewed nursing assistant Caroline Houston (who was accompanied by her POA rep) along with Linda McWilliams, who took notes (page 235 – 236). She confirmed that on the morning of 7 March she noticed that Mary McDougall looked flushed; that she followed her into the toilets and asked if she was okay. She replied no and told her why she was upset, and told her about the incident. Caroline Houston told her to speak to Siobhan Lunney about it.

40. The investigation was concluded on 24 May 2018, and Catherine Totten produced a report (page 260 – 267, with 10 appendices, including the relevant policies). She confirmed that before interviewing the patients she had obtained capacity to consent to the interview and sign a statement with the RMO. In addition to the interviews with relevant staff, she stated that she had reviewed datix reports, RIO electronic patient records for A and B from the day of the incident until a period of 2 weeks following the incident and the 24 hour patient reports in the days following the incident.

41. She set out her findings in section 2.5, namely that the housekeeper Mary McDougall had given a clear and consistent account of the events on 6 March, and while staff members interviewed did not witness the alleged incident there was consistent opinion that the incident did happen as described, given the impact on both patients and how the patients consistently described the incident. She reported that statements from Isobel Campbell, John McFarlane, Bryan McAteer, Siobhan Lunny, Jonathon Carlin and Stephen Dale all support this finding.

42. She stated that she had reviewed the electronic patient records for patents A and B and that there were various entries by MDT members which confirm the incident is widely accepted to be true with a great impact on the patients as a result of the incident. In regard to mitigation, she made reference to the assault on staff and subsequent seclusion, and the fact that staff believed B was removed from seclusion too soon and that the claimant was noted as being particularly vociferous in this regard. She stated the claimant's position was that there was no assault and there was no mitigation offered other than he felt the allegations could be malicious.

43. Her summary/conclusion is set out at paragraph 2.6 as follows: *"in summary there is consistent evidence from 3 patients and 1 staff member that patient A assaulted patient B in the presence of staff nurse Paul Bradford who failed to respond to this assault. There is substantial evidence from RIO records that the assault is believed to have taken place and it has had significant impact on both patients' mental state resulting in a change to their care and treatment. Staff interviews indicate a wide acceptance the assault took place as described given the consistent accounts from the patients and the impact this has had on them. I have considered the allegations could be malicious as suggested by staff nurse Paul Bradford and asked SCN John McFarlane in his interview if this could be a possibility. I am satisfied the patients involved have no positive relationships with each other and would not have colluded to invent such an allegation. Since a member of staff raised the initial concern rather than patients it appears extremely unlikely there was any malicious intent or collusion in the allegations by the patients. My findings conclude the allegations made were substantiated and staff nurse Paul Bradford has acted in a way which may constitute gross misconduct".*

44. At paragraph 2.7 she recommended that the matter should now be considered at a formal disciplinary hearing; that the actions of the claimant may be in breach of the nurses and midwives professional standards code, and so should referred to them for consideration; that consideration should also be given to the Mental Health (Care and Treatment) Scotland Act 2003 section 315 which relates to the ill treatment and willful neglect of mentally disordered persons; and that consideration should also be given to whether the incident should be reported under the duty of candour requirements given the impact it had on the patients concerned.

Disciplinary hearings

45. After that report was considered by Mark Richards, the claimant was advised by letter dated 8 June 2018 (269 -270) that the disciplinary hearing would take place on 22 June. The investigation report was enclosed. He was advised that the management case would be presented by Catherine Totten, supported by Linda McWilliams, and that they would call John McFarlane and Mary

McDougal as witnesses. He was advised that if he wished to provide a written statement in support of his case that he should submit that within five working days; and that he should advise of any intention to call witnesses prior to the hearing.

46. The hearing was rescheduled to 3 August to accommodate the commitments of the claimant's new union representative, Mick Gratton of POA.

47. By letters dated 25 July (page 274) and 1 August (page 275), the claimant was advised that the independent external advisor would be Gillian McAuley, chief of nursing services, NHS Lanarkshire; the claimant was reminded that any written statement he wished to provide should be submitted prior to the hearing; that John McFarlane was not available and that Dr Isobel Campbell would be called as a management witness; the claimant was advised that as requested copies of the RIO patient notes of A, B and C would be made available to him in redacted form.

48. Handwritten notes were made of the hearing by Michelle Gormley (pages 280 – 309). These were subsequently supplied to the claimant through a subject access request in a redacted form. These notes were typed up and stated not to be a formal minute or intended to be verbatim as their purpose was to record the key points of the discussion as an aide-memoire for the disciplinary panel (310 – 328).

49. The hearing was chaired by Mark Richards who was supported by Kay Sandilands Interim HR director.

50. After introductions and preliminaries, Catherine Totten presented the management case. Mary McDougall and Isobel Campbell were called as witnesses and questioned by Catherine Totten, by Mick Grattan and by the disciplinary panel. Thereafter Mick Grattan and then the disciplinary panel questioned Catherine Totten. At this point, Mick Grattan requested an adjournment due to lack of preparation. Mark Richards acceded to that request because of the lack of a written statement from the claimant and because they wanted to call John McFarlane and for the employee case to be presented after

further preparation. The claimant was advised that a list of visitors who had attended the ward on the day in question would be provided.

51. The claimant prepared a written case (page 329 – 349) for the reconvened hearing, and submitted eight character references (352 – 360). A list of visitors and staff was provided (page 360).

52. At the reconvened hearing on 27 August handwritten notes were again taken by Michelle Gormley (page 361 – 388) and provided to the claimant in a redacted form through subject access request, and subsequently typed up (page 389 – 408). The hearing was again adjourned because the panel wanted to hear from John McFarlane who had been unable to attend.

53. On 3 September 2018, the claimant raised a grievance (page 411 – 413) raising concerns about: the way media contact had been handled; missing copy of his investigation statement; the adjournment of the disciplinary hearing due to a management side witness failing to attend; contact by telephone; lack of support during suspension in breach of policies; all causing his health to deteriorate.

54. By letter dated 7 September 2018, the then chief executive James Crighton responded, stating that he had ascertained that the majority of the concerns raised were already being considered by the disciplinary panel; and that on conclusion of the disciplinary process he would then consider any outstanding issues raised in his grievance (page 414).

55. On 26 September 2018 an article was published in the Daily Record with the headline, "*Carstairs staff suspended after 'encouraging violent patient to punch vulnerable man'"* with the subheading, "*Michael Phillips and Paul Bradford allegedly goaded a patient to attack a man with profound autism"* (pages 420 – 421).

56. By letter dated 10 October 2018, the claimant submitted a further grievance, expressing concern about being denied the opportunity to have his grievance heard until after any disciplinary process was completed which he asserted was in breach of policy; which he said jeopardised his right to a fair hearing; which was further jeopardised by the publishing of the Daily Record article;

which makes false allegations against him; and requesting an investigation into the leak by someone involved in the investigation (page 415).

57. James Crighton replied on 12 October 2018 (page 416), advising that this grievance would be heard as part of the disciplinary process and advising of action taken in regard to the leak; and assuring him that the panel members would not be swayed by media interest.

