EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4106008/2019

Held in Glasgow on 26, 27, and 28 August 2019 and 16 September 2019

Employment Judge S MacLean

Mr Michael Phillips	**Claimant Represented by: Mr P Deans - Solicitor**
The State Hospital Board for Scotland	**Respondent Represented by: Mr C Reeve - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the application is dismissed.

REASONS

Background

1. On 26 April 2019 the claimant sent a claim form to the Tribunal's office complaining that the respondent unfairly dismissed him on 7 December 2018. The claimant seeks reinstatement failing which re-engagement or alternatively compensation.

2. In the response form the respondent admitted that the claimant was dismissed for a potentially fair reason: his conduct. The respondent denies that the claimant was unfairly dismissed as the respondent held a genuine belief that the misconduct had occurred and had a reasonable basis on the evidence from the investigation presented at the disciplinary hearing. The respondent says that the decision was within the band of reasonable responses.

Alternatively, the respondent maintains that the claimant caused and contributed to his dismissal and a blame that was blameworthy and accordingly any compensatory award should be reduced. As the claimant caused and contributed to the dismissal to a significant extent it would not be just to order reinstatement or re-engagement. In the event the respondent says it is not just and equitable to award compensation to the claimant.

3. Catherine Totten, Lead Allied Health Professional, Mark Richards, Director of Nursing and Allied Health Professionals and James Crichton, former Chief Executive gave evidence for the respondent. The claimant gave evidence on his own account. The parties provided a joint set of documents. They gave oral submissions and helpfully provided a written copy.

Relevant Law

4. Section 98 of the Employment Rights Act 1996 (ERA) set outs how a tribunal should approach the question of whether a dismissal is fair. Section 98(1) and (2) provides that the employer must show the reason for the dismissal and it is one of the potentially fair reasons. If the employer is successful, the Tribunal must then determine whether the dismissal was fair or unfair under sections 98(3A) and (4).

5. The Tribunal was referred to *British Home Stores Limited v Burchell [1978] IRLR 379* where it was established that a dismissal on the grounds of conduct will bb fair in the following circumstances: (i) at the time of dismissal, the employer believed the employee to be guilty of misconduct; (ii) at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and (iii) at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

6. The Tribunal was also referred to:

Clark v Civil Aviation Authority 1991 IRLR 412 for guidance as to the general principles to be considered when assessing whether there has been a reasonable investigation.

Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94 where the Court of Appeal said that what is important is the reasonableness of the investigation as a whole.

The ACAS Code of Practice on Disciplinary and Grievance Procedures.

Westminster City Council v Cabaj 1996 ICR. 960, where it was held that for a procedural defect to affect the fairness of a dismissal it has to be shown that the alleged defect denied the dismissed employee the opportunity of showing that the employer's reason for dismissal was an insufficient reason for the purposes of section 98(4) ERA.

Sharkey v Lloyds Bank pic [2015] UKEAT/0005/1 5, Sharkey v Lloyds Bank pic [2015] UKEAT/0005/1 5. The Tribunal should consider the fairness of the whole of the disciplinary process.

Iceland Frozen Foods Limited v Jones [1982] IRLR 439); Foley v Post Office; Midland Bank pic v Madden [2000] IRLR 82 Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23). The Tribunal has to consider by the objective standards of the hypothetical reasonable employer, whether in dismissing the employee "the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee". The Tribunal must not "substitute its view" for that of the employer. The band of reasonable responses test applies both to the decision to dismiss and to the investigation which led to that decision.

The Issues

7. The claimant does not argue that the respondent did not have a genuine belief in the alleged misconduct; or that this was a sham or that there was some ulterior motive for his dismissal.

8. Accordingly, the issues to be determined by the Tribunal are:

   a. Did the respondent have reasonable grounds for the belief in the alleged misconduct?

b. At the time the respondent formed that belief had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?

c. Was dismissal a fair sanction applying the "band of reasonable responses" test?

d. What, if any, remedy would be awarded to the claimant.

Findings in Fact

9. The Tribunal makes the following findings in fact.

10. The respondent is a Special Health Board and one of four high security hospitals in the United Kingdom. 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.

11. The respondent employed the claimant as a Nursing Assistant at the State Hospital, Carstairs from 4 November 2013 until his dismissal on 7 December 2018.

12. The respondent has a policy on Management of Employee Conduct (the policy). Under the policy before any disciplinary process a full and thorough investigation must be carried out timeously in order to establish the facts of the case. The investigating officer will seek to compile sufficient information and evidence for a management decision to be reached on whether a disciplinary hearing is necessary. At the conclusion of the investigation the investigating officer will make a recommendation as to whether the matter requires to be progressed to a formal disciplinary hearing.

13. From around 2015 the claimant was based in Iona 2 ward which, is renowned as one of he most challenging wards on which to work. The claimant had good relationships with colleagues and patients. He was well respected and there were no conduct issues.

14. On 5 March 2018 the claimant was working on Iona 1 ward when on Iona 2 ward patient B assaulted Staff Nurse (S/N) Paul Bradford and Nursing

Assistant (N/A) Victoria Patterson. Patient B was secluded. Later that day Locum Consultant Forensic Psychiatrist Isobel Campbell and S/N Graham Crawford decided to end the seclusion.

15. On 6 March 2018 the claimant was working day shift (7am to 2.30pm) on Iona 2 ward. He was aware of the incident that had taken place the previous day. The claimant assisted with bathing, breakfast and was then on observation for the patients who did not go out on placement. The claimant then helped with lunches.

16. Senior Charge Nurse (SCN) John McFarlane worked the day shift on 6 March 2018 and then worked on until around 6pm. He received no reports or complaints about any patient being assaulted.

17. On 7 March 2018 SCN McFarlane spoke to Mary McDougall, Housekeeper, as he was told she was upset. Ms McDougall told SCN McFarlane that on 6 March 2018 she had observed patient A being assaulted by patient B by slapping him on the face in the dayroom. Ms McDougall said that S/N Bradford and the claimant were in the dayroom and she was surprised that they did not intervene.

18. SCN McFarlane then spoke to patient A, who said that whilst in the dayroom he got up from his chair and slapped patient B on the face in response to patient B assaulting S/N Bradford and N/A Patterson the previous day. Patient A said that S/N Bradford and the claimant did not stop him, and nothing happened to him.

19. SCN McFarlane then spoke to patient B who said that patient A slapped him in the dayroom and the nursing staff did nothing. Patient B named “Paul” and “Michael”.

20. Later patient C approached SCN McFarlane and told him that he witnessed patient A assaulting patient B. Patient C was concerned that the S/N Bradford and the claimant did nothing.

21. SCN McFarlane checked the electronic patient records. He noted that the alleged incident was not recorded. He reported the incident on a Datix incident form as follows:

"I was approached this morning by nursing staff in Iona 2 concerned about the welfare of housekeeper Mary McDougall who was extremely upset and in tears. During my meeting she stated that she was extremely upset that she had observed a patient being assaulted by another patient and that staff did nothing but allowed this to happen and when it did there were 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."

22. On 8 March 2018 Jacqueline McQueen investigated the incident. Ms McDougall provided the following written statement about events in Iona 2 ward on 6 March 2018 at approximately 10.15am:

"I was in 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 this time patient B was sitting on the couch with N/A M Phillips (MP) who had appeared to bend down and pick up a newspaper at this point. Patient A then proceeded to walk over to where he had previously been standing and stood beside S/N P Bradford (PB) once more, who was sitting on the couch. Patient B then gestured to MP as if to say you are 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 to the back of the ward and assumed that staff would come and speak to me about it, however they never did. 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 7 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. 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 Lunney 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 I had witnessed it. SL stated that JF would have to be informed regarding this and SL, S/N, N Walters and S/N G Crawford 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."

23. Ms McQueen brought the incident to the attention of Mark Richards, Director of Nursing and Allied Health Professionals. He decided that given the seriousness of the incident the claimant and S/N Bradford should be suspended.

24. On 9 March 201 8 the claimant was informed over the telephone that he was suspended from duty on full pay pending a formal investigation into allegations made against the claimant, which were to be investigated by Catherine Totten, Lead Allied Health Professional. The claimant was shocked.

25. The suspension was confirmed in writing and included the investigation terms of reference drafted by Mr Richards which were:

"It is alleged that on 6 March 2018, patient A assaulted a fellow patient B in the dayroom 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 incident
- Examine clinical record keeping and incident reporting relating to this alleged incident.

- Examine the role of wider members of the nursing team in response to this alleged incident.

Report findings of management investigation back to Mr Mark Richards, Director of Nursing and Allied Health Professionals. "

26. Ms Totten was appointed investigation officer with support from Linda McWilliams (Head of HR). The policy of which Mrs Totten was aware sets how to investigate allegations of alleged misconduct and preparing the investigation report.

27. Ms Totten wrote to the claimant on 13 March 2018 inviting him to attend an interview on 22 March 2018. The claimant was invited to bring any information and documentation that may be of assistance and was informed that he had the right to be accompanied. The claimant was advised that it was a fact-finding exercise. The claimant was invited to submit a statement but did not do so.

28. On 14 March 2018 having received confirmation from Dr Campbell that patients A, B and C had capacity to consent to interview and sign a statement Ms Totten interviewed patients A and C in the presence of an advocacy worker. Ms Totten hand wrote the statements which the patients signed. Patient B was also interviewed but the interview was terminated as patient B was distressed. The interview was continued on 20 March 2018, but patient B left before signing a statement.

29. On 15 March 2018 Ms Totten interviewed Nursing Student Emma Doherty. On 22 March 2019 Ms Totten interviewed Ms McDougall, N/A Patterson, the claimant and S/N Bradford.

30. Richard Nelson, Prison Officer Association (POA), representative accompanied the claimant at the investigation interview. During the investigation interview when asked what he saw in the dayroom on 6 March 2018 the claimant responded nothing worthy of note. It was quiet and he was not aware of or had any knowledge that any patient was allegedly assaulted. The claimant said he was not assigned to a particular patient. He was sitting

next to patient B in the dayroom. The claimant did not see the alleged assault and there was no assault to his knowledge. He said that if a patient had been assaulted and they had put their arms out "asking what are you going to do?" it would be hard to miss and to the claimant's knowledge it did not happen. Nothing happened in his presence. If there had been an assault, he would have de-escalated the situation. The claimant said that patients can make allegations, but he had no knowledge of assault.

31. On 4 April 2018 Ms Totten interviewed Bryan McAteer, Charge Nurse (C/N); Jonathan Carlin, N/A; Kerrie Ann Hughes, S/N; and Stephen Dale, N/A. On 11 April 2018 S/N Siobhan Lunney, was interviewed as was Dr Campbell. On 16 April 2018 N/A Caroline Houston, was interviewed.

32. On 24 May 2018 Ms Totten issued the Management Statement of Case. Ms Totten considered that there was consistent evidence from three patients and several staff that patient A had assaulted patient B in the presence of the claimant who failed to respond to the assault. Ms Totten found that the allegations were substantiated, and that the claimant had acted in a way that may constitute gross misconduct. The recommendation was that the matter should now be considered at formal disciplinary hearing.

