# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Frank Lawson

**Respondent:** Huntercombe (Granby One) Ltd

**Heard at:** Birmingham remotely by CVP **On:** 27 and 28 May 2021

**Before:** Employment Judge Battisby

**Representation**
Claimant: In person
Respondent: Mr M Curtis

# JUDGMENT

1. The claim for holiday pay is dismissed by consent on its withdrawal by the claimant.

2. The claim for unfair dismissal fails.

# REASONS

**The claim and the issues to be decided**

1. The hearing was conducted over two days by video with all participants using the Cloud Video Platform. The claimant was unrepresented, but was assisted with some of his cross examining by his friend, Mr Joseph Adjei, who also delivered the claimant's closing submissions. Everyone coped very well with the arrangements and are to be commended.

2. This was a claim for unfair dismissal and unpaid holiday pay. At the commencement of the hearing, Mr Curtis, on behalf of the respondent, explained the basis for their contesting the claim for holiday pay. The claimant accepted the explanation and withdrew the claim. He consented to a judgment dismissing it.

3. The claimant also confirmed his agreement as to the correct name of the respondent.

4. We identified the issues to be decided initially as follows.

   4.1. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal has to decide whether the respondent genuinely believed the claimant had committed misconduct.

   4.2. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

      4.2.1. there were reasonable grounds for that belief;
      4.2.2. at the time the belief was formed the respondent had carried out a reasonable investigation;
      4.2.3. the respondent otherwise acted in a procedurally fair manner;
      4.2.4. dismissal was within the range of reasonable responses of a reasonable employer.

   4.3. If the claimant succeeds with his claim, should his compensation be reduced on the basis there was a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason ('the *Polkey* issue')? Further, should his compensation be reduced by reason of his contributory conduct? Finally, should there be any increase in his award for a failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, if it applied.

**Evidence and the facts found**

5. I heard evidence from Miss Jenna Vousden, the respondent's head of nursing, who carried out the investigation; Mr Morgan Owen, the respondent's hospital director at the time and dismissing officer; and Mr Wiz Magunda, another of the respondent's hospital directors from another location, who heard the appeal against dismissal. I heard from the claimant, who did not call any witnesses. I received a bundle of documents running to 216 pages. Where I refer to documents in this judgment, the page numbers refer to this bundle, which I received in both electronic and hard copy form. I would like to commend the respondent's solicitors for producing such an excellent electronic bundle, which made my task of navigating the documents much easier. Also, I had copies of witness statements of all witnesses. Finally, I received a digital file of some CCTV footage of the incident that led to the claimant's dismissal. This was shown from time to time in the hearing and I am grateful to Mr Curtis for his technical expertise in enabling this process to take place with ease and without any delay to the proceedings.

6. It was agreed that, for the purposes of this hearing, the patient involved in the incident should be referred to by his initials to accord with all the documentary evidence, but that in any published written judgment he would be referred to as 'Patient X', obviously to maintain his confidentiality.

7. Patient X is a patient with a long-standing diagnosis of mild learning disability associated with inappropriate behaviours, autism spectrum disorder and attention deficit hyperactivity disorder (130). The claimant accepted he was aware of these conditions from Patient X's care plan and his experience of working with him for about 8 months, and that Patient X had a propensity to feel anxious and overwhelmed in challenging situations; and that he got frustrated and violent and had a challenge when processing a distressing incident. He was also aware that Patient X was prone to uttering racial abuse. The claimant is a black man and had been on the receiving end of such abuse by Patient X, and indeed other patients.

8. The respondent is an independent provider of health and social care services. The respondent operates the Eldertree Lodge hospital at Market Drayton, Shropshire, which provides round-the-clock support to in patients with severe mental health and learning difficulties.

9. The claimant was employed by the respondent as a support worker from 21 August 2017 until his dismissal on 25 June 2020. The claimant was based at Eldertree during his employment with the respondent and was responsible for the day-to-day support and management of service users on Birch ward. On 24 February 2020 staff created an incident report (99) to the effect that Patient X was verbally and racially aggressive towards the claimant and had threatened to kill him. This was brought to the attention of Miss Vousden and, although the claimant denies it, I am satisfied that she, as was normal practice, asked the claimant if he would prefer to work on another ward, but he declined.

