EMPLOYMENT TRIBUNALS

Claimant: Nigel Stewart

Respondent: Cumbria, Northumbria Tyne & Wear NHS Foundation Trust

Heard at:	Newcastle Employment Tribunal	**on: 7th and 8th January 2021**
	And remotely, by CVP	**on: 12th February 2021**
Before:	Employment Judge Sweeney	

Representation:

For the claimant: Paul Kerfoot, counsel
For the respondent: Dominic Bayne, counsel

JUDGMENT having been given to the parties on 12th February 2021 and a written record of the Judgment having been sent on 17th February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

Covid-19 statement:
This was a hybrid (partly in person/partly remote) hearing. The parties did not object to the hearing being undertaken in this way. The form of remote hearing was V – video. It was not practicable to hold a fully face-to-face hearing because of the Covid-19 pandemic

WRITTEN REASONS

The Claimant's claims

1. By a Claim Form presented on 16 April 2020, the Claimant brought claims of unfair dismissal and wrongful dismissal arising out of his summary dismissal on 15 November 2019. In respect of the unfair dismissal claim, he maintained firstly that it was automatically unfair, contrary to section 100(1)(e) Employment Rights Act 1996 ('ERA') and secondly and in any event it was generally unfair within section 98(4) ERA. If his dismissal was not unfair, the Claimant contended that his employment was terminated in breach of contract in that he was entitled to be given 12 weeks' notice yet he was dismissed with none. The Respondent

maintained that the Claimant was fairly dismissed for a reason related to conduct and that the principal reason was not that described in section 100(1)(d). It contended that it acted reasonably in treating the reason for dismissal as a fair reason for terminating his employment. Regarding the claim of wrongful dismissal, the Respondent maintained that it was entitled to summarily terminate the contract of employment on the basis that the Claimant had repudiated it by committing gross misconduct alternatively that he had been grossly negligent.

The Hearing

2. The Claimant and the Respondent were represented by counsel, Mr Kerfoot and Mr Bayne respectively. The parties had prepared an agreed bundle running to 438 pages.

The Issues

3. The issues to be decided were agreed as follows:

Automatically unfair dismissal

a. Was the reason for dismissal that in circumstances of danger which the Claimant reasonably believed to be serious and imminent, that he took (or proposed to take) appropriate steps to protect himself or other persons from the danger?

b. If that was the reason or principal reason for his dismissal, can the Respondent show that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them?

Ordinary unfair dismissal

c. Can the Respondent show a potentially fair reason for the Claimant's dismissal?

d. If so, having regard to that reason, did it act reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant?

Wrongful dismissal

e. Was the Respondent entitled to terminate the Claimant's employment summarily?

4. The Respondent called two witnesses:

(1) Anthony Deery, Group Nurse Director (dismissing manager),

(2) Sarah Rushbrooke, former Group Director (appeal manager),

5. The Claimant gave evidence on his own behalf.

The facts

6. Having considered all the evidence before it (written and oral) and the submissions made by the representatives on behalf of the parties, I find the following facts.

7. The Respondent is a large mental health and disabilities trust, operating across some 70 sites in the north of England. The Claimant had been employed by the Respondent as a nursing assistant from February 2001. He worked at Hopewood Park Hospital in Sunderland on the Beckfield Ward. Beckfield is a psychiatric intensive care ward which caters for adults detained under the Mental Health Act and who require a period of intensive secure care. The Claimant was summarily dismissed on 11 November 2019.

8. Given the nature of the patients' mental health the need to undertake physical restraints within the hospital environment is a fact of everyday working life. The Claimant would typically use some form of restraint 2-3 times a week. That is because it is commonplace for patients to display aggression and to behave aggressively towards staff. Many of the patients have histories of psychosis, schizophrenia, drug and alcohol abuse and so on. By its very nature it is an environment in which staff and patients are exposed to the risk of harm.

9. With that in mind, the Respondent provided training for its staff in the use of, among other things, appropriate physical restraints. The Respondent provided the Claimant with an annual 2-day training course on the appropriate use of control and restraint within the context of a psychiatric hospital, most recently on 08 February 2018.

10. The Respondent also has a policy on the Prevention and Management of Violence and Aggression ('PVMA') Policy **[pp242-282].** This says that:

    a. it is generally considered to be unsafe for anybody to try and restrain another person on their own, para 17.2.6 **[p272];**

    b. physical intervention should '**never use neck holds** or place any weight on thoracic area...', para 17.4.1, **[p273];**

    c. any restraint must be necessary and proportionate, and restraining services users on the floor should be avoided paras 9.8.1 & 17.4.1, **[pp 264 &273]**.