33. On 24 May 2018 Mr Richards wrote to the claimant informing him the Management Statement of Case had been completed and the matter would be considered at a disciplinary hearing.

34. On 19 June 2018 Mr Richards wrote again to the claimant asking him to attend a disciplinary hearing on 3 July 2018 to consider the allegation that on 6 March 2018 the claimant did not respond to an alleged assault by patient A on patient B which took place in the claimant's direct presence in dayroom of Iona 2. The claimant was told that he had the right to be accompanied by a friend, colleague or trade union representative; the members of the disciplinary panel; the individuals presenting the case; and witnesses that they would be calling. The claimant was also told that if he wished he could provide a written statement in support of this case issuing arrangements. The claimant was advised that the potential outcome of the disciplinary hearing was that

disciplinary action might be taken against him up to and including dismissal. A copy of the Management Statement of Case and the policy was enclosed with the letter.

35. On 28 June 2018, the claimant informed the respondent that he had been signed off by his general practitioner and was unable to attend the disciplinary hearing. He remained sick absent until 31 August 2018.

36. On 28 August 2018 a referral was made to occupational health to check if the claimant was fit to attend the disciplinary hearing. An interim report confirming fitness to attend was received on 18 September 2018. On 26 September 2018 emails were sent out to the claimant's representative seeking availability for the disciplinary hearing.

37. On 12 October 2018 the claimant's solicitor wrote to Mr Richards expressing concern that there appeared to have been an internal leak, which led to stories being published about the respondent's investigation. A number of newspaper articles, highly critical of the respondent had been published in the Daily Record newspaper both in print and online. One of the articles was an allegation about the claimant, which was entirely without foundation. The claimant was concerned that this fundamentally prejudiced in the internal process being carried out by the respondent and precluded any chance that the claimant's case be handled fairly, impartially and without undue outside influence.

38. The first date that was offered by the claimant's POA representative for the disciplinary hearing was 8 November 2018. A further change of date was requested by the POA due to a proposed change of representation for the claimant. Another change of hearing date was requested. This request was accommodated, and a date was set for the hearing to take place on 30 November 2018.

39. On 21 November 2018 Mr Richards wrote to the claimant inviting him to attend a disciplinary hearing on 30 November 2018. The claimant prepared a statement, in reply to the Management Statement of Case, which was sent to Mr Richards before the disciplinary hearing. In his written statement the

disciplinary panel considered that Ms McDougall's evidence was credible and reliable.

46. The disciplinary panel considered the matter and then wrote to the claimant on 7 December 2018 informing him of the outcome of the disciplinary hearing (the dismissal letter).

47. The disciplinary panel considered that the comments made about Ms Totten's competence. It was satisfied that she was an experienced manager and was supported by a very experience HR Manager. The disciplinary manager decided that on the evidence before it the assault had occurred "as described". The disciplinary panel noted the claimant's position that he did not dispute that the assault may have occurred but did not see It. The disciplinary panel considered the claimant was present at the time of the assault as it was consistent with the evidence of Ms McDougall and patients A, B and C that the claimant was present and had done nothing. The disciplinary panel took account of the claimant's position that he had not seen the assault and so could not be held responsible for taking no action in response. The disciplinary panel did not accept this, given the claimant's level of experience and the heightened observational attention that was focused on patient B. In the disciplinary panel's opinion, the claimant should have intervened in some way, even if only to offer care, support and an appropriate and proportionate response after any assault. The disciplinary panel considered that the claimant's lack of action was wilful neglect of patients in the respondent's care. The unanimous decision was that the claimant had been grossly and wilfully negligent in his duties.

48. The dismissal letter confirmed that the decision had been taken to summarily dismiss him without notice on the grounds of gross misconduct and that his dismissal would take effect on 7 December 2018. The claimant was advised of his right to appeal.

49. The claimant notified his intention to appeal in a letter sent to James Crichton (then Chief Executive) on 17 December 2018. The substance of the appeal was predicated on the severity of the award considering the evidence

claimant said that he did not witness the alleged assault and that Ms McDougall's written statement supported his position that he did not see it.

40. The claimant attended the disciplinary hearing on 30 November 2018. Andy Hogg of the POA represented him. Mr Richards chaired the disciplinary panel. Kate Sandilands, Interim Director of HR and Karen McCaffrey, Associate Director of Nursing, NHS Lanarkshire supported him.

41. Ms Totten presented the management case. Mr Hogg questioned Ms Totten's technique in asking questions during the investigatory process and suggested that she made several assumptions. The management called Ms McDougall and SCN McFarlane as witnesses. The claimant was given an opportunity to ask questions of these witnesses.

42. Ms McDougall was asked about her delay in reporting the alleged incident. She thought she would be questioned and when she was not, she did not know who to tell. Ms McDougall said that she could hear through the glass partition between the dining room and the dayroom.

43. SCN McFarlane confirmed what Ms McDougall said to him on 7 March 2018 and how he raised matters with the patients that day. SCN McFarlane though that Ms McDougall could see clearly through the glass partition. He did not think that she could hear through the glass partition but potentially a raised voice could be heard; although Iona 2 was a noisy ward between 10am and 11.15am it would be quieter as there were less patients in the ward.

44. The claimant called S/N Bradford as witness. After a short period of questioning, S/N Bradford was withdrawn from the claimant's witness list with Mr Hogg's agreement. The claimant was given an opportunity to respond to the management case. The disciplinary hearing was adjourned.

45. The disciplinary panel considered that the crucial aspect was Ms McDougall's evidence that she heard the slap and patient A say, "That's for Victoria". The disciplinary panel tested whether it was feasible that sound could be heard through the glass partition between the dining room and the day room. The disciplinary panel visited a similar ward to test the sound-proofing. The

presented: Ms McDougall had indicated in her written statement and at the subsequent interview and cross-examination at the disciplinary hearing that the claimant was looking away from the alleged assault at the time she indicates she witnessed the event. The decision was therefore excessive and worthy of review.

50. Mr Crichton chaired the appeal hearing on 31 January 2019. John White, Director of Human Resources, NHS Lanarkshire and David Thomson, Associate Director of Nursing, North Ayrshire HSCP supported him. Mr Hogg of the POA represented the claimant.

51. Mr Richards presented the management case. The claimant did not refute that an assault took place only that he did not witness it. The disciplinary panel had concluded that vision is not the only sense that nursing staff rely upon and that hearing was equally important. The disciplinary panel had considered that given the claimant's level of experience the explanation that claimant did not witness the assault was incredible. The disciplinary panel did not hear anything that would have been considered a reasonable mitigating factor hence the decision to dismiss the claimant. The employer's trust and confidence in the claimant had been lost. The management called Karen McCaffrey as a witness. Mr Hogg was given an opportunity to cross-examine.

52. Ms McDougall was a witness for management and the claimant. In response to a question by Mr Hogg, Ms McDougall referred to four patients (patients A, B, D and E) being in the dayroom at the time of the alleged incident. The claimant said that this was the first he had heard this. Mr Crichton questioned why they had not been interviewed during the investigation. Mr Richards could not comment.

53. Following the appeal hearing there was an adjournment. The appeal panel considered the submissions. The appeal panel noted that Ms McDougall referred to patients D and E in her written statement. Ms Totten was asked about this. She said that consideration had been given to their inclusion in the investigation, but she did not do so because she had gathered sufficient consistent accounts. The appeal panel examined the decision and concluded

that the dismissal was entirely appropriate in the circumstances. The appeal panel considered that this was in the context of gross misconduct and the reasonable belief that the claimant was guilty of gross misconduct and wilful negligence in his duty as supported by the evidence presented. The appeal was not upheld. The claimant was advised of this decision by letter dated 5 February 2019.

54. At the date of termination, the claimant was 27 years old. The respondent had continually employed by the respondent for five years. His gross weekly was wage was £489. He earned £394 net per week. The claimant has not found alternative employment.

Observations on witnesses and conflict of evidence

55. From the above findings in fact it may be taken that the Tribunal considered that Ms Totten, Mr Richards and Mr Crichton gave their evidence honestly based on their recollection of events, which were consistent with the documents that had been produced during the disciplinary process.

56. The Tribunal considered that Ms Totten was reluctant to make any concessions particularly if she thought it would be detrimental to her position. Accordingly, at times her evidence was unconvincing. By contrast the Tribunal thought that Mr Richards displayed a willingness to concede certain points. The Tribunal felt his openness in making concessions made his overall evidence more convincing. The Tribunal found Mr Richards to be credible and reliable.

57. Turning to the claimant's evidence, the Tribunal did no doubt that the claimant was a committed and hard-working nursing assistant. He gave his evidence in a calm and measured manner and accepted points, which were unhelpful to his case.

58. The Tribunal considered that there was little dispute on the material facts between the evidence of the respondent's witnesses and the claimant. It was not for the Tribunal to decide if the alleged incident took place.

59. There was conflicting evidence between Ms Toften and Mr Crichton about the explanation for not interviewing patients D and E. Ms Totten said that she had gathered enough evidence from three patients and Ms McDougall. This was consistent with the appeal outcome letter. However, in evidence Mr Crichton said that it was a clinical decision. The Tribunal considered that there was no reference in the Management Statement of Case to Ms Totten seeking advice from the responsible medical officer about the ability to consent and interview patients D and E. There was also no evidence from her to that effect. The Tribunal therefore considered that it was more likely that Ms Totten decided not to interview them because she had sufficient information from the witnesses, she had spoken to make her recommendation.

60. The Tribunal was referred to various newspaper reports relating to the claimant. The timing of these articles was regrettable for all concerned particularly as there was no dispute that they were factually inaccurate. The Tribunal had no doubt that these reports were distressing to the claimant and could understand why he was concerned about the negative effect that they might have on the internal process.

The Respondent's Submissions

61. The respondent's witnesses gave their evidence in a helpful and open manner. They answered the questions put to them; were not evasive and spoke about matters, which were within their own knowledge. They should be found to be credible and reliable. Where there is a dispute as to fact between the respondent's witnesses and the claimant, it is submitted the respondent's witnesses should be preferred.

62. The *Burchell* test is squarely met and considering all the circumstances, the respondent's decision to dismiss the claimant fell within the range of reasonable responses open to the respondent. The respondent followed a fair and reasonable procedure and that the investigation fell well within the range of reasonable responses. The Tribunal should reach the conclusion that the claimant's dismissal was fair.

63. The claimant challenged the investigation, but it was extremely thorough and approached with a fair and open mind. It fell within the band of reasonable investigations. It should not be found by the Tribunal to have been so defective as to render the dismissal unfair.

64. It was implied in cross-examination that the claimant was unaware of the allegations made against him by the respondent. Ms Totten and Mr Richards gave evidence supported by the suspension letter that the claimant was provided with the 'Terms of Reference' which gave the date and detail of the alleged circumstances and misconduct. Ms Totten also wrote to the claimant informing him that an investigation was to take place and asking him to submit a statement, signed and dated, with any information that he had related to the incident. He did not do so. He never said he did not know what the allegations against him. Ms Totten also gave evidence that she had explained the terms of reference and the allegations to the claimant at the start of his Investigatory Interview. Reference was made directly to the names of the patients who were alleged to have been involved in the incident. Mr Crichton gave evidence that even at the appeal stage the documentation had not been redacted and so it was patently clear who the patients were. At no stage in proceedings, neither at the stage of suspension, investigation, disciplinary hearing or appeal did the claimant raise any assertion that he did not know what the allegation constituted. This was not a complaint raised in the claimant's claim form.