58. The claimant was referred to occupational health and in a letter dated 5 November 2018 following a consultation by telephone on 29 October 2018, it was recommended that the disciplinary hearing should not progress until his GP recommended he was mentally well enough to participate. By letter dated 6 December 2018 following a face to face consultation the consultant occupational health physician advised that in his assessment the claimant was not fit to return to work but was fit to attend procedural meetings with appropriate support (page 441).

59. The claimant was informed on 3 January 2019 that the adjourned disciplinary hearing was to reconvene on 29 January 2019 (page 442).

60. By letter dated 21 January 2019, Mick Grattan wrote to the respondent requesting RIO notes for patients D and E. He received a response from Ken Lawton, information governance and data security officer, dated 30 January that as these records did not relate to the claimant he had no rights under the GDPR to access them (page 488). Mick Grattan expressed concern about that decision, given they already had RIO notes for A, B and C (page 490).

61. The claimant produced a rebuttal report dated 29 January 2019 (page 445 – 467).

62. The disciplinary hearing reconvened on 29 January 2019. Typed notes of that hearing were produced (page 468 – 479). John McFarlane was called as a witness and questioned by Mark Richards, Catherine Totten and the claimant. Catherine Totten summed up for the management side, and Mick Grattan read out submissions for the claimant (445 – 467).

63. By letter dated 4 February 2019, the claimant was advised of the outcome of the disciplinary hearing. That letter stated, inter alia, that consideration was

given to the cases presented and the witness evidence, and the eight character references. It was stated that the panel was seeking to establish the probability of an assault having occurred and the probability that the claimant was present at the time and what a reasonable response would be from a staff nurse of his experience. The letter continued:

"The panel heard corroborating evidence that led the panel to conclude that there is a high degree of probability that the assault did take place as reported. This conclusion was based on a number of factors: We heard from Mary McDougall that she directly witnesses and heard the incident. Her account of the incident was clear, and there was consistency between her interview and the cross-examination responses during the hearing. Mary McDougall witnessed Patient A moving from your side, assaulting Patient B, calling out "that's for Victoria" then returning to your side. The Panel considered her to be a reliable witness. We could not establish any motive as to why she would fabricate such an event, and believe she had a positive working relationship with you.

The panel heard clear professional opinion from Dr Isobel Campbell that, clinically she was convinced that an assault took place. Furthermore, she did not consider there to be any likelihood of collusion between the patients involved. She reported that the patients were able to give clear account of events, and that she considered these to be reliable. We heard from John McFarlane that Patient A had advised him that you had specifically asked him to assault Patient B. The Panel also considered the evidence provided through the patients' account of the event. Patient A described having perpetrated the assault on Patient B and described that you were present. Patient B described being assaulted by Patient A, and that there was no response by staff, and reported to John McFarlane that you were present.

Patient C reported witnessing the alleged incident and his account of events matches that offered by Patient A and B. The panel were, however, less inclined to consider Patient C's account of events as he may have been influenced by Patients A and B discussing the event.

The panel were careful to explore with John McFarlane how he approached questioning these patients and was content that there was no leading or inappropriate influence in how he elicited a response from each patient concerned. Furthermore, the interview of each patient concerned that was led by Catherine Totten appeared to have been carried out in a thoughtful and unbiased way, and was supported by an independent advocate.

Noise levels within the ward are an important factor. We heard from Mary McDougall that she clearly heard the assault, yet John McFarlane was less sure that such an assault, as described could actually be heard. Panel members had visited a ward and specifically checked the ease of hearing through the glazing separating the day room and dining room. We concluded that the assault, as reported, could be easily heard from the dining room.

In this case you have denied any awareness or knowledge that such an event took place. This has been consistent from the point of your investigatory interview held on 22 March onwards. You have also clearly set out to the panel your skills as a staff nurse and your successes in caring for patients on Iona 2. The panel considered your level of experience, and the assurance that you offered the panel regarding your experience of caring for the Iona 2 patient group in considering if it was probable that you were unaware of the reported assault. The panel did not find your position that you were unaware of the reported assault to be a credible explanation, based on your level of expertise of working in that environment, the awareness of the team of the assault on staff perpetrated the previous day by patient B and the reported concerns about patient B's level of risk.

With specific regard to the level of concern expressed by the team about the management of patient B, we heard from you that the staff on shift came to you to voice concerns about the management of patient B, and that you shared those concerns. Furthermore, it is a fact that you were on duty the day before when patient B assaulted staff including yourself. You advised the Panel that the level of concern about this incident was that the seriousness of the incident on 5 March was underreported, and it was in fact an attempted hostage taking as opposed to an assault on staff.

The panel then considered the likelihood that you were present at the time of the alleged assault. It is the view of the panel that it is beyond reasonable doubt that you were present at the time of the alleged assault. We heard from Mary McDougall that she directly witnesses the incident, and that you were in the immediate vicinity of Patient A. Her account of the incident is considered by the panel to be consistent and reliable.

The panel also considered the evidence provided through patient accounts of the event. Patient A described having perpetrated the assault on Patient B and described that you were present. Patient B described being assaulted by Patient A, and that there was no response by staff.

We require all of our nursing staff to deliver reasonable standards of care at all times, including taking reasonable steps to protect patients from the actions of other patients. In this case, it would be reasonable to expect you to have intervened in this incident, not necessarily to have prevented the alleged assault, but as a minimum to offer care, support and an appropriate and proportionate response after such an event. To do nothing is arguably conscious neglect of the patients in our care.

Given the heightened concern regarding patient B which you were at the forefront of expressing, it was difficult for the panel to accept that you would have been completely unaware of this assault taking place. The assault itself was heard by Mary McDougall, Patient A is reported to have called out, that's for Victoria, and this took place in a context of heightened concern and within close physical proximity of you in the day room. Mary McDougall reported that both the assault and the statement made by Patient A at the time of the assault were clearly heard.

The panel considered what could have reasonably been considered as mitigating factors in this case. We reviewed the character references offered, and it is a fact that these were entirely positive. Throughout the hearing, we also heard positive accounts of your experience, your care for the patients in the hospital and the positive impact you have had. That made it difficult for the panel to understand why you would willfully and knowingly allow an assault to take place without intervening to offer support to the patients concerned.

In summary the panel considered this case in the context of gross misconduct. It is the unanimous belief of the pane that you have been grossly and wilfuly negligent in your duties, as supported by the evidence in this case. As such the decision of the panel is summary dismissal without notice. The panel did not consider that any other sanction would be reasonable in this case".

64. The claimant was advised that Police Scotland, Disclosure Scotland and the NMC were to be informed. He was advised of his right to appeal.

65. By letter dated 5 February 2019, the claimant was advised of the outcome of his grievance which was not upheld (page 496 – 498). The claimant was advised of his right to appeal that.