11. A singlehanded restraint is exceptional. In 19 years, the Claimant had never performed one before 21 December 2018 (the day on which the events which resulted in his dismissal occurred). On that day, he used a restraint on patient 'DL' The incident was captured on CCTV footage. In brief terms, DL had become agitated following routine checks carried out on patients at around 4am in the

morning. She left her room and approached the nurses' office at about 4.05am. The Claimant and another nursing assistant, Ms Barnes, were in the office at the time when they heard DL banging on the door.

12. There was a dispute between the parties as to the extent of the banging by DL, whether it was such that it could be described as almost knocking the 'hinges off the door' or whether she had been kicking the door. I consider these to be unnecessary distractions in the case. The real point is that DL was, on any analysis, agitated, loud and verbally aggressive. That may not be an unusual feature in this environment, but she was without doubt acting in a way which can be reasonably be described as agitated and aggressive.

13. About a minute after DL approached the office, another nurse, Ms Andrews, entered the corridor and stopped. She talked to DL and tried to calm her down. While doing, so she moved a bit closer to DL at which point the Claimant and Ms Barnes came out of the office. They too talked to DL trying to calm her down. The Claimant adopted a casual approach, leaning against the wall as DL stood close by, facing him and Ms Barnes. Nurse Andrews was stood to DL's right at this point. DL, still agitated, walked in the direction of nurse Andrews and walked just past her. The Claimant, anticipating the potential for some escalation in her behaviour, adjusted his stance by taking a couple of steps forward from the position he had thereto adopted. Nurse Andrews turned so that she and DL were now facing each other, at which point DL put her hands to her own head, then immediately lunged towards nurse Andrews, making contact with her chest. She tried to pull or remove the alarm which was hanging round nurse Andrews' neck. Seeing this, the Claimant rushed towards DL As he did so, DL turned her head in his direction. The Claimant physically restrained her. Essentially, he paced his arm round the front of her neck, securing her in what can be described a neck hold. He moved her forcibly against the wall and then wrestled her to the ground. As he did this, his colleagues came to his assistance and helped restrain DL when on the floor. Ms Barnes was stroking DL's hair. They continued to talk to DL to calm her down. This all happened extremely quickly, within a matter of seconds.

14. DL was then helped up and walked back to her room. There was no evidence that DL was physically hurt in the restraint. However, there was clearly, on any objective analysis, the potential for physical injury. There was no evidence that DL suffered any psychological trauma. It is less clear as to whether it can be said there was potential for psychiatric or psychological injury, although there was undoubtedly potential for some mental distress.

15. DL reported the fact that she had been restrained to the Claimant's ward manager, Joanne Linton [**162-3**]. After reviewing the CCTV footage with the Respondent's clinical manager, Marc Cookson, it was decided to report the incident to the police and to suspend the Claimant.

16. On 26 June 2019 the Respondent was informed that the CPS were not to proceed further with any criminal prosecution of the Claimant. On 7 July 2019 he was invited to return to work in a non-clinical role pending the outcome of the Respondent's own internal investigation. Although not material to the issues in the case, he did not in fact return to a non-clinical role due to a combination of the Claimant's personal circumstances and the shift arrangements of the Respondent. The result was that the Claimant remained on suspension on full pay.

17. Janice Clark, Associate Nursing Director, was appointed to investigate three allegations arising out of the incident, namely that the Claimant had:

    i. initiated a restraint on a patient alone;
    ii. used an unrecognised PMVA technique; and
    iii. used disproportionate and undue force in the restraint

18. On 16 July 2019 the Claimant attended an investigatory meeting with Ms Clark. He was accompanied by his trade union representative, Mr Kingston. The Claimant was subsequently invited to a disciplinary hearing which was chaired by Mr Deery, Group Nursing Director, and which took place on [**11 November 2019**].

19. The Claimant was represented at the hearing by his trade union representative, Ms Pretswell. The Respondent's procedures allowed for witnesses to be called to that hearing. Management side called J Linton (the ward manager), L Doyle, nursing assistant, V Boccia, a nursing assistant. Ms Clarke also called P Truman, the Respondent's senior PVMA Tutor, though not as witness to the event. He expressed his opinion on, among other things, the appropriateness of the technique used by the Claimant. The essential points made by Mr Truman are set out in the Respondent's written submissions at para 17f.

20. Ms Barnes was called to the disciplinary hearing by the Claimant. Nurse Andrews did not attend the hearing. She was not asked to by either side. However, she did attend the appeal hearing.