65. The Tribunal was referred to the notes of the claimant's investigation interview. The respondent's position was that Ms Totten approached the investigation meeting fairly, impartially and provided the claimant with all the information he needed to respond to the allegation. He appeared to know what the allegation was. His position was a simple denial. There could be nothing more to be gained by continuing to provide him with any further information; on his own words 'it was just a normal day'. Also the claimant was given a copy of the Investigation Report and appendices on 19 June 2018, five months before the Disciplinary Hearing took place on 30 November 2018. He was supported throughout by the Prison Officers' Union. The

Claimant therefore had full notice of the case against him and knew what the other witnesses' evidence was.

66. Ms Totten explained why she carried out the investigation interviews with the patients in the way she did. She had required to obtain clinical advice from the Responsible Medical Officer (RMO) as to whether the patients could provide evidence and, if so, how to go about doing that. The interviews were therefore carried out in a manner, which considered the clinical advice, and independent advocacy workers were present. The fact that patient B was unable to continue with a first interview and was too unsettled to sign his statement at the second interview highlights the importance of Ms Totten dealing with those interviews in the way that she did. The assertion that the Tribunal does not know whether the patients were inappropriately led by Ms Totten to make these statements, and that this therefore somehow renders them unsafe, simply holds no weight. Patients A and B had given evidence to SCN McFarlane on 7 March 2018 without any pressure being applied to them, and they freely explained that they were involved in the assault and that they were confused and perturbed that staff had done nothing. Patient C had in fact approached SCN McFarlane and given evidence to him. All this before Ms Totten spoke to the patients.

67. Ms Totten gave clear evidence that she had considered whether to interview patients D and E. She decided not to interview them and having received witness evidence form Ms McDougall and three patients who said they witnessed the events. This was a reasonable approach to take. These were all very vulnerable learning-disability patients and there was never any indication that they had witnessed the matters nor that they could provide evidence in support of the claimant's position or otherwise. During the Tribunal, the claimant's case appeared to be that he was unaware of the existence of patients D & E until the appeal hearing, and that in any event they were not present in the ward area on the day in question. Reference was made to these two patients in Ms McDougall's statement and they were listed in the 'Staffing and Visitor Information' document which the claimant received a copy of during the Disciplinary Hearing. It is therefore disingenuous to

suggest that no reference had been made to these two other patients until the stage of appeal.

68. Before Ms Totten carried out interviews with staff members, several the individuals who had been requested to take part in the investigation submitted their own statements. Statements were provided by Ms McDougall, N/A Patterson, SCN McFarlane, C/N McAteer, Dr Campbell, N/A Carlin, and S/N Hughes. It cannot be said that this evidence was in any way tainted by bias or that those witnesses were inappropriately led to provide that evidence. Their evidence in their statements mirrors the evidence they then provided to Ms Totten. There was no evidence of Ms Totten causing the witnesses to provide evidence, which tainted by bias in any way.

69. An investigation was carried out by Ms Totten who was supported by a very experienced Head of HR Ms McWilliams. Ms Totten had read the Management of Employee Conduct Policy before conducting the investigation and had spoken with Ms McWilliams about appropriate conduct of an investigation. She carried out interviews with the two patients involved, Patients A and B who both indicated to her that the assault had occurred, and that the claimant had done nothing in response. Patient C, had come forward saying that he had witnessed the incident and Ms Totten therefore interviewed that patient. His evidence indicated that he had witnessed the assault taking place and that the claimant had done nothing in response. While there were two other patients in the Day Room at the time, there was no indication that these other patients had witnessed the matter nor that they could give any further evidence, which could assist the investigation. No assertion was made during the disciplinary or appeal process by the claimant that these patients could have provided any evidence in support of his position. Since the patients were extremely vulnerable learning disability patients with significant mental health issues, Ms Totten had made the decision not to interview these two other patients. Ms Totten's decision was perfectly reasonable in the circumstances.

70. On 15 March 2018, Ms Totten then interviewed Nursing Student Docherty who was imminently returning to Ireland at the end of her placement, and on

22 March 2018 interviewed the claimant along with his Prison Officers Association (POA) representative and then interviewed Ms McDougall. At the start of that interview the claimant's understanding of the specific allegation was confirmed. The claimant, during the interview, denied knowledge of anything that would indicate an assault having occurred. He never at any stage raised any question of what the allegations were, neither at the investigation stage, the disciplinary stage nor at appeal. Ms Totten gave evidence to this Tribunal that she approached the matter with an open mind and with no prior judgment. She asked the claimant questions about events on 6 March 2018 and gave him every opportunity to respond openly. Her approach was fair and reasonable.

71. Between 22 March 2018 and 16 April 2018, Ms Totten carried out interviews with S/N Bradford, N/A Patterson, SCN McFarlane, C/N McAteer, N/A Carlin, S/N Hughes, N/A Dale, S/N Lunney, Dr Campbell, N/A Houston, and Nursing Student Docherty. Ms Totten explained that minor delays in the proposed timings had been caused by some staff not attending their appointments due to change of addresses, and minor delays in obtaining signed copies of the interview notes from some staff. This was not an excessive period of time over which to carry out a detailed investigation into a very serious allegation.

72. Ms Totten explained that she did not impose a one-size-fits all policy regarding changes/additions to the statements. She was confident in applying that approach because Ms McWilliams had been the scribe and Ms Totten also considered that Ms McWilliams would have noted the evidence correctly. Considering the significant number of interviews carried out the respondent carried out as much investigation as was reasonable in the circumstances.

73. Ms Totten also obtained relevant documentation such as the Datix dated 7 March 2018, the Forensic Observation Policy, visual plans of the Ward Area, and a list of staff and patients present. The investigation was therefore thorough and included all relevant documentation.

74. Ms Totten's evidence was that based on the investigation it was decided that formal disciplinary proceedings should be taken against the claimant. She had

not come to the investigation with that view in mind but that it was only after having collected all relevant evidence that she considered it, and came to view on it, as she was required to do. Her view was that the evidence before her indicated that the matter would appropriately be considered at a disciplinary hearing. It is fair for an investigator to reach a view on the strength of witness evidence and documentary evidence, which would allow them to provide a recommendation as to future process.

75. The respondent did not cause the delay in the disciplinary hearing and the passage of time cannot reasonably be said to undermine the disciplinary process in any way.

76. Mr Richards said that he approached the matter without prejudice or bias against the claimant. His role was to consider the evidence before him and to weight it up as he and the panel saw it. There was no confirmation-bias at all. His view was that he was shocked by the allegations and was surprised at the matter since the staff involved were well respected and had no previous conduct issues. He approached the matter with an inquisitorial approach. In response to questions by the Tribunal, Mr Richards maintained his position that he listened to both sides with an even hand, that he was keen to explore the evidence, and this was evidenced by the questions asked by the panel during proceedings not only of the claimant but of the other witnesses.

77. The claimant was accompanied at the disciplinary hearing by his POA representative Mr Hogg. Ms McDougall and SCN McFarlane were called as witnesses by management-side. The dismissal letter sets out the reason for the claimant's dismissal. Mr Richards gave evidence why he and the panel reached the decision to dismiss the claimant. All the claimant's evidence and arguments were considered and considered in the panel's decision-making. The disciplinary panel concluded that the investigation carried out by Ms Totten had been reasonable and fair. The claimant had had a full opportunity to challenge any aspect of the investigation or the witnesses' evidence, and those assertions had been considered.

78. The claimant's assertions that Ms Totten had asked inappropriately leading questions of the witnesses was considered by the disciplinary panel but was not accepted. Mr Richards' evidence was that the claimant's failure to take any action in response to the assault was a very serious matter. It cannot be said that a reasonable employer would not take this view. Mr Richards noted that three direct witnesses (Ms McDougall, patient A and patient B) had said that the assault had taken place and that the claimant was present. Ms McDougall gave evidence that the claimant was sitting on a sofa directly next to patient B when he was assaulted, that she had heard the sound of the slap, that she heard patient A say "that's for Victoria", that patient B had gesticulated to the claimant as if to say 'What are you going to do about it?', and that the claimant and Ms McDougall had made eye contact, but that the claimant had done nothing in response to the assault. The claimant simply maintained a position that he had not been aware of the assault. He was given every opportunity to provide any further evidence or perspective on matters.

79. The disciplinary panel checked whether it was feasible that sound could be heard through the glass partition. The test was a minor part in the disciplinary panel coming to their conclusion; it was simply a test of whether the panel was sound proofed or whether it was possible that sound could be heard through it. There was no indication that the claimant's input into that test could have added anything at all to the matter. Mr Richards said that the crucial aspect was Ms McDougall's evidence that she heard the sound of the slap and heard patient A say "That's for Victoria". The disciplinary panel considered that Ms McDougall's evidence was credible and reliable. As she attended the disciplinary hearing as a witness, she was subject to questioning by both sides and the disciplinary panel. Her evidence was tested. It was reasonable for the disciplinary panel to accept the evidence of Ms McDougall as being reliable. It was within the bounds of reasonableness open to a reasonable employer.

80. Having heard all the evidence, the unanimous decision of the disciplinary panel was that the evidence supported a finding that the claimant had been aware of the assault but had consciously taken no action in response to it. Mr

Richards highlighted the importance of the role of nursing staff to act with absolute integrity within the State Hospital, particularly with regards to the patients being extremely vulnerable in conditions of detainment in a secure mental health facility. It was reasonable for the disciplinary panel to conclude that the claimant's position lacked credibility. The claimant's position next to patient B who was on level 2 observations; Ms McDougall hearing the sound of the slap and what patient A said; patient B gesticulated to the claimant as if to say 'What are you going to do about that?' caused the disciplinary panel to reach a fair and reasonable conclusion, and one which a reasonable employer could reach. Since the disciplinary panel considered that the claimant had made the decision not to respond to the assault, they considered that this was an act of very serious misconduct meriting summary dismissal. In addition, since the disciplinary panel also believed that the claimant was not telling the truth about his knowledge of the assault having taken place, they considered that any relationship of trust which they had in the claimant had fundamentally broken down.

81. The claimant was provided with the opportunity to appeal his dismissal, which he did on 17 December 2018. Mr Hogg drafted the claimant's appeal statement of case. An appeal hearing took place and the claimant had every opportunity to present his appeal case. Ms McDougall attended as a witness, for both staff-side and management-side. Also, management-side called Ms McCaffrey. Both those witnesses were asked questions, and the claimant had every opportunity to challenge their evidence.