Appeal hearing

66. By letter dated 12 February 2019, the claimant intimated grounds of appeal in respect of his dismissal, as follows: *"there was insufficient consideration of my explanation of the circumstances regarding the events of the day; Mary McDougall's account of her location during the alleged incident is inconsistent; Mary McDougal inaccurately locates two other patients D and E in the day area at the time of the alleged incident; Accounts of the whereabouts of staff in the ward at the time of the alleged incident are inconsistent and contradictory; the details of the assault that is alleged to have taken place are inconsistent; Mary's account of her response to witnessing the alleged incident is inconsistent with her presentation on that day, and conflicts with her employee responsibility to report concerns; Paul Bradford was frequently out of the day area on the morning of the alleged incident in response to staff visiting the ward; there are discrepancies between reported events and the information recorded; the objectivity of staff involved in the investigation could be compromised; the evidence of the statement that was used by John McFarlane during the initial hearing on 29 January 2019; the sanction imposed was too severe and disproportionate to the conduct; there was unfairness and bias approach regarding panel members; my previous disciplinary record is clear and should have been considered in imposing a penalty less than dismissal; the state hospital and panel members have not taken into account my exemplary record over the last 26 years of service".* He stated that he would

be accompanied by Mick Grattan and asked to recall Mary McDougall as a witness.

67. By letter dated 18 February 2019, the claimant appealed the outcome of his grievance (page 502).

68. By letter dated 20 February 2019, the claimant was advised that an appeal hearing would take place on 13 March, and that it would be chaired by the chief executive; he was advised to submit his written statement of case and any supporting information and to confirm which witnesses he intended to call prior to the hearing (page 507 -508).

69. By letter dated 25 February 2019, the claimant requested full unredacted minutes for the disciplinary hearings which he attended. By letter dated 29 February, James Crighton confirmed that the claimant had been provided with copies of the first two hearings as part of his subject access request, and would be provided with those for the hearing when they had been finalised by HR (page 509). Mick Grattan made a further request for unredacted minutes on 1 March 2019 (page 513).

70. By letter dated 4 March 2019 (page 511), the claimant was advised that the management side would be calling Gillian McAuley as a witness.

71. Mick Grattan submitted amendments to the notes of the hearing (page 528).

72. Mark Richards produced a management statement of case for the appeal (pages 514 – 526) which was forwarded to the claimant by letter dated 8 March 2019 (page 529).

73. The claimant produced detailed grounds of appeal (pages 531 – 536).

74. On 12 March 2019, the claimant forwarded detailed grounds of appeal and consequently the appeal was postponed from 13 March to allow management time to consider that document (page 537).

75. The new chief executive, Gary Jenkins, subsequently agreed to a further postponement of up to six weeks, to facilitate the claimant's decision to call Mary McDougall, but who was at that time on sick leave (page 549).

76. The claimant was subsequently informed by letter dated 10 May that the appeal hearing would take place on 4 June 2019, and that it would be chaired by Gary Jenkins, who would be supported by John White, director of human resources NHS Lanarkshire and the internal independent advisor would be Craig Stuart, associate nurse director for East Ayrshire Health and Social Care Partnership. He was told that the management case would be presented by Mark Richards and Kay Sandilands (pages 550-551). He was advised that management side would be calling Gillian McAuley and Mary McDougall as witnesses.

77. The appeal hearing took place on 4 June 2019 and notes of the hearing were typed up (pages 555 – 568).

78. The claimant had prepared a detailed document for the appeal headed up *"key points for consideration",* stating that *"the discrepancies, contradictions and gaps in evidence presented here and in the rebuttal report of 29.1.19 give weight to the view that the severity of the disciplinary sanction imposed is disproportionate to the evidence provided"* (569 – 578).

79. By e-mail dated 5 June from Mark Richards to John White (page 579), he advised that he had clarified with the investigating officer the rationale for not interviewing patients D and E, namely that the investigating officer had gathered consistent accounts of events reported from three patients and 1 member of staff which, in consultation with HR, was considered sufficient; the investigating officer took account of the distress caused by this incident to the wider patient group, noted that the mental health of patients D and E was deteriorating, and that interviewing these patients would exacerbate this deterioration. With regard to the recording of patient whereabouts, he advised that the recording sheet is used specifically for recording of patient whereabout when they are in the bedroom area, and to evidence that a well-being check has been completed, and therefore could not be used to pinpoint the location of patient D and E in the day area at the time of the alleged assault.

80. In an undated letter sent by the claimant by e-mail dated 7 June, he complained about the failure of the respondent to forward to him an appeal pack prior to the appeal, although it transpired that Michelle Gormley had attempted to send

it to the claimant's union representative, and that he had all of the documents in the pack in any event (page 590).

81. By letter dated 14 June 2019 (page 592 – 594), the claimant was advised of the outcome of his appeal, as follows:

"Your representative considered the decision to dismiss you from your employment was made on the basis of inconsistent and unreliable evidence, however this was not evidenced to the panel at the hearing or in examination of the written submissions.

Your representative considered there to have been insufficient consideration of your explanations of the circumstances in regard to the events of the day in question, this was not evidenced to the panel at the hearing or in examination of the written submissions.

It was suggested that new information was used as grounds for your dismissal, the panel examined this claim in detail and did not find evidence of this in examination of the written submissions. In addition, the panel sought specific clarification from the management representatives, at the hearing, which confirmed the detail in the written submissions.

The suggestion that media reports had biased the disciplinary process was not evidenced to the appeal panel.

You suggested during the hearing that a further two patients, identified as being in the vicinity of the incident by the witness Mary McDougall, were not in fact in the day room.

The panel examined this claim in detail and established that these patients were included in the statement provided by the witness, furthermore the investigating officer confirmed that consideration had been given as to their inclusion in the enquiry.

The decision not to include these patients in the investigation was due to the fact that the investigating officer gathered consistent accounts of events reported from two patients and one member of staff and this was considered to be sufficient in providing a reasonable and reliable breath of responses.

Furthermore this substantiated the evidence from Mary McDougall that a further two patients were in the vicinity of the incident.

The panel were not able to evidence your claim that the said patients were in fact in the hub area of Iona. This included attempts to review ward records on patient movement.

Your representative considered that the witness Mary McDougall could not have witnessed any incident as the television in Iona 2, day room would have obstructed her view. It was also suggested that the investigating offices were incorrect to assume that their simulated visit to an empty ward allowed them to assume the witness could have seen and heard any untoward incident. The panel examined this claim in detail and undertook a site visit to Iona 2 to fully understand if it were indeed possible to have seen and heard an incident from the exact location stated by Mary McDougall. As the time of this visit the day room was occupied and the television was on. The panel unanimously agreed it was highly probably that an individual could easily see and hear activity from the dining room location cited by Mary McDougal.

The panel examined the decision to apply summary dismissal as a sanction and concluded this to be entirely appropriate in this circumstance. The panel considered this in the context of gross misconduct and held a reasonable belief that you were grossly and willfully negligent in your duties as supported by the evidence presented".

82. By letter dated 14 June 2019, the claimant was advised of the outcome of his grievance appeal which was that it was not upheld (page 595).

83. By e-mail dated 12 August 2019, the claimant sent to the respondent amendments to the notes of the appeal hearing (page 599).