21. The Claimant maintained that he had acted solely to protect his colleague nurse Andrews from physical harm and that he used reasonable and proportionate force in doing so. He believed that DL in lunging at nurse Andrews had struck her in the face and he was concerned about a risk of biting. He accepted that he did not use a recognised PMVA technique but that he did what was necessary in the circumstances. He said that he would do the same again if faced with a similar situation. He meant that he would physically intervene single-handedly so as to protect a colleague. Mr Deery regarded the Claimant's position to be that he would use an inappropriate restraint again and that he could not see how this was inappropriate.

22. Mr Deery confirmed his decision in a letter dated 15 November 2019 **[pp79-84]**:

    i. That C had acted alone in initiating the restraint, despite two other members of staff being present;
    ii. That he did not use an approved restraint, and evidently put his arm around DL's neck; and
    iii. That the restraint was not proportionate

23. He concluded that the Claimant had acted alone in initiating the restraint; that he had missed opportunities to de-escalate or use low-level PMVA techniques; that he had undertaken PMVA training and was aware of approved techniques and that the restraint that was used was not proportionate in the circumstances. He believed that the Claimant had acted negligently by adopting an unsafe technique which could have resulted in serious physical or psychological injury. He interpreted the Claimant's statement that he would take the same action if faced with the same situation again as meaning that the Claimant had not reflected or learned from the situation with the result that he (Mr Deery) was unable to trust whether he would act in accordance with the Trust's policies in the future. The key conclusion was that the Claimant used an unapproved and unsafe technique, not in line with guidelines and that the nature of the restraint and the force of it was disproportionate to the threat posed. He had had regard to a number of character references which the Claimant had provided and to the Claimant's long and unblemished record of employment.

24. Mr Deery concluded that the Claimant's intention in intervening was to protect his colleague; that it was a spontaneous reaction which was done in an unthinking and dangerous way. He concluded that the Claimant showed no sign of remorse and was quite strident about not having done anything wrong and would do same again. He concluded that he could take no assurance from the situation that he would be accepting an employee back into role that he would not create same potential harmful situation again for a patient; the act was, he concluded, reckless. He terminated the Claimant's employment without notice.

25. On 21 November 2019, the Claimant appealed Mr Deery's decision. The appeal was heard on **06 January 2020** by Sarah Rushbrooke,. Mr Deery attended the appeal to present the management case. The appeal was unsuccessful. However, Ms Rushbrooke did not arrive at her decision immediately. She went to the ward to see the layout of the area. In rejecting the appeal, Ms Rushbrooke accepted that the CCTV footage lacked sound and accepted that DL was agitated when she entered the office area. However, she concluded that she did not display a high degree of aggression in her body language but that the restraint was disproportionate to the situation. She considered evidence as to how DL had been presenting and whether the restraint was in accordance with the PMVA

policy. She concluded that the Claimant had not applied what he had been trained to do. She too concluded that the Claimant showed a lack of insight and understanding of the potential impact of his actions.

26. There is very little dispute as to the facts. Much of what dispute there is, comes down to an interpretation of the level of aggression displayed by DL on the morning in question, whether there was any improper discussion between Mr Deery and Ms Rushworth at the appeal hearing or as to whether the Claimant showed any insight into the event. To the extent that there were disputes I make the following findings.

27. DL had a history of physically assaulting people. She had previously bitten and spat at staff. She had hepatitis C. I accept that she was had not been displaying psychotic tendencies in the run-up to this incident and that she was in recovery and due for imminent release. However, I accept, and find, that the Claimant considered her to pose a risk to staff safety and that she had been in an agitated mood earlier when the Claimant had started his shift. I find that she was agitated and displaying aggression immediately before and at the point when she was restrained. I find that she posed an imminent risk to the safety of nurse Andrews – albeit this was nowhere near the extent of being a life-threatening situation. The force of the lunge, however, was sufficient to, and did in fact, leave a red mark on Nurse Andrews chest.

28. As to whether Ms Barnes was in fact fit to restrain any patient that night, I conclude that the Claimant genuinely believed she was not fit to do so. I also find that he genuinely believed the ward to be short staffed – whether it was or not. I also find that, in the very short period he had to assess the situation, he believed Nurse Andrews to have frozen when DL lunged at her.