82. Mr Crichton explained in the appeal outcome letter how the appeal panel reached its unanimous decision. The appeal panel had found the investigation to have been sufficiently detailed and even-handed. It was reasonable and fair. Mr Crichton stated that on the evidence before them the appeal panel's belief was that the assault had occurred and that the claimant had been aware of it but had intentionally taken no action in response. The appeal panel considered that taking no action was a serious act of gross misconduct, which merited summary dismissal. As such, they concluded that the claimant's dismissal was appropriate. Further, the appeal panel considered that the

Claimant's continued assertion that he had not been aware of the assault was simply not credible, and by maintaining that position he had fundamentally undermined the relationship of trust and confidence that the respondent had in him.

83. The Tribunal should conclude that the claimant's dismissal was fair. The respondent had reasonable grounds for believing that the claimant had been aware of the assault but had taken no action in response. Having made this decision it cannot be said that the sanction of dismissal was outwith the band of reasonable responses open to the respondent. The respondent acted in a reasonable manner in treating this conduct as a reason to dismiss the claimant. The dismissal was both substantively and procedurally fair.

84. If the Tribunal considers that there was any flaw in the procedure adopted by the respondent it relies *on Polkey v A E Dayton Services Ltd [1987] ICR 142* in contending that any compensation should be reduced to reflect the fact that the claimant would have been fairly dismissed in any event.

85. In terms of section 123(6) of ERA, where the Tribunal finds that the dismissal "was *to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".* The Tribunal should reduce the basic award to nil on the basis that it is just and equitable in the circumstances. Reductions of 100 percent are appropriate.

86. Mr Richards and Mr Crichton gave unchallenged evidence that re-instatement or re-engagement orders would both be highly inappropriate. The trust and confidence in the claimant by the respondent has fundamentally broken down. In the context of a high secure psychiatric facility it is not possible to have a member of staff working there in which the employer has no trust.

The Claimant's Submissions

87. Ms Totten was an unconvincing witness. In cross-examination she frequently appeared to be unable to address herself to the questions being asked. She frequently refused to accept points being put to her in cross-examination

where the obvious answer was detrimental to the respondent's case. She was unwilling to engage with any proposition that did not fit with the narrative that she had constructed.

88. Overall, the claimant gave credible and reliable evidence in a calm and measured fashion. He admitted when he could not recall matters and did not seek to speculate as what he thought would have happened. He was willing to accept matters which were unhelpful to his case.

89. Where there is any dispute of fact between the respondent's witnesses and the claimant then it is submitted that the claimant should be preferred.

90. The claimant does not argue that the respondent did not have a genuine belief in the alleged misconduct. The claimant's position is that the second and third elements of the *Burchell* test are not satisfied.

91. The claimant makes the following criticisms of the investigation and says that the investigation process was so fundamentally flawed that it cannot be said to satisfy the requirement of a reasonable investigation.

a. Ms Totten did not approach the investigation with a view to establishing facts. Before even speaking to the claimant, she had made her own mind up as to the claimant's guilt. The Tribunal was referred to Ms Totten's choice of words when interviewing witnesses.

b. She was unclear as to the remit of her role: was it to gather and collate information about the allegations or carry out a fact-finding exercise coming to conclusions as to whether the allegations were true. If the former she overstepped her role in concluding that the allegations made were substantiated. This goes beyond gathering and collating facts; it involves her making decisions and coming to conclusions about the information presented to her. Concerningly, her investigation or Management Statement of Case, is entitled "Disciplinary Hearing ".

c. Ms Totten acted in more than a fact-finding capacity; she came to conclusions as to what did and did not happen which were wholly unsupported by the evidence, which was given to her. She used

leading questions to elicit answers from staff which suited the conclusions she had arrived at, but which were not borne out by the evidence given. There is no apparent attempt to carry out any critical questioning or analysis of the information being provided.

d. Before his investigation meeting the claimant was not provided with any detail of the allegation against him beyond the very broad "terms of reference" In the investigation meeting, the specifics of the allegations were not put to him (e.g. the time of the alleged incident). He was asked vague questions. The claimant was not properly given the opportunity to respond to the allegations against him. He believes that these specifics were not put to him because Ms Totten had already decided the allegations were true and did not entertain the possibility that the claimant had not witnessed and had not been aware of any alleged assault.

e. The Management Statement of Case records that Ms McDougall advised she had a clear view into the day room despite there being no evidence to substantiate this conclusion. Ms Totten fails to ask Ms McDougall where she was and whether she had a clear view of the day room when she interviews her. The only information about Ms McDougall's whereabouts comes from S/N Lunney: Ms McDougall had informed her that she had been mopping behind the television and that people in the dayroom may not have seen her. Ms Totten's evidence to the Tribunal was that Ms McDougall had told her that she could clearly see into the dayroom - this is not substantiated by any of the evidence upon which Ms Totten drew her conclusions for the management case. Ms Totten also told the Tribunal that before concluding the investigation she asked Ms McDougall to identify where she was on the floor map of Iona 2 ward. This was not evidenced in any of the paperwork provided to the Tribunal. Ms Totten's assertion was made without evidence. It was noted by the Tribunal that there appeared to be a lot of questioning which Ms Totten alleged was happening outside recorded meetings.

f. The Management Statement of Case concludes that Ms McDougall *"stated she both saw and heard the assault'* There is no evidence to support the conclusion that Ms McDougall said she heard the assault. She does not write this in her initial statement, and in her investigation meeting, although Ms Totten records the words "she had heard the incident", Ms McDougall amends this wording when she signs and returns her copy of the minutes, making no mention of whether she heard the alleged assault. Notably, there are no follow up questions to Ms McDougall on this matter. Moreover, Ms Totten's evidence to the Tribunal was that in Ms McDougall's first statement, that she confirmed she heard the slap in the next room. It is evident that from reading Ms McDougall's statement, this is not true. Again, this is an assumption made by Ms Totten, which is unsubstantiated by the evidence.

g. Ms Totten concludes that all three patients interviewed gave the same account of the events as reported by Ms McDougall. This conclusion is unsubstantiated by the evidence. Patient A alleges that he punched patient B. Patient B provides no statement, whilst patient C alleges that patient A kicked patient B in the shin and that another member of staff (Victoria) witnessed the incident. None of these witnesses, (who were apparently in the room when the alleged assault occurred) corroborated Ms McDougall's evidence that when Patient A slapped Patient B, this emitted a loud sound, nor did any of them corroborate that Patient A used the words *"that's for Victoria"* after the alleged assault.

h. Ms Totten, in cross examination stated that if the member had been sitting next to the Patient B and Patient A approached him, that even if he missed the slap, she would expect him to see *"some part of patient A moving".* If this was her conclusion, it is reasonable to expect that she would have at least put this allegation to the claimant. It is evident however, that Ms Totten failed to even ask the claimant if he was aware of patient A moving towards patient B. Instead, as was consistent

throughout her investigation, she made assumptions and failed to ask the key questions.

i. Ms Totten gave evidence that the colleague alleged to have been in the room at the time of the incident, S/N Bradford, advised that he was not aware of any assault having occurred.

j. The Management Statement of Case concludes that the incident happened "as *described".* In support of this conclusion, she refers to the statements from Dr Campbell, S/N McAteer, S/N Lunney, N/A Carlin and N/A Dale. None of these employees witnessed the alleged assault and some of them were not even working on Iona 2 when the assault allegedly occurred. To rely on their statements of speculation is not a reasonable basis for concluding that the assault occurred as described. The style of questioning used by Ms Totten was designed to lead the witness to the conclusions at which Ms Totten had already arrived. For example, when asking the multi-disciplinary team if they believed that the incident had occurred as described, in each of the interviews, she used leading phrasing such as *"there is a belief from the multi-disciplinary team that the assault took place".* As seen in her questioning of these witnesses she suggests to each team member that their colleagues had already confirmed their belief that an assault had occurred. To lead a witness with this type of wording is to inevitably lead the witness to agree with the proposition being suggested to them.

k. Ms Totten concluded that the claimant believed that there was no assault from patient A to patient B on 6 March 2018. This is despite the claimant's clear evidence that he could not offer a view on whether an assault had occurred beyond advising that he was not aware of anything untoward having occurred. Ms Totten further concluded that the claimant put forward *'no mitigation'.* The claimant was clear throughout the process that his mitigation for not responding to any alleged assault is because he did not see an assault, nor did he hear anything which suggested to him that an assault had occurred.

l. The inconsistencies in the evidence given should have raised concerns in Ms Totten's mind which should have led her to question and test the evidence. She did not. Her investigation failed to put the allegations to the claimant for comment, and to establish the basic facts.

m. Ms Totten, at the disciplinary hearing, used leading questions to Ms McDougall "CT *stated that MM told them that she heard the assault',* despite Ms McDougall not previously having given this evidence. Moments later, Ms Totten *"reminded Ms McDougall that she heard it as well as saw if,* again leading Ms McDougall to conclusions which were unsubstantiated by the evidence given by Ms McDougall.

n. The respondent could not reasonably conclude that Ms McDougall gave clear and consistent evidence. She identified two patients as being present (patients D and E), both of whom the claimant said at Tribunal had already left the ward before the time of the alleged assault, and she changed her position on key issues within a matter of seconds, by both agreeing that the claimant had not witnessed the assault and only seconds later, stated that he had witnessed it. Ms McDougall was a suggestible and unreliable witness.

o. At the disciplinary hearing, Ms McDougall, for the first time alleges that she made eye contact with staff in the day room. This was never previously mentioned by Ms McDougall, and this was not put to the claimant for comment. Given that the claimant was sitting facing away from the dining room, it is difficult to see how Ms McDougall could have made eye contact with the him. This similarly casts doubt on Ms McDougall's evidence that the claimant glanced up when patient B apparently made a gesture to him. It is difficult to see how Ms McDougall could see this, given that the claimant had his back to her.

p. Ms McDougall gave evidence that at the time of the assault, patients D and E were present in the day room suggesting that as such, they were potential witnesses. The respondent's position on this is confused. They appear to conclude that Patients D and E were present in the day

room yet seem unconcerned that the investigator did not seek to question them, despite their own policy requiring that potential witnesses are identified and questioned.

q. In the Management Statement of Case, Ms Totten does not record, and makes no mention of her decision not to interview patients D and E despite her willingness to question many staff present not on duty at the time of the alleged assault. In the evidence apparently given to Mr Craigton, Ms Totten advised that she decided not to interview patients D and E due to her already having interviewed three patients, which was sufficient in providing a reasonable and reliable breadth of responses. Yet, Mr Crichton's evidence was that Ms Totten advised him that a clinical decision was taken not to interview patients D and E. It is the claimant's position that these significantly differing accounts do not reflect the truth of the reason why these patients were not interviewed. It is the claimant's position, (as evidenced in his interview) that on the morning of 6 March 2018, there were only a couple (two) patients left in the dayroom i.e. patient A and B. Patients D and E had left Iona 2 to go to the hub. Had Ms Totten questioned these patients, it is highly likely they would have confirmed this, thus casting further doubts on the reliability of Ms McDougall's evidence, as she identified both as being present, when in fact, they could not have been present.

r. Ms Totten misunderstood or misinterpreted the claimant's position regarding whether an assault had occurred. Ms Totten opined in evidence that the claimant had been 'absolutely certain' that no assault took place. This was not and had never been his position. He was unaware of an assault allegedly taking place. This is another example of Ms Totten being unable to objectively consider information put to her and to come to evidence based conclusions.

s. Ms McDougall's evidence was confused, inconsistent, unreliable and lacked credibility. Yet despite this, Ms Totten unreasonably concluded she gave clear and consistent evidence.