Relevant law

84. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial

reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

85. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

86. In a dismissal for misconduct, in *British Homes Stores Ltd v Burchell* [1980] ICR 303 the EAT held that the employer must show that: he believed the employee was guilty of misconduct; he had in his mind reasonable grounds upon which to sustain that belief; and at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

87. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to "reasonableness" under section 98(4) (*Boys and Girls –v- McDonald* [1996] IRLR 129, *Crabtree –v- Sheffield Health and Social Care NHS Trust* EAT 0331/09).

88. The employer does not need to have conclusive direct proof of the employee's misconduct – an honest belief held on reasonable grounds will be enough, even if it is wrong. The *Burchell* test was subsequently approved by the Court of Appeal in *Panama v London Borough of Hackney* 2003 IRLR 278. The principles laid down by the EAT in the *Burchell* case have become the established test for determining the sufficiency of the reason for dismissal where the employer has no direct proof of the employee's misconduct, only a strong suspicion.

89. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed as well as the penalty of dismissal were within the band of reasonable responses (*Iceland Frozen Foods Ltd –v- Jones* [1982] IRLR 439). The Court of Appeal has held that the range of reasonable responses test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached (*Sainsbury v Hitt* 2003 IRLR 23). The relevant question is whether the investigation falls within the range of reasonable responses that a reasonable employer might have adopted.

90. The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

Tribunal's deliberations and decision

91. It may be of assistance to start this deliberations section by confirming what this case is not about. Whatever I may think happened on 6 March 2018 that is nothing to the point. As is clear from well-established case law, I may not substitute my own view of the question whether dismissal was reasonable or not. The question I must ask is whether the respondent's actions and conduct fall within the range of reasonable responses open to an employer in these circumstances; and that question applies to the extent of the investigation, the procedure carried out and to whether dismissal was the appropriate sanction in the circumstances.

92. It is for that reason I that I have not required to make findings in fact about what actually happened on 6 March 2018. This is not least because there is no question of contributory fault (which may have necessitated such) and I understood that both Mr Deans and Mr Reeve agreed when I suggested this is an "all or nothing" case.

93. Further, during the hearing I was taken through by both the claimant and the respondent's representative considerable detail about the specifics of what was said during the disciplinary hearings. While I appreciate that both representatives considered it important to bring that level of detail to my attention, I did not take the view that the detail of what was said had a major influence on my decision, not least because there was one central and crucial fact in dispute in this case, and because I was considering reasonableness in the round. Beyond that, except how some of what was said during the hearings was recorded, which I did not consider to be significant overall, little was in dispute. As is often the case, the dispute lay in the significance of the facts and in the application of the law to otherwise generally undisputed facts.

94. Mr Deans and Mr Reeve delivered oral submissions based on a written script, which I consider in these deliberations. Both set out the key features of the relevant law which is well established and not disputed.

95. Mr Deans submits that it is not appropriate to deal separately with substance and procedure, because the two are inextricably mixed in this case. While I agree that there is no clear cut division between whether a decision is substantively or procedurally unfair, I have considered the decision from both points of view, considering all of the evidence in the round, and in doing so considered the issues which arise in this case both individually as well as cumulatively.

96. Mr Deans appears not to have pursued, at least not with any force, a number of concerns which were raised in the ET1 and a number which were not stressed in submissions. For the sake of completeness however I deal with them in this decision.

Reason for dismissal

97. The burden of proof is on the respondent to show that the reason for dismissal is a potentially fair reason. The first issue to consider is thus whether the respondent has shown that the claimant has been dismissed and that the reason for the dismissal was misconduct.

98. Mr Deans made it clear in submissions that the claimant does not dispute that the claimant was dismissed for misconduct which is a potentially fair reason for dismissal. This means that the first limb of the *Burchell* test is conceded, and therefore I concluded that the first limb of the *Burchell* test had been met and that the respondent believed the claimant to be guilty of misconduct.

99. Accordingly the respondent has shown that the reason for the dismissal of the claimant was conduct, which is a potentially fair reason for dismissal.

Reasonableness of decision to dismiss

100. The Tribunal then turned to consider whether the respondent acted reasonably in dismissing the claimant for misconduct. The burden of proof is neutral at this stage. The question is whether it was reasonable in all the circumstances for the respondent to dismiss the claimant for misconduct. As discussed above, the issue is not whether this Tribunal would have dismissed the claimant in these circumstances but whether the dismissal was within the band of reasonable responses available to the respondent in all the circumstances.

101. Mr Deans confirmed that the focus is on the second and third limbs of Burchell in this case which interplay. He submits in essence that the respondent did not have a genuine belief in the claimant's misconduct not least because they had not carried out as much investigation as was reasonable before forming that belief.

The Investigation

102. Mr Deans had a good number of concerns about the investigation. He pointed out that this was Catherine Totten's first investigation and it was suggested that her lack of experience led to errors. I did note however that witnesses confirmed that she was supported by Linda McWilliams who was an experienced senior HR official. Mr Deans made the following submissions regarding the investigation:

103. *The claimant was not provided with any detail of the allegations made against him except for the broad terms of reference:* In my view the terms of reference set out the allegations clearly so I could not accept this submission. I accepted Mr Reeve's submission, based on Catherine Totten's evidence, that she had

explained the terms of reference and the allegations to the claimant at the start of his investigatory interview, when reference was made directly to the names of the patients alleged to be involved.

104. *The investigating officer had pre-judged the claimant's guilt*: Mr Deans submitted that it was evident that Catherine Totten had predetermined matters from the fact she failed to put the specific details of the allegations to the claimant and that she had made no effort to investigate whether his assertion that he had not seen the assault might be true. I did not however accept that the way that questions were put suggested that she had prejudged the claimant's guilt and in any event that did not impact on the fairness or reasonableness of the investigation. While the way that questions were framed was perhaps not ideal in some places, I accepted that the claimant had every opportunity, in the investigation interview on 22 March and subsequently, to set out his position in response and to comment on the specifics of the allegations. It is difficult to see what it was that he was expecting Ms Totten to do, beyond taking statements from others regarding the whereabouts of the claimant at the time in question. In fact, Mr Deans only highlighted two aspects in submissions that he said suggested a pre-judging, namely the fact that Catherine Totten's questions were vague and she did not put the specifics of the allegation or asked about the slap to the clamant; and the suggestion to John McFarlane that *"its difficult to see how staff could not have seen this incident in the day room"* but noted that his reply to this was *"you couldn't guarantee this 100%".* I did not accept Mr Deans submission that she found no need to put the specifics to the claimant because she had already decided that they were true. I concluded that there had not been any material failure to adhere to the respondent's policies.

105. *The investigating officer came to conclusions which were unsupported by evidence*: this Mr Deans submitted was due to a failure to critically question or analyse the information being provided and to take account of inconsistencies in the evidence. The focus here was on the evidence of Mary McDougall, and that those in the day room may not have seen her, and her contradictory evidence about where [exactly] she was at the time of the alleged assault.