10. On 29 February 2020 at 10:30 am the incident occurred on Birch ward, which led to the claimant's dismissal. The respondent's CCTV recordings show two camera views from each end of the corridor in which what appears as a lengthy scuffle between the claimant and Patient X took place. During the incident the claimant used his device for calling for assistance and, as a result of the intervention by the support team, the scuffle was brought to an end.

11. Miss Vousden was the on-call manager at the time and was alerted to the incident when she was at home. As a result, Miss Vousden attended Birch ward to watch the CCTV footage with Heidi Jennings, the senior staff nurse on duty

12. Because the incident gave rise to potential safeguarding issues, Miss Vousden completed an incident log on the respondent's incident reporting platform (100109) and she asked Heidi Jennings to obtain a statement from both the claimant and Patient X about the incident. Later, she received statements from the claimant (113-114) and from Patient X (115). The claimant denied that he had been interviewed by anybody. Miss Vousden had assumed that Ms Jennings had

interviewed him to obtain the statement, but now accepts that Ms Jennings may simply have asked him to provide a statement without an interview having taken place. As is normal practice with the respondent, Patient X was debriefed and a body map was prepared showing his injuries, which included scratches and breaks to the skin to his right hand and neck area, what was considered to be a bite mark on his chest and a reddened area to his face (110-111).

13. The claimant attended his local hospital A&E soon after the incident and Ms Jennings arranged for Patient X to be taken to their local hospital later to assess his injuries. The hospital confirmed that Patient X had also suffered a sprained ankle with bruises to his wrist and various cuts and abrasions, though the cause of one being a bite was denied, and these were confirmed in a letter from the hospital to Patient X's GP dated 29 February 2020 (199) and the hospital also provided photographic evidence of his injuries (189-191). The claimant himself had suffered a possible fracture injury to his hand and ligament damage to his ulna as recorded in a letter from the hospital to his GP dated 3 March 2020 (125).

14. The incident was subsequently reported to the police by both the claimant and, separately, by Patient X.

15. As a result of her review of the CCTV footage and consideration of the other evidence and, following a discussion with Mr Owen, it was decided there was no alternative but to suspend the claimant, and Mr Owen asked Miss Vousden to implement the suspension and conduct a disciplinary investigation. Miss Vousden telephoned the claimant to inform him of this decision, which was then confirmed in a letter dated 2 March 2020 (116). The allegation being investigated was "alleged patient abuse". The suspension was on full pay with immediate effect.

16. Miss Vousden was requested by one of the police officers dealing with their investigation to refrain from carrying out any internal investigation until they had concluded theirs on the basis that they wanted to take their own statements first. Miss Vousden wrote to the claimant on 6 March 2020 to inform him of this (126). She confirmed she would arrange a meeting with him once the police investigation had been concluded

17. The police investigation was finalised on or about 1 May 2020 and they decided not to pursue any charges against either party involved. Notwithstanding the decision of the police, the respondent still considered it necessary to proceed with its own investigation and Miss Vousden went on to prepare her investigation report, which is dated 8 June 2020 (127-130). There were no witnesses to the incident and so no further statements were taken. Miss Vousden reviewed the CCTV footage from both camera angles and reviewed the claimant's training records. As she had the statement from the claimant and one from Patient X both made immediately after the incident, she decided it was not necessary to invite the claimant to a further meeting at that stage as his statement was comprehensive. Further, as the CCTV footage showed fully what had occurred, she did not consider it would make a material difference to her investigation if the claimant reviewed the

CCTV footage, and decided to leave it to the discretion of others as to whether the footage should be shown to him. However, in her investigation report (127-132) she described minute by minute exactly what happened during the incident according to what she observed on the CCTV footage. She concluded in terms that, whilst Patient X had presented in a threatening manner towards the claimant such as by throwing a ball at his chest and stamping on his foot, it appeared Patient X was returning to his bedroom at the time when the claimant initiated actual physical contact with Patient X. In her opinion, the claimant should have removed himself from the environment once Patient X became verbally abusive and put himself in a place of safety until others arrived. She felt the claimant had chosen to follow Patient X down the corridor resulting in the incident occurring. The claimant had had opportunities during the incident where he could have disengaged to a place of safety, but did not do so. She disputed the claimant's assertion that his actions were in self-defence. She accepted that the claimant may well have been racially abused by Patient X. She confirmed that the claimant was up-to-date with his physical intervention training, but concluded that the holds he used in the CCTV footage were not in line with the training, known internally as ‘Maybo’. She recommended that disciplinary action be taken against the claimant.