92. There are flaws in the subsequent disciplinary procedure that renders the dismissal procedurally unfair and that the decision reached by the disciplinary panel, that the claimant was guilty of the misconduct in question was not one, which could reasonably have reached based on the available evidence.

93. Mr Richards said that the decision to progress to disciplinary hearing was based on the Management Statement of Case. He fell into the same errors as Ms Totten in failing to critically test the evidence, analyse it or resolve disputes of fact as set out above. Instead, he unquestioningly accepted Ms Totten's findings.

94. These failures have the effect of rendering the dismissal procedurally unfair as there was not a proper consideration of the evidence before the disciplinary panel. However, these failings go beyond procedural unfairness and mean that the disciplinary panel could not have reasonably reached the conclusion that the claimant was guilty of the misconduct in question. They failed to put key questions to the claimant.

95. The disciplinary panel had no concerns about Ms Totten's approach to questioning despite the claimant's concern that she had determined the outcome of the investigation before she spoke to him. Mr Richards accepted in cross-examination, that neither he, nor Ms Totten put the specifics of the allegations to the claimant. This included a failure to put the allegation, (made only by Ms McDougall) to the claimant that patient A slapped patient B and used the words *"that's for Victoria".* Mr Richards further accepted that he did not put the allegation, (again made only by Ms McDougall) that the alleged assault caused the sound of a loud slap to be emitted.

96. Mr Richards accepted that he did not ask Ms McDougall to recreate the sound of the alleged slap, and that as such, the disciplinary panel were using a noise of an unknown volume, in an empty ward to test to see whether it could be heard through the glass separating the dining room from the day room. Given that SCN McFarlane's doubts on whether sounds could be heard through the glass, the disciplinary panel's finding that the sound of a slap could be heard, is evidently unsafe.

97. Mr Richards did not put forward key allegations to the claimant for comment and did not ask his recollection of what occurred on 6 March 2018. Consequently, it could not be said that the disciplinary panel carried out a proper analysis of what had occurred in order to make findings of fact considering the relevant evidence.

98. The disciplinary panel concluded that the claimant was guilty of the allegations based on the inconsistent and unreliable evidence of Ms McDougall. The disciplinary panel could not have come to a reasonable conclusion about the conduct of the claimant in circumstances where they failed to address the above noted evidential issues.

99. Ms McDougall did not report this incident on the day in question. She appears to have carried on as normal, from the time of the alleged incident at 10.15am through until finishing her shift around 2pm. She interacted with the claimant and others thereafter, giving no indication of the apparent distress she was feeling. At least ten staff were on Iona 2 on the shift in question yet Ms McDougall did not report the alleged assault to any one of them, nor did any colleague note any concerns or distress in Ms McDougall. Patients A and B appeared to interact for the rest of the shift without evidence of any behaviours which might cause concern. None of the day shift staff leaving work on 6 March 2018 had any idea that an assault had allegedly occurred, nor has that anything apparently untoward happened.

100. Mr Richards accepted in cross-examination that he did not know any of the questions Ms Totten asked to patients A, B, or C, and therefore could not come to any view as to whether those questions were appropriate or not. This is especially concerning given the worrying number of leading questions used by her through the investigations. Despite this, no further investigation was carried out with these patients and so he was unable to come to a view as to whether the patients' evidence supported the claimant's version of events or not.

101. There was no acceptance by the claimant that he witnessed the alleged assault as described, and this is another factual dispute that is not properly

resolved. The disciplinary panel failed to properly put the allegations to the claimant for comment and reached his conclusions based on insufficient and contradictory evidence. Consequently, the disciplinary panel could not have reasonably reached the conclusions it did based on the flawed investigation and similarly flawed disciplinary process.

102. In the dismissal letter Mr Richards noted the claimant's concerns regarding Ms Totten's competence to undertake the investigation. He advised that the disciplinary panel was content that she was an experienced manager who was supported by a very experienced HR Manager and consequently the panel had no concerns in that area. The claimant accepts that Ms Totten is an experienced manager. However, this does not mean she can carry out a fair, consistent, impartial and thorough investigation. There are numerous flawed assumptions and conclusions at which she arrived which were unsubstantiated by the evidence, which was in front of her. There are numerous examples of Ms Totten using leading questions to witnesses to have them give answers, which unprompted, they may not have given. Despite these fundamental flaws, these were not explained nor was there an explanation why there were *"no concerns"* with her competence, other than a bare assertion that that she was an *"experienced manager".*

103. Mr Richards noted that the role of the disciplinary panel was to consider the probability of an assault having occurred between patient A and patient B and the probability that the claimant was present at the time of the event. He went on to state that the disciplinary panel considered what a reasonable response would be from a nursing assistant with his experience of working in Iona 2 would be. The claimant makes two points in that regard. Firstly, he has never denied that an assault may have occurred on the day in question, and he does not dispute that he was in the day room at or around the approximate time of the alleged assault. What the claimant has been clear throughout is that he did not witness any assault.

104. Ms McDougall's evidence was that the claimant was bending down looking at or reading a newspaper at the time of the alleged assault, and that the assault comprised of one single slap. Consequently, the claimant is not looking at

patient B nor patient A for the split second when the alleged assault occurs. He does not see any alleged assault. It is not in dispute between the parties that patient B does not react, he does not speak, he does not shout, he does not cry out. The alleged assault apparently involved one strike, which could have occurred in the course of a split second. If such an assault has occurred, neither patient has reacted in a way which might bring this to the attention of the claimant. Consequently, the disciplinary panel is considering what the reasonable response would be from a nursing assistant who was aware that an assault had occurred. The claimant was not aware, and so cannot be judged against the standards expected of an individual who did witness an assault. The claimant been clear throughout the process that if he had been aware that such an incident occurred, he would have reacted, he would have de-escalated and he would have reported the incident.

105. There is no reason why the claimant would not react to an assault he was aware of. He would stand to gain nothing, but would stand to lose everything by any failure not to deal with an incident between two patients. The respondent unreasonably disregards the evidence of the claimant (who has five years' clean service) and S/N Bradford (who has around 20 years' service) that neither of them witnessed an assault or anything untoward on the day in question.

106. The disciplinary panel concluded that Ms McDougall witnessed the incident and that her account of the incident was clear and there was consistency between her interview and her cross-examination answers. Ms McDougall was far from clear and consistent. Ms McDougall does not volunteer evidence that she heard the assault rather she is prompted into this by Ms Totten. Ms McDougall, at the disciplinary hearing, within the course of a few seconds, gives evidence that the claimant did witness the alleged assault and also that he did not witness the alleged assault. She suggests at the disciplinary hearing that she made eye contact with staff in the day room, this being the first time this allegation has arisen). Despite advising her colleague, S/N Lunney that she was positioned behind the television and that colleagues may not have seen her, remarkably, at the disciplinary hearing, she contends that

she had a clear view of the day room. Based on these inconsistencies in evidence, the panel cannot reasonably conclude that Ms McDougall was a credible or reliable witness.

107. The disciplinary panel advised that they visited a ward and specifically checked the ease of hearing through the glazing separating the day room and dining room. They concluded that the assault as reported, could be easily heard from the dining room. It is accepted by the respondent that at no point in proceedings, did anyone ask Ms McDougall to describe the noise she heard, or the volume of the alleged slap. Consequently, the disciplinary panel was seeking to re-enact a sound of unknown volume, in order to determine whether this sound could be heard through a glass panel. This re-enactment appears to have occurred in an empty ward, which was devoid of the usual noise which would occur on Iona 2, and so cannot be said to realistically recreate the environment in which any sound which Ms McDougall alleges that she heard, may have occurred. It is also notable that SCN McFarlane believed it was unlikely that any such sound could be heard by someone in the dining room. In that regard, it should be noted that the dining room is a space used by clients for private meetings with family or for appointments with their doctor or solicitor and so enjoys a level of sound proofing.

108. The disciplinary panel accepted without question, the evidence of patient A that he had perpetrated an assault and that the claimant was present. The claimant has never disputed that he was in the day room at the approximate time of the alleged assault. There is no indication from the statement of patient A, whether the patient thought that the claimant had seen, heard or otherwise been aware of the alleged assault. There is no indication as to which questions the investigating officer asked patient A, which elicited the response apparently given. Bearing in mind the number of flawed assumptions and leading questions used by Ms Totten throughout her investigation, this should have been of concern to the disciplinary panel. It is notable that patient A makes no mention of the respondent's key evidence - the comment *"that's for Victoria"* as alleged by Ms McDougall.

109. The disciplinary panel accepted without question, the evidence of patient B that he had been assaulted by patient A. Despite interviewing patient B on two occasions, Ms Totten has kept no record of the interviews, nor even a note of the questions she asked him, nor the responses he apparently gave. Nor is there any indication from patient B that the claimant was aware of any assault having occurred, and no mention of patient B apparently making any gesture towards the claimant.

110. The disciplinary panel concludes that patient C's account of the event matches that of patient A and patient B. It is notable that patient C alleges that he witnesses patient A punch patient B in the face and kick him on the shin. He also alleges that Victoria saw the assault and did nothing. It is troubling that the disciplinary panel appeared quite content to select as credible the parts of patient C's statement which supported Ms Totten's findings, whilst they appeared willing to discount the parts of patient C's evidence which contravened her findings. No further investigation into these matters was carried out.

111. The disciplinary panel concluded that the interview of each patient led by Ms Totten appeared to have been carried out in a *"thoughtful and unbiased way".* This is a conclusion which is wholly unsupported by evidence because the approach taken by Ms Totten (confined to the interviews of patients A, B, and C) failed to record the questions she asked of the patients, and fails to record the answers given by her. Without a record of the questions Ms Totten posed to the patients, and the answers given, Mr Richards cannot reasonably conclude that Ms Totten was *"thoughtful and unbiased"* in her approach. These are vulnerable and suggestible patients, yet despite knowing this, Ms Totten departed from her earlier approach of recording the questions she posed to the interviewee, and recording the answers given. Whilst patient B was apparently unable to sign a statement, there is no reason why Ms Totten could not have recorded her questions to him and the verbal answers he gave her, and produce an unsigned copy of the interview. Similarly, it is unclear why she would write a statement for patient A and patient C, and ask them to

sign it. She was unable to satisfactorily explained why she departed from the approach she took with all her other interviews.

112. Mr Richards cannot reasonably conclude that the patients' accounts match with one another's accounts, given the striking differences noted above. Nor can he come to a reasonable conclusion that Ms Totten carried out the interviews a thoughtful and unbiased way given that he has no idea whatsoever what she asked the patients, or what the patients' responses were.

113. Mr Richards was the Director of Nursing for the State Hospital, which shortly before the claimant's disciplinary hearing was pilloried in the press through a series of newspaper articles being published in a national newspaper. Numerous critical stories emerged in the press alleging mismanagement, staff morale being at an all-time low, staff being on the verge of mutiny and concerns over patient safety.