106. I did not accept Mr Deans submission that there was no objective evidence upon which the respondent could rely. The key and central point in this case is whether it was reasonable for the respondent to conclude a) that the assault had happened and b) that the claimant had witnessed it and done nothing. In coming to the conclusion that she did, Catherine Totten was entitled to take into account the totality of the evidence of Mary McDougall. The information she had was that she had been upset and told a member of night shift; that member of night shift had told her to tell nursing staff coming on that day; that Mary McDougall got on well with the claimant; the information of Siobhan Lunny that the patients themselves had mentioned it. She had the information from the patients themselves; and her decision to discount some of what patient C had said was based on the interview with John McFarlane. Further, she had the view of a number of members of staff, but in particular the view of Dr Isobel Campbell, that in her professional opinion the assault had taken place. I considered that it was reasonable to rely on these clinical opinions, despite the fact that no clinicians had actually witnessed the assault. She had all of this information and otherwise only the assertion of the claimant that he had not seen any assault. Mr Reeve submitted that there was little more which could be done in light of his simple denial and that it was a "normal busy day".

107. *The investigating officer overstepped her role in concluding that the allegations were substantiated*: this he submitted went beyond her remit which was to gather and collate facts. Again her choice of words in the report may not have been ideal, but there was sufficient material, discussed above, which pointed to the recommendation that a disciplinary hearing be conducted.

108. *None of the clinically trained staff noted any change in the presentation of either patient A or B on 6 or 7 March*: I did not accept that the evidence supported such a submission. While Mr Deans took the Tribunal through the RIO notes which he asserted supported that submission, that seemed to relate only to the time immediately after the alleged incident, and this was to ignore other evidence both from the RIO notes and from others interviewed regarding the patient's reactions, not least Isobel Campbell.

109. *Wrongly concluding that the claimant's position was that there was no assault:* rather the claimant's position was that he was not aware of any such assault, and despite that concluded he had put forward no mitigation. I noted that consideration was given both to whether an assault had taken place and whether he should have been aware of such an assault. The claimant had ample opportunity in the investigatory interview (and subsequently) to put forward his case; and in any event if Catherine Totten did misunderstand his exact position, I did not consider that impacted on the reasonableness of the decision which she made to recommend disciplinary action.

110. *Wrongly concluding that the claimant was unhappy about patient B having been released from seclusion*: Mr Deans stated that his frustrations in fact arose from management's failure to follow policy and have an exit plan. Again I did not consider that even if there was such a misunderstanding on Catherine Totten's part that had the result of rendering any decision unreasonable.

111. *That she was selective in who she decided to interview*: Mr Deans submitted that although Mary McDougall identified patients D and E as being present, the claimant's position was that they had already left the ward prior to the time of the alleged assault. Catherine Totten chose not to interview them or explain why she had not done so and she failed to access their RIO notes which would have confirmed that they were not there, and this would have cast doubt on the reliability of Mary McDougall's evidence. However, as Mr Reeve submitted, there was no indication that they had witnessed the matter nor that they could give any further evidence which could assist the investigation. Further these patients were extremely vulnerable learning disability patients with significant mental health issues. I accept that this decision was perfectly reasonable in the circumstances. Further as Mr Reeve pointed out, no assertion was actually made by the claimant during the disciplinary or appeal process that they should have been interviewed to provide support for his position, rather that their whereabouts would cast doubt on the credibility of Mary McDougall.

112. *The investigating officer had failed to sufficiently investigate the possibility of malicious intent on the part of certain nursing staff who did not like him or his methods*: I did not accept that Catherine Totten did not take this into

consideration when conducting the interviews. I noted for example that she had asked John McFarlane about this in his interview and had addressed it in her investigation report. Further, Mr Reeve pointed out in submissions, the investigation report had noted the claimant's assertion that previous allegations were raised against him by nursing staff and that management had taken no action against him once they investigated the matter.

113. As Mr Reeve stressed in his submissions the requirement is to conduct as much investigation as is reasonable. He referenced a number of cases setting out the correct approach and in particular *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94; *Westminster City Council v Cabaj* 1996 ICR 960, *Sharkey v Lloyds Bank plc* UKEAT/0005/15 and *Taylor v OCS Group* 2006 IRLR 613.

114. These decisions direct me to consider the reasonableness of the investigation as a whole, and confirm that the extent to which an employer must consider any defences advanced by the employee will inevitably depend on the particular circumstances of the case. I have concluded that individually these concerns could not be said to render the extent of the investigation carried out by Ms Totten unreasonable, and I did not consider that considered as a whole, it could be said that the extent of the investigation was unreasonable.

115. Whether she overstepped the mark as submitted by Mr Deans, or not, I did not consider that her other recommendations in regard to reporting to Disclosure Scotland and NMC could be said to render the investigation or her decision to recommend further disciplinary action unreasonable.

The disciplinary hearings

116. In any event when assessing whether the decision of the respondent to dismiss was based on a genuine belief formed after a reasonable investigation, I take into account not simply the investigation carried out by Catherine Totten, but subsequent information gathered through the disciplinary process before the decision to dismiss took place. The further information obtained and further scrutiny of the evidence by the disciplinary panel during the subsequent disciplinary process before the decision to dismiss was made is also to be

taken into account before coming to any conclusions on whether the decision was reasonable.

117. I took into account in my deliberations that the claimant was given notice of the disciplinary hearing and advised that he could lodge a written statement and call witnesses. The disciplinary hearings were chaired by Mark Richards, he was assisted by the interim director of HR and independent external panel member, Gillian McAulay. The claimant had every opportunity to question Mary McDougall and Isobel Campbell at the first disciplinary hearing. The claimant chose not to submit a written statement, as I understand it on the advice of his union. It would appear that advice was misplaced and indeed as I understand it the claimant's union representative conceded that he was not sufficiently prepared, and an adjournment was granted before the claimant presented his case.

118. That enabled the claimant to be provided with a list of visitors to the ward that day and for him to provide a detailed written statement of his defence. This also gave the opportunity for another key witness, John McFarlane, to be called and indeed it was the absence of this witness whom as I understood both sides wished to question and the panel believed to be an important witness which resulted in a further adjournment. The claimant ultimately got the opportunity to question him in some detail. Further adjournments were granted in light of the claimant's health. This gave the claimant a further opportunity to produce a so-called rebuttal report dated 29 January 2019 extending over 20 pages (page 445 – 467).

119. The claimant was accompanied at each stage by his trade union representative, whom he said in evidence he had great respect for, despite, I think, implied criticisms of his knowledge of the NHS procedure. During this time the claimant was given every opportunity to challenge any aspect of the investigation or the witnesses evidence.

120. However, Mr Deans expressed concerns about how the disciplinary panel had reached their decision and in particular:

121. *The failure of Mr Richards, like Ms Totten, to put key allegations to the claimant for his response*: I did not accept that submission. Again I thought that the claimant knew the details of the allegations against him and had every opportunity to make his position clear in response. As Mr Reeve also pointed out in submissions, the claimant had a copy of the investigation report and appendices almost two months before the first disciplinary hearing and more than seven months before the final one. By then at least, he knew what the other witnesses' evidence was, and he was assisted throughout by union representatives.