18. The records show that the claimant completed his Maybo training on 24 July 2019 (196) and the training included breakaway techniques, namely how to safely remove oneself from a situation with an aggressive patient as well as deescalation. As the claimant was well-aware, the training emphasizes the need to avoid violent incidents and reduce the risk of violence, and that it is about redirecting the aggressor and avoiding escalation by acting in a non-threatening manner. The use of force in self-defence is permitted when in ‘imminent/immediate danger’ and action can be taken in anticipation. However, the force used must be necessary, reasonable and proportionate (195). Retaliation is not permitted.

19. Her investigation report was sent to Mr Owen and he accepted the recommendation that there should be a disciplinary hearing. On 17 June 2020 he wrote to the claimant and invited him to a disciplinary hearing (133-134). This made it clear that the disciplinary hearing would be held on 25 June 2020 in accordance with the company's disciplinary policy. The stated purpose of the hearing was to consider an allegation that "on the 29 February 2020 you assaulted Patient X causing injury". He was sent Miss Vousden's investigation report and its listed appendices, the respondent's disciplinary policy and a document described as ‘notes of your investigation meeting’. This latter document was in fact the claimant's statement (113) which he, like Miss Vousden, had mistakenly believed had come about as a result of an interview between the claimant and Ms Jennings. The claimant was informed of his right to be accompanied at the meeting. Mr Owen's letter also pointed out that the alleged offence was defined as "gross misconduct" in the respondent's disciplinary procedures, so that one possible outcome of the hearing could be his summary dismissal. The letter gave the claimant the option of responding to the allegations in writing before the hearing, but he chose not to do so. At this point Mr Owen was not aware the claimant had not seen the CCTV footage. Mr Owen is a qualified nurse with over 30 years’ experience.

20. On 25 June 2020, Mr Owen chaired the disciplinary hearing and was supported by Ms Caroline Foxall, senior HR administrator. The claimant attended the hearing with his union representative, Mr Mark Turner. Ms Foxall prepared minutes of the hearing (135-137).

21. At the beginning of the hearing, Mr Owen asked the claimant to provide his summary of events on the day in question. In response, the claimant maintained that he had been racially abused and attacked, which meant he had to use selfdefence in line with his Maybo training. The claimant also said he had been previously verbally abused and threatened by Patient X and that a shortage of staff on Birch award that day, as well as a delay in the response team arriving, exacerbated the danger he was in. Indeed, he alleged they were three members of staff short and that the response team took six minutes to arrive.

22. Whilst acknowledging the claimant's concerns, Mr Owen pointed out that the video had clearly shown three occasions when the fighting stopped and he could have walked away, but did not stop. The claimant denied this and further denied having initiated any physical contact. He said that Patient X was pushing him and the claimant was deflecting many punches by using Maybo deflects. Mr Owen disagreed, stating he was not using Maybo techniques. He said the claimant was hitting Patient X back with keys in his hand. He asserted the claimant's responses were inappropriate and not in accordance with Maybo techniques. Mr Owen further pointed out that the video showed the claimant exhibiting violence and aggression. The claimant continued to assert that he felt in danger and that Patient X was "going to kill me".

23. Mr Owen pointed out that, according to the investigation report, there were sufficient staff on duty and that the response team arrived within two minutes, as shown by the video timings, and not six minutes. Towards the end of the hearing Mr Turner asked if they could see the CCTV footage to ascertain whether the claimant had the opportunity to move away and that, if he could see it, the claimant might respond differently. Mr Owen stated that the video showed the claimant did have the opportunity to move away. Nevertheless, he said the request to see the footage would be considered. The hearing lasted 40 minutes, at which point Mr Owen took a break to review the evidence. He was accompanied by Ms Foxall, but I am satisfied she played no part in the decision-making process. After a break of five minutes, Mr Owen reconvened the meeting. He informed the claimant that he considered the claimant had used inappropriate force against Patient X and that this amounted to gross misconduct and warranted a decision to dismiss. He concluded also that the claimant could have protected himself very differently, that his actions were not appropriate and were, in his opinion, "quite appalling". The claimant indicated he would appeal the decision and would need to see the CCTV footage. Mr Owen considered the possibility of a lesser sanction, but ruled this out as the offence was so serious and the claimant had shown no indication he had learnt from the experience. He was still saying he would not have acted any differently. Mr Owen felt it would be unsafe to let him continue to work with vulnerable adults.