114. A story was leaked to the press regarding the allegations against the claimant. This story was leaked, not by the claimant but by someone else within the respondent's organisation. The story portrayed by the media was wholly inaccurate, but extremely serious. It was alleged that the claimant had been attacked by an autistic patient on 5 March 2018, and that the following day, he encouraged a violent patient to attack the autistic patient. This story bears no resemblance to the truth nor to actual allegations against the claimant. Yet, these were the allegations disclosed to the public. It is submitted that given what the public understood the claimant was alleged to have done, that the disciplinary panel was never going to come to any decision other than dismissal. It did not matter that the allegations were wholly inaccurate. As the Director of Nursing, Mr Richards could not be seen to be employing staff accused of such serious allegations. In terms of a disciplinary outcome, there could be no other outcome.

115. Dismissal was not within the band of reasonable responses. In particular, that the matters of which the respondent might reasonably have found the claimant to be guilty of i.e. not reacting to an assault that he was not aware

of, does not amount to gross misconduct entitling the respondent to move to summary dismissal. In these circumstances, the dismissal could not fall within the band of reasonable responses.

116. Mr Richards submitted a Management Statement of Case to the appeal panel. He suggests that the claimant must have been aware of an imminent assault, due to the patient using the words "that's for Victoria" **prior** to the assault being perpetrated. This was the first time it had ever been suggested by any party that these words were used prior to the alleged assault, or that the claimant ought to have been aware that an assault was about to occur. In cross-examination, Mr Richards sought to explain this away as an insignificant error. The claimant does not accept this suggestion. Mr Richards is evidently very experienced in disciplinary matters. This was a carefully prepared Management Statement of Case. Mr Richards is aware of his responsibilities in that regard. The claimant cannot accept Mr Richard's suggestion that in a formal document, he simply made such a significant mistake. The claimant believes that Mr Richards took this step to bolster the strength of the management case against the Claimant.

117. Mr Richards was disingenuous in his suggestion to the appeal panel that the claimant had specific responsibility for patient B and that S/N Bradford had specifically asked the claimant to keep an eye on patient B on the morning in question. The evidence given and recorded at the disciplinary meeting was that S/N Bradford said to the claimant, N/A Paterson and other staff to keep an eye on both patients A and B. It is the claimant's position that staff use this type of phrase to each other numerous times on each shift, yet Mr Richards used this to further the suggestion that the claimant had been specifically assigned and so his failure to respond constituted willful negligence.

118. For a number of reasons, the appeal process did not cure any of the defects highlighted above. The appeal was not a re-hearing. As such, given the errors identified in the process followed by Ms Totten and Mr Richards and in the reasoning of the disciplinary panel, a mere review would be incapable of fixing those flaws. The appeal panel appears to have fallen into the very same errors as the disciplinary panel.

119. In cross-examination, Mr Crichton accepted that it was not uncommon behaviour for the patients to try to unsettle one another and that pushing and shoving was commonplace. He was unreasonably unwilling to accept the suggestion that given the absence of any adverse reaction from patient B (i.e. he did not shout, cry out, say anything when he was apparently assaulted), that if there was an exchange between patient A and patient B, that this was nothing out of the ordinary, and did not constitute an assault as concluded by the respondent.

120. Mr Crichton accepted that he did not revisit and re-examine the evidence against the claimant. At the appeal hearing, the appeal panel has not put the specific allegations of the alleged assault to the claimant for comment. Rather, the appeal panel appears to have considered that the allegations against the claimant are already proven, thus repeating the mistakes of the investigation and disciplinary process.

121. The appeal panel have failed to engage with the substance of the claimant's appeal, as is evident from the appeal outcome letter. The appeal panel does not make any findings in relation to what occurred on the day in question. In the appeal outcome letter, Mr Crichton simply summarises a short paragraph from the claimant's grounds of appeal, then goes on to state that *"the management case presented included a detailed response that refuted the legitimacy of your appeal and restated the appropriateness of your dismissal."* It does not explain why the appeal panel took the decision to uphold the decision to dismiss, nor to explain any findings in fact that they made, rather they simply refer to the disciplinary panel's management statement of case.

122. Ms McDougall advises at the appeal hearing that two further patients were present at the time of the assault (D and E). As part of the appeal, this concern is raised by the claimant, and he asks why these other two witnesses were not interviewed. Mr Crichton advises that Mr Totten confirmed that consideration had been given as to their inclusion in the inquiry and that the decision not to include these patients was due to the fact the investigating officer had gathered consistent accounts of events reported from three patients and one member of staff, this was considered to be sufficient in

providing a reasonable and reliable breadth of responses. Ms Totten makes no mention of having considered their inclusion yet decided against investigating them in her Management Statement of Case. Ms Totten holds interviews with some 13 employees. Many of whom she knows were not present in Iona 2 at the time of the alleged assault, yet there is no mention of her decision not to interview Patients D and E. She notes who she interviewed and even records that she interviewed additional nursing staff as the investigation progressed where they may have had information to inform the investigation. During the disciplinary hearing she states that she *"thought it was important to interview all three patients who were present."* This appears to contradict Mr Crichton's evidence that she told him she did consider interviewing these witnesses, but decided against it as she believed she had enough information. It is submitted that the decision to exclude two individuals who the key eyewitness identifies as being in the room at the time of the alleged assault, means that the respondent has not carried out a reasonable investigation in the circumstances. Moreover, it appears Mr Crichton took the opportunity to 'backfill' his evidence, and advised that, contrary to the content in his appeal outcome letter, the decision not to interview patients D and E was a clinical decision taken by Ms Totten. It is the claimant's position that the real reason these patients were not interviewed is because they were not present in the day room, and that patient D and E's evidence to this effect would have been fatal to the credibility of Ms McDougall.

123. There was no real attempt to genuinely consider the claimant's evidence as to what occurred on 6 March 2018, nor to reinvestigate failings from investigation or disciplinary stage.

124. The claimant believes that chairing his appeal hearing was one of the last high-profile tasks he was required to carry out. Mr Crichton had been Chief Executive of an institution with a tattered reputation in the press. The claimant's belief that the truth of the tabloid allegations was not what mattered. What mattered was that a widely read national daily newspaper (the Daily Record) had broken a sensationalist story, which made allegations which would appall its readers. It was evident that they would do a follow up story

once the outcome of the disciplinary hearing had concluded. Had the outcome been anything other than dismissal, this would have provided the press with more ammunition to throw at the State Hospital, and more 'evidence' in their eyes of a badly run hospital with problems with staff, patients, morale, violence, and lack of control. It is the claimant's belief that the press involvement significantly impacted on the decision of the appeal panel, and that, as such, the only decision that the appeal panel were ever going to take, was to uphold the decision to dismiss.

125. A reasonable employer would have ensured transparency in the investigation and disciplinary procedure. A reasonable employer would not have unquestioningly accepted the evidence of a witness who changed her story and gave inconsistent evidence. A reasonable employer would have questioned the key witness on inconsistencies in her evidence, and on the new allegations she only brought forward at the disciplinary hearing, which were not raised in her statement or her investigation interview. A reasonable employer would not have relied on the specific allegations made by Ms McDougall without having put these specific allegations to the claimant for a response. A reasonable employer would have allowed the claimant an opportunity to comment on the specific allegations against him. The respondent unreasonably failed to properly investigate specific details of the allegations i.e. the alleged sound of the slap and the comment *"that's for Victoria"* yet founded on these as key pieces of evidence against the claimant.

126. By these failures, the respondent failed to conduct an adequate investigation and so caused unfairness, to make the claimant's dismissal an unfair dismissal. The investigation was inadequate when judged by the standards of the reasonable employer and with regard to the band and range of reasonable responses. The investigation cannot be regarded as sufficient in the circumstances. The failure of the investigation was relevant to the decision to dismiss because it resulted in an absence of proper information at the time of the decision to dismiss. The failures in the investigation led to a prejudice to the claimant in terms of him not being able to address specifics of the allegations against him. There was a lack of transparency as to what

investigations had been carried out, especially in relation to investigations apparently carried out by Ms Totten but which were not recorded anywhere. These procedural defects had a bearing on the decision to dismiss. The dismissing and appeal panels did not act within the band or range of reasonable responses as they failed to establish what had occurred in respect of the specifics of the alleged assault of 6 March 2018. Both panels failed to ensure that the investigation had been adequate in ascertaining what had occurred. Both panels took into account in their decision to dismiss, matters which were not put to the claimant i.e. the reliance on the alleged sound of a slap, and *"that's for Victoria* "comment.

127. In summary, it is submitted that the claimant's dismissal was unfair for the following reasons:

a. The investigation, disciplinary and appeal process took such an excessive period that this alone renders the dismissal unfair.

b. The investigation by Ms Totten was so fundamentally flawed for the reasons set out above, that it fails to meet the *Burchell* test and was not a proper and reasonable investigation

c. The conclusions reached by Mr Richards were not ones, which he could reasonably have reached given the various flaws in his analysis and reasoning set out above. This again, fails to meet the *Burchell* test.

d. Mr Crichton did not rehear the case, rather he reviewed the decision of Mr Richards. Given the fundamental flaws in the investigation and disciplinary process, a review could not, and did not cure these

e. The dismissal was procedurally unfair for the reasons set out above.

f. The only employee who apparently witnessed the alleged assault did not report the incident to any colleague, despite claiming to witness this at 10.1 5am but did not finish her shift until 2pm. It cannot fall within the band of reasonable responses to dismiss the claimant who was not aware of any assault having occurred, yet take no disciplinary action whatsoever against a colleague, who claims to have witnessed

an assault, bearing in mind she is trained in Prevention Management of Violence and Aggression and did not, on the day in question, report the alleged assault to anyone.

g. Dismissal was not within the band of reasonable responses.

128. In terms of remedies, the claimant seeks re-instatement or re-engagement, and does not believe this to be unachievable. Failing which, he seeks financial compensation. In relation to financial loss, reference is made to the Schedule of Loss.

129. In relation to any *Polkey* deduction, this will entirely depend on what basis the Tribunal concludes that the dismissal was unfair.

a. If the Tribunal decides that the decision to dismiss was outwith the band of reasonable responses then no *Polkey* issue will arise even if there are also procedurally failings.

b. On the other hand, if the Tribunal were to find that dismissal was only unfair on the grounds of a procedural error then would potentially give rise to a *Polkey* deduction

130. In the present case, it could not be said that the lack of fair procedure made no practical difference to the decision to dismiss on grounds of conduct. It could not be said in this case that it was inevitable on the facts found that the claimant would be dismissed for his conduct. The procedural defects in this case led to substantial unfairness. The failure of the respondent to provide specific details of the allegations against the claimant and to seek the position of the claimant as to what was alleged to have occurred, the failure to investigate or address the claimant's position, the lack of transparency and the failure to establish what had actually occurred was prejudicial to the claimant. The procedural defects were sufficiently serious so as to render the process unfair. It could not be said that in sufficiently investigating the claimant's alleged conduct, dismissal would have then occurred at some later date. In the event of a *Polkey* deduction, it is submitted that any such

deduction should be minimal where the procedural error is significant. For example, if the Tribunal were to find that an error arose from the failure to interview all potential witnesses to the alleged incident, or the failure to allow the claimant to comment on the allegations against him, then it is submitted that this is so fundamental that it could not be said that there was any real prospect that the claimant would have been dismissed absent these errors.