122. *The failure of the panel to question the approach taken by Ms Totten which indicated she had determined the outcome before concluding the investigation*: as Mr Reeve submitted, the claimant's assertion that Ms Totten had not carried out a sufficient investigation was considered by the disciplinary panel but not accepted. Mark Richards had reasonably concluded that the investigation carried out by Catherine Totten had been fair and reasonable, and his rationale is set out clearly in the outcome letter.

123. *The failure to take account of absence of evidence to support the finding that the sound of a slap could be heard*: As Mr Reeve pointed out in submissions, the panel did not simply take the evidence of Mary McDougall in this regard at face value, but went so far as to check whether it was feasible that sound could be heard through the glass partition in light of John MacFarlane's misgivings. Their decision to carry out a test of whether the glass partition was sound proofed or whether it was possible that sound could be heard through it illustrates that this is a matter which the panel gave consideration to. Their conclusion in light of that test cannot be said to be unreasonable.

124. *The failure to take into account the inconsistent and unreliable evidence of Ms McDougall*: I considered in particular the concerns raised by the claimant that it was unsafe to rely on the evidence of Mary McDougall. However, I accepted Mr Reeve's submission, that it was reasonable for the respondent to focus on her core evidence repeatedly stated which was that she heard the sound of the slap and heard patient A say "that's for Victoria" and that the claimant had been beside A shortly before and after the assault. She attended both the disciplinary

hearing and the appeal and therefore she was subjected to questioning on two occasions. I did not accept that absolute certainty on details (or a shifting of position on detail over time) meant that it was not reasonable for the panel to conclude that she was a credible and reliable witness. I accepted Mr Reeve's submission that in context this was a decision which was open to a reasonable employer.

125. *The failure to further investigate the evidence of the patients when Mr Richards did not know of the questions put to them, but did know of the leading questions put by the investigating officer*: I did not agree with Mr Deans that it was unreasonable for the panel not to have further investigated the evidence of the patients. I accepted that in the particular circumstances and the conditions under which the patients gave evidence, it was reasonable for the panel to rely on their statements and the evidence of the staff and not to have followed up this matter.

126. Although Mr Deans did not dwell on the matter in submissions, Mr Reeve submitted that any concerns about the different approach taken to the interviewing of the patients, and in particular the fact that the questions were not set out in their statements, had undermined their validity was misplaced, given that the interviews were carried out in a way which took account of clinical advice. In any event Siobhan Lunny's evidence in her investigation interview was that the patients had already told staff on backshift about the assault but staff were not sure whether it was true or not; and then they advised SCN McFarlane of their involvement without being under any pressure. He submitted that it was simply not credible to assert that Ms Totten somehow led those patients to raise allegations against Mr Bradford.

127. The claimant also raised concerns about relying on the evidence of patients with intellectual disabilities. However this was not a case where the only evidence was that of the patients, who had in any event spoken to SCN McFarlane informally and Catherine Totten in carefully arranged circumstances. There was the evidence of Mary MacDougall but also all the "circumstantial" evidence and opinion of other staff members including Dr Campbell.

128. *The fact that the panel's stated expectation that the claimant should have been extra vigilant was unreasonable*: Mr Deans submitted that this led to a conclusion that the claimant should have been aware of an alleged assault despite the patients remaining on level 2 observations, which was unreasonable. He submitted that the claimant's position that he did not witness the assault is entirely credible, given it was one slap and the patient did not react. I heard a good deal of evidence regarding the fact that no decision had been made to increase the observation levels on the patients to level 3 in light of what happened the day before. However, I did not consider that was what was meant by extra vigilance, and indeed I noted that the claimant himself, in the interview on 22 March, had said that he needed to keep an eye on the patients although it was very common for patients to make threats. This was taken into account by the disciplinary panel, referring to concerns which the claimant was at the forefront of expressing.

129. *The failure of respondent to consider that patients D and E may not have been in the day room at the time*: I understood that this submission related to the fact that it would cast doubt on Mary McDougall's credibility. The particular concern was that the respondent failed to produce the RIO notes for D and E while they had for A, B and C, which Mr Deans argued was unreasonable. The claimant believes that the respondent did check them and did not produce them because they were aware they had confirmed that these patients were checked out to the hub. I must say that this strikes me as suggestive of a"conspiracy theory" mentioned by Mr Reeve, not least because of the evidence of Mr Jenkins during the hearing that he had subsequently consulted them, evidence which I accepted.

130. Mr Jenkins said that while that had confirmed those patients were in the hub that morning, they did not confirm the time at which they were there. This, as I understand it, was said to be one of the reasons at the time why the RIO notes were not obtained. I accept that the method of the request, through a subject access request, was properly dealt with by Ken Lawton. However, the request was not made of James Crighton under GDPR and it was not clear to me why the RIO notes could not have been produced, beyond it subsequently being

confirmed that they would not show the whereabouts of D and E at a particular time.

131. The question for me however was the extent to which the failure to provide them during the disciplinary process meant that the procedure adopted by the respondent was unreasonable and whether this impacted on the fairness of the hearing.

132. Mr Reeve submitted that the respondent took sufficient action in seeking to identify whether it was possible to make those checks and that the respondent took a wholly reasonable approach to investigating the claimant's assertion that D and E were not in the ward on 6 March. He pointed out that reference was made to these two patients right at the start of matters by Mary McDougall in her unredacted statement. The claimant therefore knew on receipt of a copy of her statement around 8 June that those patients had been identified as being present. The first time anyone queried whether those patients were on placement was when Mick Grattan asked at the disciplinary hearing on 3 August 2018 if it was possible they were on placements. By way of querying about placements the claimant and his representative were understood to be querying whether the patients had been booked out to the Skye Centre. Catherine Totten therefore checked the Skye Centre records only to find that no patients were booked out because of snow. During the reconvened disciplinary hearing on 27 August the claimant accepted that three patients were still in bed because there had been snow that day. Mr Reeve submitted that the claimant's position changed at the appeal hearing on 4 June 2019 when he then alleged that they were not booked to the Skye Centre but were in fact in the hub. The method known to the respondent's witnesses which would confirm for certain where patients D and E were at any precise time on 6 March 2018 would have been to check the patient Movement and Tracking system. Both Ms Totten and Mr Richards sought to check this but found that it was only stored for 3 months so had been deleted by then. Indeed it would have been deleted by the time that Mr Grattan queried on 8 August whether the patients were on placement. During the internal process, neither the claimant nor his rep identified any other way to obtain that information. It was only during the tribunal hearing that the claimant sought to identify other ways

to find out the information and this information was not known to the respondent's witnesses at the time of the claimant's internal process so no weight should be given to it. Further Mr Richards stated in evidence that he had now checked the RIO reports for these patients and while there was reference to the patients being in the hub at some point during the morning, that would not have led him to conclude that it undermined Mary McDougall's clear evidence that those patients were in the dining room at 10.15 am when the incident occurred.