29. I am not satisfied that Mr Deery and Ms Rushbrook did anything other than exchange pleasantries, if at all, at the appeal hearing. The Claimant did not hear or see them speak – he relies on something he had been told and even then he is not in a position to say what, if anything, they said. I reject the suggestion that they attempted to speak to each other about the case, so as to give rise to any impropriety. I also reject the suggestion that any contact as the Claimant might have believed them to have had created the appearance of any impropriety. I accept their evidence that they understood the need not to speak about the case together and that to do so would be wholly improper. If it is to be asserted that they spoke about matters, it is for the Claimant to prove this – either by adducing evidence of what was said or by adducing sufficient evidence from which I might properly infer improper conduct. He has not done so.

Relevant law

Unfair dismissal

Automatic unfair dismissal –

30. Section 100 ERA 1996 provides where relevant:

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –
>
> (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.
>
> (2) For the purposes of subsection (1)(*e*) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.
>
> (3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(*e*), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

31. Section 100(1)(e) was considered by the EAT in **Oudahar v Esporta Group Ltd** [2011] ICR 1406, EAT – see in particular paragraphs 27-29 of the EAT judgment.

32. Essentially, it is for the tribunal to decide whether the employee reasonably believed there to be circumstances of serious and imminent danger; and whether he took or proposed to take appropriate steps to protect himself or others from the danger. In determining whether the steps were appropriate the Tribunal is bound to have regard to all the circumstances, but in particular, the Claimant's knowledge and the facilities and advice available at the time.

33. If the tribunal is satisfied of the matters in subsection (2) then the Claimant must not be regarded as unfairly dismissed if the Respondent shows that it was so negligent for the Claimant to take the steps which he took that a reasonable employer might have dismissed him for taking them.

34. If the Respondent has shown that a reasonable employer might have dismissed the Claimant for doing what he did, then the Tribunal must go on to consider whether in any event, it acted reasonably within section 98(4) ERA in treating the reason for dismissal as a sufficient reason.

Ordinary unfair dismissal

35. The legal principles were not in dispute. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reference to the

'reason' or 'principal reason' in section 98(1)(a) and s98(4) is not a reference to the category of reasons in section 98(2)(a)-(d) or for that matter in section 98(1)(b). It is a reference to the actual reason for dismissal (**Robinson v Combat Stress** UKEAT/0310/14 unreported). The categorisation of that reason (i.e. within which of subsection 98(2)(a)-(d) it falls) is a matter of legal analysis: **Wilson v Post Office** [2000] IRLR 834, CA.

36. A reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

37. In a 'misconduct' dismissal, the employer must show that the principal reason for dismissal relates to the conduct of the employee. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. The burden here is, of course, neutral. It is not for the employer to prove that it acted reasonably in this regard. The Tribunal must not put itself in the position of the employer. The Tribunal must confine its consideration of the facts to those found by the employer at the time of dismissal and not its own findings of fact regarding the employee's conduct.

38. The Tribunal must take as the starting point the words of s98(4). The section poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. The Tribunal must not substitute its own view as to what was the right course of action. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions.

39. In misconduct cases, the approach which a Tribunal takes is guided by the well known decision of **British Home Stores v Burchell** [1978] IRLR 379, EAT. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions:

    (i) Did the employer carry out a reasonable investigation?

    (ii) Did the employer believe that the employee was guilty of the conduct complained of?

(iii) Did the employer have reasonable grounds for that belief?

40. In gross misconduct unfair dismissal cases, in determining the question of fairness, it is unnecessary for the Tribunal to embark on any analysis of whether the conduct for which the employee was dismissed amounts to gross misconduct. However, where an employer dismisses an employee for gross misconduct, it is relevant to ask whether the employer acted reasonably in characterising the conduct as gross misconduct – and this means inevitably asking whether the conduct for which the employee was dismissed was capable of amounting to gross misconduct – see **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** (UKEAT/0032/09/LA) [2009] and **Eastland Homes Partnership Ltd v Cunningham** (EAT/0272/13). This means asking two questions:

(1) is the conduct for which the employee was dismissed conduct which, looked at objectively, capable of amounting to gross misconduct, and

(2) Did the employer act reasonably in characterising the conduct as gross misconduct?

Fair procedures

41. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

Wrongful dismissal – breach of contract

42. If an employee is dismissed with no notice or in adequate notice in circumstances which do not entitle the employer to dismiss summarily, this will amount to a wrongful dismissal and the employee will be entitled to claim damages in respect of the contractual notice.

43. An employer is entitled to terminate a contract without notice in circumstances where the employee has committed an act of gross misconduct. It is for the employer to prove on the balance of probabilities whether the employee has committed gross misconduct. Although a question of fact in each case, the courts have considered when 'misconduct' might properly be described as 'gross': **Neary v Dean of Westminster** IRLR [1999] 288 (para 22). In **Neary**, Lord Jauncey of Tulichettle rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing.