131. In relation to whether any deduction should be applied to reflect contributory fault the Tribunal would require some form of evidential basis to come to any view that the claimant engaged in blameworthy conduct. Given the fundamental flaws and gaps in the evidence gathered by the respondent in the disciplinary process, and the absence, at Tribunal, of any eye witnesses to the alleged incident, that the Tribunal must accept the evidence of the claimant and that it should not reach a conclusion that the claimant engaged in any blameworthy conduct beyond any momentary lapse in observations whilst on duty in Iona 2.

132. The Tribunal is asked to take into account that the respondent's stated reason for dismissal had been gross misconduct and that this would have an effect on the Claimant's search for alternative employment. The claimant received no notice or payment in lieu of notice. The Tribunal will take all of these circumstances into account when assessing the extent of the compensatory award with regard the general application of the requirements of s.123(1) ERA 1996 in awarding what is just and equitable having regard to the loss sustained by the Claimant. In these circumstances, it is submitted that no or only a small deduction for contributory fault should be made.

133. The Tribunal will consider whether it is just and equitable to adjust the compensatory award in respect of any unreasonable failure to comply with the ACAS Code, in accordance with section 207A of the Trade Union Labour Relations (Consolidation) Act 1992. Although there was an investigation, disciplinary and appeal, and so the procedures were complied with to some extent, there were defects in the procedures, which impacted on the decision to dismiss. The respondent has failed to comply with Part 9 of the Code, by failing to provide the claimant with sufficient information about the alleged

misconduct to enable the claimant to prepare to answer the case at a disciplinary hearing. The respondent failed to explain the complaint against the claimant and to go through the evidence that had been gathered, in breach of part 12 of the Code. These failures were unreasonable and it the circumstances, it is submitted that it is just and equitable to increase the unfair dismissal award and the compensatory award.

Deliberations

134. The Tribunal had to decide firstly, whether the claimant had been unfairly dismissed and secondly, if he was unfairly dismissed, what remedy to award.

135. In reaching a judgment in this case, the critical question for the Tribunal was whether or the claimant's dismissal was fair in terms of Section 98 of the ERA.

136. The parties agreed that the reason for the dismissal was misconduct. Mr Richards confirmed in evidence that the disciplinary panel believed that the claimant was aware of the assault by patient A on patient B and the claimant took no action. The disciplinary panel formed this belief based on information obtained during Ms Totten's investigation and at the disciplinary hearing. Mr Richards said that the claimant's misconduct was the reason why the disciplinary panel dismissed him. The Tribunal was satisfied that the respondent had shown the reason for the dismissal was misconduct. The Tribunal therefore concluded that the respondent was successful in establishing that the dismissal was for a potentially fair reason.

137. At this point the Tribunal referred to Section 98 of the ERA, which sets out how a tribunal should approach the question of whether a dismissal is fair. The Tribunal then referred to the case of *Burchell (above)* which was approved by the Court of Appeal in the case *Foley v Post Office [2000] IRLR 827.*

138. The Tribunal noted that the claimant accepted that the respondent believed that he was guilty of the misconduct. The issues therefore to be determined, the burden of proof being neutral, were whether the respondent had reasonable grounds for the belief in the alleged misconduct and at the time it

formed that belief had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?

139. The Tribunal was mindful that it could not substitute its own view as to whether a reasonable investigation was carried out or embark on an analysis of the quality of the evidence obtained, so as to lead to its own view of the evidence resulting in its conclusion as to what the disciplinary panel ought to have found as opposed to applying a range of reasonable responses test to the investigation carried out by the respondent leading to its decision to dismiss the claimant.

140. The Tribunal turned to consider the investigation in this case. Before Ms Totten's appointment a Datix incident form had been completed; Ms McDougall had given (but not yet signed) a written statement; and the claimant had been suspended and provided with the terms of reference. There was no suggestion that Ms Totten had any involvement before her appointment.

141. The Tribunal noted that at the investigation stage Ms Totten was investigating an allegation that on 6 March 2018, patient A assaulted patient B in the dayroom of Iona 2 in the presence of S/N Bradford and the claimant and the staff members did not respond. Ms Totten invited the staff working on Iona 2 on 6 March 2018 to interviews. She also asked them to provide a written statement with any information before the interview.

142. As the Datix incident form referred to the alleged incident being support by three patients (A, B and C) the Tribunal considered that it was reasonable for Ms Totten to seek clinical guidance as to whether these three patients could provide evidence and if so, how this should be done.

143. The Tribunal could also understand why Ms Totten interviewed those members of staff who were in the working in Iona 2 ward at the time of the alleged incident. Ms Totten also interviewed Dr Campbell, S/N McAteer, S/N Lunney, N/A Carlin and N/A Dale. None of these employees witnessed the alleged assault and some were not working on Iona 2 when the assault allegedly occurred. Given the extent of the terms of reference: examining the

role of the wider nursing team in response to the alleged incident the Tribunal did not consider that this was unreasonable approach.

144. The claimant criticised the way Ms Totten interviewed the three patients in comparison to the staff. The patients' involvement was already recorded in the Datix incident form. Ms Totten said that she had obtained clinical advice about interviewing the patients and followed it. In these circumstances the Tribunal considered that it was reasonable for Ms Totten to take a different approach when interviewing the patients and the staff. While Ms Totten could have provided the list of questions that she asked the patients the Tribunal did not consider that it was unreasonable not to do so especially as neither the claimant nor management requested this at the time. The comments made by the patients to SCN McFarlane on 7 March 2018 were noted in the witness statement provided by him before his interview. There were some inconsistencies about nature of the assault but not that it had taken place and the staff (the claimant and S/N Bradford) did not respond.

145. Ms Totten was criticised by the claimant for not interviewing patients D and E who Ms McDougall said were in the dayroom at the time of the alleged incident. The Tribunal noted that the Ms Totten's explanation that she decided not to do so because she had interviewed three patients and Ms McDougall who said that they witnessed the alleged incident. Neither patients D or E spoke to SCN McFarlane or any other member of staff before the claimant was suspended. They were mentioned in Ms McDougall's written statement but the claimant did not asked for them to be interviewed before or at the disciplinary hearing. Reasonableness does not necessarily demand that everyone in the vicinity is interviewed particularly where there are large numbers involved. It seemed to the Tribunal that while Ms Totten could have interviewed patent D and patient E she had good reason for not doing so and had not acted unreasonably in taking that approach especially as it was not suggested at the time that they were not present in the day room at the time of the alleged incident.

146. The claimant said that Ms Totten did not approach the investigation with a view to establishing facts and her decision was predetermined. The Tribunal

accepted that Mr Totten was inexperienced as an investigating officer however she was supported by an experienced HR Manager. Before interviewing the claimant Ms Totten had interviewed patients A and C; she had met patient B; had written statements from Ms McDougall, N/A Patterson and SCN McFarlane; and had interviewed Student Nurse Doherty and Ms McDougall. The Tribunal considered that this was a reasonable approach. It was important that Ms Totten understood what was alleged before speaking to the claimant. The Tribunal referred to Ms Totten's choice of words when interviewing witnesses. The Tribunal was however mindful that the interview notes were not word for word and in some cases the witnesses had previously set out their recollection of events in a written statement before meeting Ms Totten.

147. The claimant argued that in his investigation interview, the specifics of the allegations were not put to him (e.g. the time of the alleged incident). He was asked vague questions and was not properly given the opportunity to respond to the allegations against him. The claimant was asked about events in the Iona 2, dayroom in the morning of 6 March 2018. He was asked what happened. On being informed that there was nothing worthy of note Ms Totten asked if he witnessed or heard anything between patients. When the claimant said there was nothing and confirmed that he was sitting next to patient B, the specific allegation of patient A assaulting patient B while the claimant was sitting next to him was put to the claimant. The Tribunal considered that at this stage of the investigation the claimant was being given an opportunity to recall his recollection of the events of that morning. As he had no specific recollection; it was a normal day it seemed to the Tribunal a reasonable course of action to prompt the claimant with others' recollection and allow him to comment.

148. The Tribunal was not satisfied that Ms Totten's investigation was predetermined. She was aware of the policy. The Tribunal considered that Ms Totten understood that her role was to make findings including the facts and evidence presented to her; and comments on inconsistencies and

explanations. She also had to draw conclusions and make a recommendation.

149. The claimant also criticised Ms Totten's assessment of Ms McDougall. The Tribunal referred to the claimant's submissions in this respect. The Tribunal considered that Ms McDougall's recollection during the investigation was consistent with her written statement prepared on 8 March 2018 where she said that she observed patient A slapping patient B across the face and proceeding to say, "That's for Victoria". As Ms McDougall recorded what she heard was said the inference in the Tribunal's view was that Ms McDougall's evidence was that she saw and heard the assault. Ms McDougall also commented during her investigation interview that she heard the incident and patient B did not say anything. The Tribunal therefore considered that there was evidence to support the conclusion that Ms McDougall said she heard the assault.

150. The Tribunal also did not accept that there was no evidence that Ms McDougall had a clear view into the dayroom. In her written statement Ms McDougall describes not only the alleged incident in detail but also the claimant's location and what he was doing.

151. The claimant also said that the conclusion that all three patients interviewed gave the same account of the events as reported by Ms McDougall was unsubstantiated by the evidence. The Tribunal acknowledged that the detail of their accounts varied but not that an assault took place in the claimant's presence and no action was taken. The Tribunal also considered that patient C's account was inconsistent but as SCN McFarlane explained patient C may just have wanted to be part of what was going on.

152. In cross-examination the claimant accused Ms Totten of making assumptions and failing to ask him key questions for example seeing some part of patient A moving. While the Tribunal accepted that Ms Totten could have put various suggestions to the claimant his position was consistent that he was not aware of any assault having occurred. She had not yet interviewed S/N Bradford who also said that he was unaware of any incident. Against this background

the Tribunal felt that Ms Totten's approach during the investigation interview with the claimant was reasonable.

153. Turing to the Management Statement of Case, this is a comprehensive document which includes all the witness interviews and statements where provided. The Tribunal appreciated that several members of staff did not witness the alleged assault. Most were not in the vicinity. The claimant said that he was not aware of and had no knowledge of any assault; it was a normal day. S/N Bradford had not seen the alleged assault. This contrasted with Ms McDougall who said that she saw patient A slap patient B and the claimant and S/N Bradford did not do anything. Patient A said that he assaulted patent B in the dayroom and nothing happened to him. This was confirmed by patent B. Patient C says he witnessed it. It was in the Tribunal's view reasonable for Ms Totten to assess the information and when weighing up what she believed happened to consider what staff said happened before and after the alleged incident.

154. In the Management Statement of Case Ms Totten recorded that the claimant believed there was no assault from patient A to patient B. While he did not say this, it was not inconsistent with his investigation interview where it is noted that the claimant was not aware of and had no knowledge of any assault; it was a normal day. Nothing happened in his presence. If there had been, he would have de-escalated the situation.