133. As I understood it, this was not something which was raised in the initial investigation interview; and that the claimant's position changed with regard to whether he meant the Skye Centre or the hub. I heard evidence too that those patients were not meant to be sitting together but it seems this was not brought up until the appeal. This seems to have become an important point for the claimant over time, but it was not actually raised immediately at a time when it might have been possible to have obtained evidence which might have confirmed the position incontrovertibly. Ultimately however I agreed with the respondent that this was a side issue, not least because it was designed to cast doubt on the credibility of Mary McDougall and not to present any positive case for the claimant.

134. Given this background, I did not consider that it could be said that any failure to consult the RIO notes of D and E could be said to render the process unreasonable. In any event the RIO notes would not (and did not) provide conclusive evidence that D and E were not in the ward when Mary McDougall said they were. In any event, even if she had been wrong about who was actually there at the time, the respondent relied, reasonably, on the central tenets of her evidence regarding what she said about the assault.

135. *The failure of the panel to properly understand the claimant's reaction and its rationale in regard to the decision to end seclusion:* I did not consider that this was a significant influence on the panel's decision, and in any event any misunderstanding of his rationale to that extent would not serve to render any decision unreasonable, given other evidence relied on.

136. *The failure of the panel properly to take account of the claimant's unpopularity with some staff*: I gave consideration to the claimant's concerns regarding him being a target by other staff, and somehow the object of their revenge. As Mr Reeve pointed out, in regard to the reliance by the claimant on the position of Mr Alexander, it was reasonable for Mr Richards to discount his assertions as partisan when his daughter was involved initially at least in the investigation. Mr Reeve submitted that there was no evidence whatsoever presented by the claimant during the internal process that his suspicions were justified. Mr Richard took account of the fact that the allegation was raised by a housekeeper, not a member of nursing staff. As noted above, in any event the patients involved had already told the backshift staff that the incident had occurred; and the following day the patients gave evidence to SCN McFarlane. I considered that there was some substance to Mr Reeve's submission that to reach this conclusion involved something of a conspiracy theory. If this were to explain the incident, it involves a very elaborate interplay of circumstances, with the patients colluding (which Dr Campbell and SCN McFarlane discounted) and/or of a good number of individuals who did not apparently see the claimant as their nemesis, including Ms Houston and Ms McDougall being involved in the collusion. I came to the view that the respondent's conclusion that this could not explain events on that day was entirely reasonable.

137. *The unreasonable refusal of the panel to consider the claimant's position that he genuinely did not see or hear anything which indicated that an assault may have occurred:* Mr Deans submitted that the panel failed to take account of the claimant's universally accepted reputation when dealing with patients, which he submitted was a very clear indication that had the claimant seen the assault he would not have done anything other than react appropriately, and to take account of the fact that he had everything to lose from a failure to react. I took the view that this was a matter of which the panel were aware, and which was taken into account, but it was reasonable for them to have relied on other information gathered to conclude that this could not weigh matters in the claimant's favour.

138. *Being selective in accepting the evidence of Patient A and B, but discounting aspects of C's evidence which did not support the conclusions which had been*

reached: I understood the panel to have relied on the evidence of A and B. I did not consider that it was unreasonable for the panel to take account of their statements in this context, or to discount aspects of C's evidence when John McFarlane gave an explanation for the discrepancy based on his clinical and personal knowledge of C. This suggests an objective approach was being taken to the assessment of the evidence of the patients.

139. *Being unreasonably influenced by the negative press publicity*: Mr Deans submitted that, although untrue, the respondent was concerned to send a message to the public that they did not employ staff accused of such serious allegations so the outcome was inevitable. Mr Deans submitted that although the respondent stated that no new evidence would be allowed by the claimant at the disciplinary hearing of 29 January, Mr McFarlane was permitted to bring forward new evidence, which had not been mentioned before but which mirrored the allegations published in the Daily Record. He argued that the respondent's reliance on this evidence shows that the respondent was influenced in its decision by the press speculation surrounding the claimant's claim.

140. One particular passage of evidence which did concern me was the evidence of SCN McFarlane at the disciplinary hearing on 29 January 2019 that patient A told him that the claimant has asked him to strike patient B. The claimant expressed concern that he had not been permitted to include new evidence at that stage but it appeared that this was new evidence being allowed by the management side, and indeed this is referenced in the outcome letter and appears to have been relied on by the panel. I thought that it was surprising that this had not been raised before and I understood the claimant's concern when it was raised for the first time by John McFarlane at that hearing.

141. Mr Reeve submitted that the claimant did not properly challenge that evidence, but that he could and should have done. I did not however accept that submission. I thought that the claimant was taken by surprise at this suggestion and that he thought it was important to record it, and this linked with his concerns about the adverse newspaper coverage.

142. While I did have concerns about the decision of Mr Richards to include that in the outcome letter and apparently rely on it to come to his decision, I noted, as Mr Reeve pointed out, Mr Richard's evidence to the Tribunal that the panel had deliberated on the matter and decided that even if they had discounted this particular evidence, they would still have reached the decision to dismiss the claimant based on all the other evidence. Mr Reeve submits that it was within the bounds of reasonable responses for them to have accepted this evidence.

143. Given all of the other evidence before them, I was of the view that recording this or even taking it into account, did not render an otherwise reasonable decision unreasonable. Nor did I accept that there was any validity in the suggestion that the respondent was unduly influenced by the press article. This was particularly the case given all of the other evidence relied on.

144. *the respondent unreasonably failed to provide the unredacted notes of the disciplinary hearing:* I did not accept that this impeded the claimant's ability to present his defence or impacted on the overall fairness of the procedure, as submitted by Mr Reeve. Indeed, I was at something of a loss to understand the significance made by the claimant of this issue. Copies of the redacted notes where lodged which indicate relatively limited redactions. The respondent gave a plausible explanation why the notes were redacted (given that they were requested under a SAR). Their reluctance to produce them was because they were taken for the use of the disciplinary panel in their deliberations and it was not normal practice to share them so that there was no expectation that the claimant would receive them, and indeed Catherine Totten did not see them either. Beyond that I was not sure why the respondent would not simply forward the notes to the claimant (as I think they did in respect of the final disciplinary hearing). I did not understand why the respondent could not share the notes on this occasion.

145. However, the claimant was at the meetings. He must have had a good idea what they said. He could have made his own notes. He said he thought that notes were being made by others but it might be expected that a claimant would in any event want their own set of notes. Indeed that would be the standard practice so that they could be cross reference against any notes

made by the respondent. However, and crucially, I did note that the claimant did get a set of unredacted notes through the NMC. He repeated in evidence that they were very small. I thought that was a rather lame response given how easy it would have been to magnify them. I got the impression the claimant was trying to make an issue of this matter since he was not able to point to any substantive disadvantage which resulted from how the respondent dealt with this issue. Mr Reeve pointed out in submissions that the claimant had provided a detailed appeal case and very detailed rebuttal report prior to the appeal. I therefore did not accept that the way that the respondent dealt with this matter could have impacted on fairness, even if the failure to forward them to the claimant could have been questioned.