24. Following the disciplinary hearing, Mr Owen consulted with Ms K Pearson, the respondents HR Business Partner. They agreed that the claimant should be permitted to view the CCTV footage but that, in the meantime, the decision to dismiss would stand. The reason for the reticence in releasing the CCTV footage to the claimant had been due to sensitivities about patient confidentiality.

25. Mr Owen sent a letter to the claimant dated 26 June 2020 (138-139) informing him of the outcome of the disciplinary hearing. The letter confirmed his findings, notified him that he was being dismissed with immediate effect and of his right to appeal. The letter concluded by stating that the time for appealing was extended to 6 July 2020 to enable the claimant to view the CCTV footage on 30 June 2020 accompanied by his union representative.

26. On 30 June 2020, as evidenced by the email from Ms Foxall to the claimant that day (145), the claimant telephoned Mr Owen cancelling the meeting to view the CCTV footage and confirming that he would rather watch the footage on the day of the appeal. This was agreed.

27. Later the same day the claimant submitted his letter of appeal (141-142). In his letter he set out what he considered to be procedural errors and his grounds of appeal. In summary, he sought to argue that, if the respondent had followed correct procedures in regard to staffing levels and speed of response to his emergency situation, the incident would not have occurred. Further, he argued that he did not show violent aggression against Patient X, but had applied Maybo techniques to defend himself when in immediate danger and that, in such a situation, an appropriate level of force could be used.

28. The appeal against dismissal was heard on 29 July 2020 by Mr Wiz Magunder. He has been employed by the respondent since 2015 and is the hospital director for Stafford Hospital responsible for the operational running of the hospital and is the registered manager with the Care Quality Commission. He has had a career in this and the NHS sector for some 40 years. He has handled many disciplinary and appeal hearings. He was accompanied by Ms Pearson, who took notes. She prepared the minutes of the hearing (156-165). The claimant was accompanied once again by his union representative, Mr Turner. Prior to the hearing, the claimant viewed the CCTV footage with Mr Turner. At the beginning of the hearing the claimant said that, on viewing the footage, he still considered that his actions had been reasonable and justifiable and that he had done nothing wrong. Mr Magunder wanted to give him an opportunity to view the footage yet again to see if he remained of the same mind because, as he said, his impression was different. As they viewed the CCTV footage together the claimant talked Mr Magunder through it. The claimant was given every opportunity to comment upon the footage and explain his actions and how he considered he had conducted himself in line with his Maybo training. The claimant continued to assert that his actions had been reasonable and justifiable in that he had acted in self- defence because he viewed himself as being in danger. Mr Turner drew Mr Magunder's attention to the

claimant's allegations that the respondent had not taken care of his safety in the light of alleged understaffing issues on the day of the incident, which delayed the response team. He also questioned why the police report had not been provided in response to the claimant's request. Ms Pearson confirmed the police had not provided a copy of their investigation report to the respondent, but had merely advised that their investigation had concluded with no further action.

29. In relation to staff shortages, the claimant presented Mr Magunder with a new document which the claimant had prepared himself, outlining how Birch ward operates and the alleged shortfall in staff on that day. Mr Magunder responded that, on the information he had received, the staffing levels on the day of the incident were correct and there was no shortfall

30. All points covered by the claimant's appeal letter were dealt with in. The claimant maintained his position that he had not initiated the scuffle, had been acting in self-defence and had used appropriate force. At the very end of the hearing Mr Magunda asked the claimant whether, having reviewed the CCTV footage, he would have done anything different. After thinking about it, the claimant said that, after raising the alarm, he would have tried to secure himself in safety wherever he could. It is very clear from the minutes of the hearing that all relevant details were covered and the claimant and his representative had every opportunity to state their case.

31. On 31 July 2020 Mr Magunder wrote to the claimant to notify him of his decision not to uphold his appeal (186-188). He confirmed his findings in relation to the various matters raised and concluded by stating his opinion that the claimant's actions were not reasonable nor justifiable and were not in line with recognised Maybo techniques. He believed the claimant could have removed himself to a place of safety and not engaged in what he could only describe as a fight. For those reasons, he upheld Mr Owen's decision to dismiss.