155. The Tribunal considered that was reasonable for Ms Totten to come to a view of the evidence as she was required to do and make a recommendation.

156. The investigation did not however stop with the Management Statement of Case it continued throughout the disciplinary hearing. The Tribunal turned to consider the investigation undertaken by the disciplinary panel.

157. The disciplinary panel were told of the claimant's concern about Ms Totten's competence and the way she conducted the investigation. The Tribunal was satisfied that the disciplinary panel considered this. The disciplinary panel had read the Management Statement of Case; it had the opportunity to engage with and assess Ms Totten during the disciplinary hearing and concluded that

there were no concerns particularly as a very experienced and senior HR Manager supported Ms Totten during the process. The Tribunal considered that this was a reasonable approach by the disciplinary panel particularly as it did not rely only on the Management Statement of Case when forming its belief. Ms McDougall and SCN McFarlane attended the disciplinary hearing and were subject to questioning by management, the claimant and the disciplinary panel. The disciplinary panel also had a written statement from the claimant responding to the Management Statement of Case and he too was questioned at the disciplinary hearing. Although S/N Bradford attended as a witness he withdrew.

158. At the disciplinary hearing the claimant clarified his position that he did not witness the assault so was not able to confirm or deny that it took place. In his written statement he says that Ms McDougall's written statement supports his position that he did not see it. He was charged for failing to respond to something that he did not see.

159. The Tribunal's impression was that there was no dispute that although regrettable staff could not necessarily prevent patient-to-patient assaults but there was an expectation that staff would intervene and de-escalate the situation. There was also no dispute that the claimant and S/N Bradford were in the dayroom that morning as were patient A and patient B. The claimant's position was that he could not respond to something of which he was unaware. It therefore seemed reasonable to the Tribunal that the investigation by the disciplinary panel focussed on the likelihood of the assault having happened; and the claimant's level of awareness of what allegedly happened between patient A and patient B when he was present in the dayroom. The disciplinary panel was able to make its own assessment particularly of Ms McDougall's credibility.

160. The Tribunal considered that it was significant that neither Ms McDougall nor SCN McFarlane had any previous issues with the claimant. If anything, it was to the contrary. The claimant was highly regarded. Also, Ms McDougall and SCN McFarlane had no personal gain in raising any issues about him. The Tribunal's understanding was that while the patients were challenging the

claimant had a good rapport with them. There was no suggestion that they colluded against the claimant.

161. The claimant submitted that the disciplinary panel concluded that he was guilty of the allegations based on the inconsistent and unreliable evidence of Ms McDougall. The disciplinary panel knew that there was a delay in Ms McDougall reporting the alleged assault and that none of the shift staff leaving work on 6 March 2018 had any idea that an assault had allegedly occurred, nor that anything apparently untoward happened. The disciplinary panel knew Ms McDougall is a housekeeper; she expected someone to speak to her. No one did.

162. The disciplinary panel also explored with SCN McFarlane what Ms McDougall said to him on 7 March 2018; how he raised matters with the patients that day; and what he thought Ms McDougall could see and hear through the glass partition.

163. The disciplinary panel also tested if it was feasible that sound could be heard through the glass partition. Ms McDougall said that she could. SCN McFarlane said that he would not have thought so but potentially a raised voice could be heard; although Iona 2 was a noisy ward between 10am and 11.15am it would be quieter as there were less patients in the ward. The disciplinary panel visited a similar ward to test the sound-proofing. There was no suggestion that this was a scientific exercise or that much weight was put on it. In the Tribunal's view this showed a willingness to test Ms McDougall's evidence.

164. The Tribunal noted that the disciplinary panel considered that Ms McDougall's position during the investigation and disciplinary hearing was consistent. It weighed up what she said and assessed the likelihood of what she said having happened. It concluded that she appeared to be reliable and credible and had no reason to disbelieve her. The disciplinary panel felt that SCN McFarlane recounted what was reported to him on 7 March 2018; explained how he obtained information from the patients; and what is expected of staff on level 2 observations.

165. The Tribunal was satisfied that before the disciplinary hearing the claimant was aware of the case against him. He had been provided with the Management Statement of Case, which Ms Totten relied in support of her recommendation to proceed to a disciplinary hearing. The claimant was given an opportunity to respond to the allegation, call witnesses and ask questions of management witnesses.

166. It was alleged that a patient-to-patient assault took place in Iona *2* dayroom on 6 March 2018 in the presence of the claimant who took no action. The claimant said that he did not witness an assault nor did S/N Bradford who was also alleged to be present. Ms McDougall said that the assault took place. Patient A and patient B confirmed that there was an assault. Patient C confirmed there was an assault.

167. The disciplinary panel decided that there was a high degree of probability that an assault took place in the claimant's presence. The issue was whether it was reasonable for the disciplinary panel to do so.

168. The Tribunal noted that the disciplinary panel found Ms McDougall's evidence clear, consistent and reliable. There was no motive for her to fabricate the event. The disciplinary panel had visited a ward and believed that Ms McDougall could have heard the assault. When assessing the evidence from the patients the Tribunal noted that the disciplinary panel considered how SON McFarlane approached questioning the patients and that an independent advocate had supported Ms Totten in these interviews. The disciplinary panel also noted the professional opinion of Dr Campbell that an assault had taken place. The disciplinary panel considered the claimant's position that he did not refute that an assault occurred but that he did not witness it and could not be held to account. The disciplinary panel did not find this credible given the claimant's experience and awareness of the assault on staff by patient B the previous day. The disciplinary panel accepted Ms McDougall's evidence which was supported by patient A and patient B.

169. Having the belief that the claimant was present when the assault took place it was reasonable in the Tribunal's view for the disciplinary panel to consider

the claimant's awareness of it. His position was that he was unaware of it. The disciplinary panel concluded that this lacked credibility. The claimant was sitting next to patient B, who was on level 2 observations. Even if the claimant was looking away when patient A assaulted patient B from the dining room Ms McDougall heard the slap and what patient A said. The disciplinary panel believed that the claimant was aware of the assault and had failed to take reasonable steps to protect patients from other patients by intervening with an appropriate response after the event.

170. Given that the claimant was provided with Management Statement of Case; his position at the disciplinary hearing, his opportunity to call and ask question of any witnesses, the Tribunal did not consider that there was any further reasonable investigation to be undertaken by the disciplinary panel.

171. The Tribunal acknowledged that while other employers may have acted differently it could not conclude that the investigation carried out by the respondent up to and including the disciplinary hearing did not fall within a reasonable band of responses to the situation.

172. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached.

173. As regards the investigation and the conduct of the disciplinary hearing for the reasons previously indicated the Tribunal was satisfied that there had been a reasonable investigation.

174. The Tribunal accepted that Ms Totten's investigation took around two months. Given the terms of reference and the availability of witnesses this was not unreasonable. The claimant was aware of the Management Statement of Case in June 2018. The delay in convening the disciplinary hearing was understandable given the claimant's health and his representative's availability.

175. The claimant was aware of the case against him and at the disciplinary hearing he was given an opportunity to explain his position or any mitigating

circumstances. He could call witnesses and ask question of management witnesses. The claimant was represented throughout the internal process.

176. The letter inviting the claimant to the disciplinary hearing enclosed a copy of the policy and warned of disciplinary action up to and including dismissal.

177. The Tribunal considered the claimant's submission that once the inaccurate story leaked to the press by someone in the respondent's organisation was made public the disciplinary panel was never going to come to any decision other than dismissal. The Tribunal considered that the timing of the newspaper article was unfortunate for both parties. The Tribunal appreciated that the inaccurate content was devastating for the claimant and was embarrassing for the management of the respondent as this was one of a series of adverse articles about the State Hospital. The Tribunal did not accept the claimant's submission that this meant that he was going to be dismissed. The Management Statement of Case was produced in May 2018. The Tribunal's impression was that Mr Richards was surprised at the allegations against the claimant and genuinely sought to understand why the allegations came about. Mr Richards was only one member of the disciplinary panel whose decision was unanimous. There was no evidence to suggest that the other members, particularly Ms McCafferty, who did not work at the State Hospital were influence by the newspaper article.

178. The Tribunal observed that it was agreed that there was no history of misconduct by the claimant. He was a well-regarded employee with good prospects for advancing in the nursing profession. The claimant denied misconduct. He did not concede that his conduct on 6 March 2018 was in any way inappropriate or that in retrospect he would have acted differently.

179. The disciplinary panel believed that an assault had taken place when the claimant was present, and he did not intervene after the event. The claimant confirmed that he was aware of the incident the previous day involving staff and patient B who was under level 2 observation. The disciplinary panel did not believe the claimant was credible when he said that he was unaware of

assault by patient A on patient B given that Ms McDougall saw and heard it from the dining room. They also did not believe S/N Bradford.

180. The Tribunal concluded that the disciplinary panel's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

181. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to reasonableness of the whole dismissal process.

182. The Tribunal then considered the appeal process. It was satisfied that Mr Crichton who chaired the appeal panel had no previous involvement. Mr Crichton was senior to Mr Richards. The other members of the appeal panel did not work at the State Hospital. The claimant was represented by Mr Hogg who prepared the claimant's appeal statement of case.

183. At the appeal hearing the management case was present first. Ms McCafferty, a member of the disciplinary panel was called as a witness. Ms McDougall who was called by the claimant and management. The claimant had an opportunity to ask questions. The Tribunal considered that the claimant was aware of the case against him and the reasons why the disciplinary panel reached the decision it did. The claimant also had an opportunity to respond.

184. The Tribunal appreciated that Mr Crichton was aware negative press about the State Hospital and the inaccurate the newspaper article about the claimant. The Tribunal considered that Mr Crichton was sitting as one of three members of the appeal panel. There was no evidence to suggest that the adverse press was a factor in the appeal panel's decision making.

185. During the appeal hearing following a question by Mr Hogg, Ms McDougall referred to four patients being in the day room (patients A, B, D and E) and one in the corridor outside the dayroom (patient C). The claimant said that this was the first he had heard this. It was Mr Crichton who questioned why they had not been interviewed during the investigation. The claimant did not suggest during the internal process that patient D and patient E were not in

Iona 2 ward at the time. Mr Crichton investigated why patient D and patient E were not interviewed. The information was in Ms McDougall's written statement a copy of which the claimant had since May 2018. The appeal panel was satisfied with Ms Totten's explanation for not interviewing patient D and patient E. For the reasons previously explained the Tribunal considered that this was a reasonable approach.

186. The Tribunal referred to the appeal panel's decision set out in Mr Crichton's letter of 5 February 2019. The Tribunal considered that it explained how the appeal panel reached it decision and examined the decision to apply summary dismissal. It also explained that the appeal panel had examined the suggestion that the claimant was unaware of two further patients being in the vicinity and the exclusion from the investigation.

187. The Tribunal was satisfied that the respondent had carried out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage.

188. The Tribunal concluded that the dismissal was fair. Having reached this conclusion, the Tribunal did not consider it necessary to go onto determine the question of remedy.

Employment Judge: S MacLean
Date of Judgment: 6 November 2019
Entered in register: 7 November 2019
and copied to parties