Reasonableness of the sanction of dismissal

146. Mr Deans submitted that the flaws in the disciplinary procedure rendering the dismissal procedurally unfair and the decision to dismiss in the circumstances was one which the respondent could not have reached on the basis of the available evidence were inextricably linked. Specifically he submitted that the procedural failings meant that there was no proper consideration of the evidence by the disciplinary panel. I took it therefore that in arguing that the sanction of dismissal was unreasonable that all of the above concerns ought to be taken into account.

147. I accept that even if the Tribunal is satisfied that the requirements of *Burchell* are met, then the Tribunal still needs to consider whether dismissal was a fair sanction and reasonable in all the circumstances. In this case, the respondent categorised the misconduct as gross misconduct resulting in summary dismissal. The question is whether that was fair in all the circumstances, having regard to the equity and the merits of the case, including the size and administrative resources of the respondent.

148. As discussed above, the claimant expresses concern about the influence of the media articles on the respondent's decision to dismiss, and suggested that had it not been for that then any sanction may have been less severe. I noted too that in a document which the claimant had prepared for the appeal, it states that "*the discrepancies, contradictions and gaps in evidence presented here*

and in the rebuttal report of 29 January 2019 give weight to the view that the severity of disciplinary sanction imposed is disproportionate to the evidence provided".

149. However, as I understood it both Mr Deans and Mr Reeve agreed when I suggested that this is an "all or nothing" case. By that I mean that either the process undertaken which led the respondent to conclude that the incident had occurred and that the claimant witnessed it, were reasonable, so that the claimant must have lied about his involvement in the incident, such that the resulting sanction fell within the range of reasonable responses open to the respondent; or the respondent's processes were such that their conclusion that the incident occurred was unsafe and thus not within the range of reasonable responses, and so that to dismiss the claimant in such circumstances was unfair.

150. In essence, either the claimant did not witness any assault, perhaps because he was out of the room, or he was present when an assault took place and chose to ignore it. Having concluded that it was reasonable for the respondent to come to the conclusions which they did, based on the evidence which they heard, it was evident that dismissal in the circumstances was reasonable, not least because the respondent was left with the conclusion that the claimant lied about what had happened that day. To suggest that the respondent was influenced by the public perception of what happened would be to discount all of the other reasons for concluding what they did.

151. This is not a contributory fault type of case, and indeed the respondent having ultimately found that the claimant lied, there is, in my view, little question that the sanction of dismissal was disproportionate, given what was alleged the claimant had done in the context in which it had taken place. Trusting employees is a necessary ingredient of all employment relationships and the reason for that is writ large in a case such as this where employees are entrusted to the care of particularly vulnerable people.

152. It follows that other factors which the claimant asserted had not been taken into account, such as his reputation as a staff nurse especially with patients, the fact that he had 25 years of unblemished service with the respondent, could

not be said to render the sanction disproportionate. Indeed I did not think it was unreasonable for the respondent not to rely solely on the claimant's excellent patient care reputation over 25 years to conclude that he was credible, which would have been to ignore the other evidence.

153. The respondent took the view that the claimant had not told the truth. In the context in which the claimant was working, I find that the sanction of dismissal falls within the range of reasonable responses.

Procedural fairness

154. Mr Deans argument involved considering procedural and substantive fairness together in this case, so that his submissions were relevant to both. I agreed with him on that front and have set out above the procedure adopted by the respondent in regard to the investigation and disciplinary hearings which I have found to fall within the range of reasonable responses.

155. However, Mr Deans made specific submissions in regard to the appeal, process which he submitted did not cure any of the asserted defects. He submitted that the appeal panel had apparently fallen into the very same errors as were made during the investigation and disciplinary process by failing to; put the allegation to the claimant for comment treating the allegations as already proven; engage with the substance of the claimant's appeal; explain why they took the decision to uphold the decision; take account of the claimant's concerns regarding the new evidence; investigate his claim that patients D and E were not present; take account of the ROI notes because these would have proven the claimant to be correct instead deliberately and unreasonably choosing to focus on the patient movement tracking system records which are only kept for 70/90 days; address the fact that Ms McDougall had changed her evidence throughout the process; give proper consideration to the claimant submissions that his colleagues had improperly influenced the evidence against him; take account of his assertion that Mr Connor had written Ms McDougall's witness statement with the intention of causing him to lose his job; genuinely consider the claimant's evidence as to what occurred on 6 March; reinvestigate failings from investigation or disciplinary phase to seek out evidence which would have assisted his version of events. Finally, he

submitted that the appeal panel were unduly influenced by the negative media publicity.

156. Mr Reeve's position was that the appeal panel considered investigation carried out by Ms Totten to have been sufficiently detailed and even handed and it was considered to be reasonable and fair; they had considered all of the evidence of Mary McDougall (and indeed she had been recalled as a witness for the appeal). They took into account the fact that she had been off sick with stress and concluded that any differences in her evidence between her initial statement on 8 March 2018 and the appeal hearing on 29 January 2019 could be explained by the passage of time; the panel considered that the core of her evidence remained the same and she continued to assert with credibility that the claimant had been at the panel door next to Patient A before and after A assaulted B that she heard the slap and a say that's for Victoria through a glass partition, and considered in the circumstances Mr Bradford must have been aware of it having occurred but did nothing.

157. Although I have found that the decision to dismiss was based on a genuine belief after sufficient investigation and a sanction falling within the range of reasonable response, I did not in any event accept these submissions with regard to any failings of the appeal process. The matters raised were covered at previous stages of the disciplinary process, and which I have found to be reasonable. Further, I accept that it was reasonable for the appeal panel to rely on the core elements of Ms McDougall's evidence which had not changed and that it was not inappropriate for Ms McDougall to say that it was her statement but that her trade union rep had typed it up, given that there was no evidence that he had changed it.

158. One matter which the claimant asserted in the claim form (although not stressed in oral submissions) was that the respondent refused to address his grievance "in breach of the ACAS code". But in the ACAS code and in the claimant's own policy it is stated that it may be appropriate to deal with both issues concurrently. The respondent heard the claimant's grievance as part of the disciplinary hearing and communicated that to the claimant. I have not given any detailed consideration of the grievance itself because I accept that

this was reasonable in the circumstances, and therefore that it could not be said to undermine the reasonableness of the disciplinary process.

159. In the ET1 the claimant also complained about the delay in concluding the disciplinary process. Mr Reeve in submissions denied that the length of time taken to deal with the disciplinary was excessive. He submitted that the passage of time was caused largely by factors outwith the respondent's control and that it was the claimant himself who was a significant cause of matters taking longer than expected. Considering the time line, and the explanation for the delays, I did not accept that these could be said to render the process procedurally unfair.

Conclusion

160. The Tribunal has concluded that dismissal for misconduct was within the range of reasonable responses open to the respondent in these particular circumstances, and therefore that the dismissal was not unfair. This claim does not succeed and is therefore dismissed.

Employment Judge: M Robison

Date of Judgement: 04 March 2020

Entered in Register,

Copied to Parties: 05 March 2020