32. He agreed that dismissal was the appropriate sanction. I should add that, although Mr Magunder had not undertaken Maybo training himself, he looked it up on the internet and knew from all the training he had received in the past that the objective must be to seek to avoid a violent situation. He concluded that, whatever danger the claimant felt he was in, his response was inappropriate and he could have walked away on more than one occasion. The claimant made the situation worse by bringing Patient X to the ground and by acting in a physically aggressive manner.

33. After the appeal decision had been communicated to the claimant, he commenced ACAS early conciliation, which ran from 10 August 2020 to 10 September 2020. He presented his claim form to the tribunal on 28 September 2020.

**The relevant law**

34. I was not referred to any statutory or case law, but set out here the relevant law I have taken into account. Under section 98 of the Employment Rights Act 1996 ('ERA') it is for the respondent to show the reason the dismissal, and conduct is a potentially fair reason for dismissal. Under section 98(4) ERA, the determination as to whether the dismissal is fair or unfair having regard to the reason given by the respondent- (a) depends on whether 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 the dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits case.

35. In most unfair dismissal cases involving misconduct, the tribunal will consider three questions following the case of *British Home Stores v Burchell* [1978] IRLR 379, in which they were set out, namely whether:

    a) the employer had a genuine belief in the employee's guilt
    b) that belief was formed on reasonable grounds
    c) the employer carried out a reasonable investigation in forming that belief

36. Tribunals are not obliged to follow these guidelines, although they are used in virtually every misconduct case.

37. The investigation has to be a reasonable one. In *W Weddel & Co Ltd v Tepper* [1980] IRLR 96 at 101 per Stephenson LJ, it was held that employers:

    *20.. 'must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds*.'

38. Further, the investigative exercise that was undertaken must be considered as a whole: *Shrestha v Genesis Housing Association Limited* [2015] IRLR 399, where Richards LJ held:

    *23 'To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole'*.

39. The Court of Appeal in *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23 clarified a point, namely that the tribunal must not substitute its own view as to what was reasonable or adequate in terms of the investigation. This means the need to apply the objective standards of the reasonable employer applies as much to the question whether the investigation into the suspected misconduct was reasonable

in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason.

40. Following the Court of Appeal decision of *Taylor v OCS Group Ltd* [2006] IRLR 613, there is a general acceptance that procedural defects in an initial disciplinary hearing may be remedied on appeal. This case made it clear that what matters is not whether the internal appeal was technically a rehearing or a review, but whether the disciplinary process as a whole was fair. The task of the tribunal is to apply the statutory test and, in doing so, they should consider the fairness of the whole disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care, but their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at the early stage.

41. To be clear and reiterate the point, I remind myself of the long-standing principle of law that, when determining whether dismissal is a fair sanction, the tribunal must not substitute its own view of the appropriate decision for that of the employer: *Rolls-Royce Ltd v Walpole* [1980] IRLR 34).

42. There is an area of discretion within which management may decide on a range of outcomes, all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction such as a final written warning would have been reasonable, but whether the dismissal was reasonable: *British Leyland v Swift* [1981] IRLR 91. In *Tayeh v Barchester Healthcare Ltd* [2013] IRLR 387 it was held the tribunal had erred in finding that Ms Tayeh's dismissal had not been within the band of reasonable responses; it had substituted its own views as to the seriousness of the charges for those of the employer.

43. It is well-established law that the function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted; *Iceland Frozen Foods v Jones* [1982] IRLR 439.

## Conclusions

44. I will deal with the submissions made far as is necessary in my conclusions that follow. Dealing with the issues previously set out, the first question is whether the respondent had reasonable grounds for its belief that the claimant had assaulted Patient X. Having viewed the CCTV footage myself, there can be no doubt that there were reasonable grounds for that belief. Further, the fact that the police had decided to take no further action has no bearing on this question. A decision by the police whether or not to prosecute is based on entirely different considerations, not least the criminal burden of proof, namely beyond reasonable doubt. In civil

proceedings the burden of proof is on the balance of probabilities i.e., more likely than not, or 51% or more.

45. The next question is whether, at the time the belief was formed, the respondent had carried out a reasonable investigation. By the time of Mr Owen's disciplinary hearing, the respondent had a written statement made by the claimant on the day of the incident, another one from Patient X and the CCTV footage, which clearly showed the incident in full from two different angles.