44. Exactly what type of behaviour amounts to **gross** misconduct is difficult to pinpoint and will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract).

45. Moreover, the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence — **Laws v London Chronicle (Indicator Newspapers) Ltd** *1959 1 WLR 698, CA*, and **Sandwell and West Birmingham Hospitals NHS Trust v Westwood** *EAT 0032/09*.

46. **Neary** was considered more recently by the Court of Appeal in **Adesokan v Sainsbury's Supermarkets Ltd** [2017 I.C.R. 590. At paragraph 23, Elias LJ said that the focus was on the damage to the relationship between the parties; that dishonesty and other deliberate actions which poison the relationship obviously fall into the category of gross misconduct but so in an appropriate case can an act of gross negligence. The question, in any particular case, will be whether a negligent dereliction of duty is so grave and weighty as to amount to a justification for summary dismissal. This involves an evaluation of the primary facts and an exercise of judgement. Whist the exercise is one of judgement, in paragraph 24 Elias LJ cautioned that the parameters of the exercise are not boundless and that "*it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or to undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal*."

47. Therefore, an employee's negligent act can entitle the employer to dismiss without notice, even if not deliberate, dishonest or wilful — provided that the act is sufficiently serious. As with all other forms of repudiation, this is a question of fact to be determined on a case-by-case basis. in a case of alleged gross negligence the question will be whether the dereliction of duty was 'so grave and weighty' as to justify summary dismissal.

Submissions

48. I propose only to set out a very brief summary of the submissions, without in any way seeking to do them any injustice.

49. Mr Kerfoot submitted that the principal reason for dismissal was that the Claimant took appropriate steps to protect his colleagues from serious and imminent danger; that viewed reasonably from his perspective he is squarely within section 100(1)(e) read alongside subsection (2). Given his knowledge of DL's history it was appropriate to initiate a physical restraint. One issue was whether the 'method of restraint' (the application of the neck-hold) should be considered under subsection (2) (when considering whether the steps taken were 'appropriate') or under subsection (3) (when considering whether the Respondent has shown that the step taken was 'so negligent'). Mr Kerfoot submitted that the method of restraint was to be considered under subsection (1)(e) – that the 'appropriate step' taken was to initiate **a** physical restraint. He submitted that the subsection (read alongside subsection (2) required the Tribunal to consider whether the step of initiating **a** physical restraint was appropriate. He submitted that the actual method of restraint falls to be considered under subsection (3), when considering whether the Respondent has shown that it was so negligent

for him to have taken the actual steps which he took. Whilst the method of restraint was not the best and was not an approved method, Mr Kerfoot submitted that it was nevertheless reasonable, and proportionate. He submitted that the Respondent cannot show that it was 'so negligent' (which connotes a higher standard) that a reasonable employer might dismiss him for taking the step that he did. The dismissal was automatically unfair.

50. In any event, he submitted that the decision to dismiss was generally unfair. He accepted that whilst Mr Deery's belief was genuinely held, it was, he submitted, not reasonable: there were flaws in the investigation, (failure to call certain witnesses) rendering it an unreasonable investigation. There was, he submitted, procedural unfairness in the questioning by Mr Deery of Ms Clark. Mr Kerfoot submitted that it was inappropriate for the investigator to express an opinion at the disciplinary hearing. The investigator's role is to be unbiased; it is to be a fact finder only. He submitted that to push it beyond that gives the risk that the evidence is tainted and may have manipulated consciously or unconsciously the opinion of investigator. He submitted that the fact that the opinion was expressed at all was unreasonable. He further submitted that there was procedural unfairness in that Ms Rushbrooke and Mr Deery spoke at the appeal hearing other than in the presence of the Claimant. Mr Kerfoot also challenged the reasonableness of the sanction and submitted that Mr Deery did not give sufficient weight to the Claimant's length of service and good record. He submitted that it was unfair of Mr Deery to interpret what the Claimant said as a lack of remorse when all he was doing was standing by the reasonableness of his actions.

51. Mr Kerfoot submitted that the Respondent cannot show that the Claimant had committed a repudiatory breach of contract and that his dismissal was wrongful. The conduct was wilful or deliberate, nor was it grossly negligent. He pointed to the absence of any harm to DL and that, if anything, the Claimant's actions prevented harm being caused to others, which is all he had tried to do.

52. For the Respondent, on the section 100 claim, Mr Bayne submitted that the steps taken by the Claimant were not appropriate and that I must have regard to the actual technique deployed when considering the appropriateness of the step under section 199(1)(e). However, even if it is right to consider the method/technique under section 100(3) it amounts to the same result: that the Claimant cannot be regarded as unfairly dismissed because the Respondent has done enough to show that 'a reasonable employer' might have dismissed him for restraining DL in the way that he did. Mr Bayne submitted that the effect of subsection (3) is to oust subsection 100(1)(e), providing that the negligence is of a level that it amounts to a potentially fair reason for dismissal. He relied on the evidence of Mr Deery supported by the views of Mr Truman and Ms Clarke. Mr Bayne also relied on the Claimant's own evidence of the exceptional nature of a single-handed restraint and his admission that it was not an approved technique. He further relied on the clear wording of the policy. He submitted that I must

conclude either that the restraint was not appropriate (within section 100(1)(e) and (2) or that the Respondent has shown what it is required to in subsection (3).

53. As for ordinary unfair dismissal, Mr Bayne reminded me of the legal principles and that I am unable to substitute my opinion for that of Mr Deery and Ms Rushbrooke. He submitted that Mr Deery's genuinely held belief was based on reasonable grounds following a reasonable investigation. He invited me to reject the suggestion of procedural unfairness or impropriety and that the sanction was within a band of reasonable responses open to Mr Deery particularly in light of the Claimant's lack of remorse. He submitted that Mr Deery was clear in his understanding of what the Claimant was saying in that respect: that he would do precisely the same thing again – an unapproved and reckless method of restraint.

Discussion and conclusion

54. I conclude that the reason for dismissal was as set out in paragraph 12 of the Respondent's submissions, namely Mr Deery's belief that the Claimant had performed an unsafe restraint, which was inappropriate in the three ways alleged in the letter of dismissal and the Claimant's refusal to accept that it was inappropriate. It was accepted by the Claimant that Mr Deery's belief was genuine.

Section 100 claim

55. I accept and conclude that there were circumstances of danger which the Claimant reasonably believed were serious and imminent: namely, given his knowledge of DL, there was an imminent risk of her hitting or biting nurse Andrews, thereby causing her significant (more than minor) injury. I accept that in seeking to restrain her he was both from his perspective and viewed objectively, taking appropriate steps to protect nurse Andrews. When I say appropriate, I mean that it was in my judgement appropriate for him to intervene so as to prevent, by restraint, DL from injuring nurse Andrews – with the result that the reason for dismissal was within section 100(1)(e). I then considered section 100(3).

56. Whereas 98(1)(2)(b) ERA requires the employer to show simply that the reason for dismissal 'relates to' the conduct of the employee, section 100(3) requires more than this – that is the effect of the inclusion of the words 'so negligent'. To escape a finding of automatic unfair dismissal, the employee's act must in fact have been sufficiently negligent and such that a reasonable employer might fairly dismiss for doing it.

57. However, the wording of subsection (3) is such that it envisages scope for disagreement as between reasonable employers: one reasonable employer 'might' dismiss yet another reasonable employer might not dismiss for an act which is 'so' negligent. The words 'might' and 'so' allow for the possibilities of

different outcomes (dismissal or not dismissal) and varying degrees of negligence.

58. I conclude that the Respondent has shown that the way in which the Claimant carried out the restraint (ie in taking the step) was so negligent that 'a reasonable employer' might have dismissed him for doing what he did (i.e. carrying out an unapproved restraint, a neck-hold).

59. I arrive at this conclusion on the basis of my findings of fact: the clear wording of the policy about neck-holds indicating how wrong the Respondent considered such a restraint to be; that the Claimant was aware of the policy; the fact that the Claimant had never initiated a single-handed restraint before whereas aggression from residents and restraint of them is common place in the hospital; the that staff, including the Claimant had been trained on restraint techniques and the agreed fact that the Claimant used an unapproved technique. I have had regard to the fact that DL was not physical injured – but there was undoubtedly the potential for this and the fact that she was not is not the result of a carefully applied technique, and is more likely down to good fortune.

60. In circumstances where the policy is clear and where training has been afforded, and having seen the CCTV footage, I am satisfied that the Respondent has discharged the burden under subsection (3) such that I am unable to regard the dismissal as being automatically unfair. A reasonable employer might have dismissed the Claimant for restraining DL around the neck, forcing her against the wall and then onto the ground; that the action was sufficiently negligent in the circumstances of the case. It was, as described by Mr Deery, a reckless act. The complaint of automatically unfair dismissal must therefore fail.