46. There was therefore no need for any further investigation to be carried out prior to the disciplinary hearing at which the claimant had every opportunity to state his case.

47. The third question is whether the respondent otherwise acted in a procedurally fair manner, and the claimant makes a number of criticisms. First, he complained that neither Ms Vousden, the investigating officer, nor anybody else, met him for an investigatory interview prior to the hearing. He suggested this was a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Code provides that there may be an investigatory meeting, but it is not necessary in every case. It depends on the circumstances of each case. Here I find the was no breach of the Code. The purpose of such an investigatory interview would have been to obtain evidence and decide if a disciplinary hearing was appropriate. However, there was sufficient evidence already obtained to justify the disciplinary hearing and the claimant was not prejudiced by any lack of such a meeting because he later had every opportunity to state his case.

48. A second complaint by the claimant is that he was not shown the CCTV footage before, or at, the disciplinary hearing. Mr Owen accepted this criticism. He had only found out that the claimant had not had an opportunity to see the footage during the course of the hearing itself. At that point, he had the option to suspend the hearing to enable the CCTV footage to be made available, either then or in the near future. Instead, he decided to proceed with the disciplinary hearing and leave this issue to be resolved on any appeal against his decision. I find this was a substantial procedural failing on the part of the respondent. However, once the claimant appealed, he was given every opportunity to view the CCTV footage and did so both with his union representative alone just prior to the appeal hearing, and then during the hearing itself. It was his decision to put off the viewing of the footage until the day of the hearing, even though the respondent had offered to make it available to him some time before. Applying the case law to which I have referred, I find that the procedural failing in this respect was cured by the appeal and, when looking at the overall process followed, this failing did not render the procedure unfair. In any event, his viewing of the CCTV footage did not change what the claimant had to say about the incident.

49. The claimant submitted that there were staff shortages on the day in question and a delay in the response of the support team once he had raised his alarm. I am satisfied the respondent was entitled to conclude that there was no staff shortage

and that the response delay was about two minutes. Indeed, the claimant now accepts the delay was two minutes rather than six minutes. I agree with the submission made by Mr Curtis that, in the time before the response team arrived the claimant had already conducted himself in such a way as to justify his dismissal.

50. Regarding the argument that the respondent should have obtained the police report and supplied a copy to him, I am satisfied there was no police report to disclose and that the police would not have been entitled to release it to the respondent, and certainly not without the permission of all parties involved. As the person under investigation, it must have been for the claimant to approach the police for a report, if he felt it would assist him. I am satisfied that the respondent never promised to supply a copy of it to him. In any event it is hardly likely to have made any difference since the respondent was judging the case based on its own investigations and it was entitled to do so.

51. In his witness statement the claimant suggested that the respondent should have involved the Maybo team to review his actions before coming to a final decision. I am satisfied there was no need this to be done. Those involved in deciding the issue were aware of the appropriate Maybo behaviour required and it was simple for them to reach their own conclusions without involving anybody else.

52. Accordingly, I reiterate that the respondent acted overall in a procedurally fair manner. All points raised by the claimant in his defence were considered and dealt with and the managers concerned reach their conclusions based on the evidence.

53. The final question is whether the dismissal was within the range of reasonable responses of a reasonable employer. I am satisfied that Mr Owen and Mr Magunda reached a reasonable conclusion based on the evidence that the claimant had initiated the more serious part of the fight when he had been in a position to walk away and that further opportunities presented themselves to the claimant to walk away, but he continued to act in an aggressive physical manner towards Patient X, who was a vulnerable adult, and caused him physical injuries. I am satisfied that the CCTV footage does indeed show, and they were reasonable in concluding, the claimant swung his keys in his hand to strike Patient X. They were reasonable in viewing this as a most serious incident justifying summary dismissal. Given the provocations faced by staff in such hospitals they are trained and have to be trusted to act in an appropriate manner when faced with severe provocation, be it racial abuse, physical threats or, indeed, violence. Here they considered the claimant's responses as being wholly inappropriate and unreasonable in the circumstances prevailing. The fact that he himself would not recognise this exacerbated matters.

54. Accordingly, I find the dismissal was fair in all circumstances.

Employment Judge Battisby
Date: 26 June 2021