Section 98(4)

61. As set out above, there was no dispute as to the genuineness of the reason for dismissal or as to whether the Respondent had shown a potentially fair reason. That reason, (as set out in paragraph12 of the Respondent's written submissions) is a reason that relates to conduct.

62. I have given very careful consideration to the criticisms of the investigation. However, I conclude that it was a reasonable investigation, essentially for the reasons set out in Mr Bayne's submissions. It was not unreasonable not to interview two members of staff who were not witnesses to the incident. The Claimant could have asked them to attend the hearing or give a statement as was the case with Ms Andrews who in any event did give evidence at the appeal hearing.

63. As with all aspects of the test of 'band of reasonable responses', the question is not whether the Respondent carried out a 'Rolls Royce' standard investigation; the question is whether the investigation was reasonable in the circumstances.

Given the very narrow focus of this incident, whilst recognising some of the criticisms, I conclude that the investigation that was carried out was within a band of reasonable responses. I must always bear in mind that the reasonableness of the investigation is to be considered in the context of asking whether there were reasonable grounds for sustaining the genuine belief. The disciplinary hearing consisted of evidence from people on both sides of the fence, giving an account as to the reasonableness of Mr Stewart's actions on that night.

64. Although Mr Kerfoot raised a point of as a flaw in the investigation that the CCTV was did not show footage of the patient leaving the room, I reject the suggestion that this demonstrates that the investigation was unreasonable. There was always an acceptance that DL was agitated. Even if she had been banging and kicking at the door of the office, the ultimate conclusion was that looking at the actual restraint at the time she was restrained, and whilst she lunged towards Ms Andrews, nevertheless the force used and the technique used was reckless and unacceptable to the Trust.

65. It was not incumbent – in order to carry out a reasonable investigation – to interview everyone on the ward that night or to scrutinise every second of CCTV – although I find that the relevant CCTV footage was, in fact, intensely scrutinised. The procedures allowed for the Claimant to call other people which he did not. Mr Kerfoot says it is unfair to put the burden on the Claimant to do that. However, it is not a case of putting a burden on him – it was not a burden but an opportunity. It is a case of standing back overall and asking whether what was done and what was made available to the Claimant was reasonable. In my judgement it was.

66. As to the grounds for Mr Deery's belief, I conclude that he did have reasonable grounds for sustaining his belief that the restraint was a single initiated restraint, that it was an unrecognised technique and that it was, in the circumstances, a disproportionate use of force.

67. He had the evidence of the CCTV footage, albeit without sound. He had the evidence of Ms Linton and he had the opinion and experience of Mr Truman. He also had the benefit of his own considerable experience. I must not substitute my view of events for his. It was, in light of the material before him, open to him to accept the view of Mr Truman, and whilst recognising that DL was agitated and even displaying some signs of aggression, that by going in to restrain around the neck, it was open to him to conclude that this was a dangerous manoeuvre which was disproportionate in all the circumstances.

68. He also had the view of the investigating officer, Ms Clark. It is of course desirable for one person to investigate and another to make the decision. That is what happened here. I am not persuaded that it is in all circumstances wrong to ask the investigator for a view on the issue at hand. As Mr Bayne says, she may well have said something helpful to the Claimant. There is no bright line in situations such as this. Why would it be unreasonable to ask an experienced nurse as to

her view of the restraint? It might taint his decision, submitted Mr Kerfoot. I accept that there is a risk of this. However, I conclude that given everything else, the addition of Ms Clark's view point was simply confirmative of what Mr Deery had considered himself to be the case as supported by Mr Truman. The same can be said for the view of Mr Rushbrooke. It is not for me to prefer nurse Andrews' view of the proportionality of the Claimant's actions, as she gave at the appeal hearing, over those expressed by others. That was a matter for Mr Deery and then Ms Rushbrooke to assess. What I must do is consider whether their genuinely held beliefs were held on reasonable grounds. And I so conclude.

69. As for the suggestion of procedural unfairness, I have rejected the suggestion of impropriety (actual or perceived) regarding the conversation between Mr Deery and Ms Rushbrooke. I also reject the suggestion of procedural unfairness in relation to the questioning of Ms Clark. As I have already concluded, whilst there may in some cases be a theoretical risk of manipulation or tainting of decision making, I am satisfied that was not the case here. Mr Deery reached his conclusion on a careful consideration of the evidence. I do not regard it as outside the band of reasonable responses for the decision maker to ask the view of the investigator at that stage of proceedings to express a view, in the circumstances of this case. I also conclude that in any event his conclusion would have been the same even if he had not asked Ms Clark for her view based as it was on his own assessment and that of Mr Truman's. It did not result in any unfairness to the Claimant.

70. Therefore, having considered the investigation and looked at the material before the disciplinary panel (and the appeal panel) Mr Deery had reasonable grounds for sustaining his belief (as was the case with Ms Rushbrooke).

71. On the question of sanction, again it is not for me to substitute my view. It is not a question of whether the Respondent should have imposed a lesser sanction. It is a question of asking whether the sanction of dismissal was reasonable.

72. I bear in mind that this was a split-second decision that Mr Stewart made and Mr Deery recognised that as well. Did Mr Deery act reasonably in characterising the conduct as gross misconduct? In my judgement he did: the policy is clear about neck-holds; this was a neck-hold from the front. It was done quickly and with force and had potential to cause significant physical injury. By the nature of things (in the environment in question) staff will have to act quickly in situations. Yet in acting quickly, the Respondent still reasonably requires them to exercise appropriate restraints.

73. Mr Deery took account of the references and of the Claimant's length of service. However, what led him to impose the sanction of dismissal was his conclusion not only that the technique was reckless and potentially injurious to DL but that the Claimant showed no sign of recognising that he should not intervene in this way again. In Mr Deery's assessment at the time, the Claimant was strident in

that view. Therefore, he reasoned that a lesser warning would be inappropriate in these circumstances.

74. Against those findings of his, in respect of which – in applying section 98(4) – I am unable to substitute my view, he was reasonably entitled to conclude that he 'showed no remorse' (that might be the wrong way of describing it but in effect it amounted to Mr Deery coming to the conclusion, reasonable in the circumstances, that he could not trust the Claimant to act differently (i.e. to use an appropriate restraint) in a similar situation in the future – even against the background that this was the only time in 19 years that the Claimant had so acted. Even if I were to consider that to be a harsh assessment or a harsh sanction to apply, I conclude that he acted reasonably in coming to his assessment of the appropriate sanction and that it was one which a reasonable employer could have applied. The Respondent acted reasonably in treating the reason for dismissal as a sufficient reason in the circumstances. As such, the claim of unfair dismissal must fail.

Wrongful dismissal

75. I take a different view on the question of wrongful dismissal. Here, I am not constrained to accept the views of Mr Deery or Ms Rushbrooke. It is not a case of asking whether it was reasonable to regard the Claimant as showing no remorse. I must look at the matters as I find them to be.

76. I conclude, from my findings, that the Claimant acted with one purpose and one purpose only: to protect his colleague from a serious injury. Whilst he had training, and his method of restraint was dangerous and had the potential to cause significant harm to DL, his split-second decision was not a wilful act of disobedience or a wilful decision to ignore his training. It was, in my judgement, a wrong decision to restrain DL in the way he did but it was a reaction to his quick assessment of the situation based on his genuine belief that others were unable to restrain DL because of their personal circumstances. That may not be what the Respondent would expect of a trained employee working in this environment with vulnerable residents/patients and although it is conduct which is so negligent as to warrant dismissal, nevertheless, the Claimant did not evince an intention not to be bound by the essential terms of the contract.

77. Whilst I conclude that his restraint was a negligent restraint, given the speed with which this happened, and the other circumstances as he understood them to be, and the absence of any actual injury to DL, this was not such a gross dereliction of duty as would warrant summary dismissal.

78. I have accepted Mr Deery's assessment of what the Claimant said about 'doing the same thing again' as being one which was reasonably open to him (for the purposes of section 98(4)). I am unable to substitute my view of that for his for those purposes. However, having heard the Claimant in evidence and having read what was said in context, I respectfully disagree with Mr Deery. The

Claimant was in effect saying that he would step in again to physically restrain a patient whom he believed to be a danger to a colleague, in the circumstances which he found himself in at the time: i.e. where he believed them to be incapable of acting and where he believed not to, would expose them to harm. He was not, in my judgement, saying he would ignore his training and deploy a dangerous and unapproved technique in the future. That is my assessment of what the Claimant was in effect saying. I accept it differs from Mr Deery's assessment and for that reason I accept the sanction of dismissal was reasonable for the purposes of section 98(4).

79. But it is a question of fact for me to decide whether, in restraining DL in the way that he did, by reacting to a situation with the intention of protecting his colleagues, and by saying that he would do so again if compelled, he repudiated the contract of employment. The burden of proving the fundamental breach is on the Respondent and I conclude that it has not shown that by his actions the Claimant repudiated the contract of employment. Therefore, his claim for wrongful dismissal succeeds. The Claimant was entitled to be given notice or payment in lieu of notice of his dismissal.

Employment Judge Sweeney

4 March 2021