



EMPLOYMENT TRIBUNALS

Claimant: Mr D Uchendu

Respondent: Guy's and St Thomas's NHS Foundation Trust

Heard at: London South Employment Tribunal
On: 22-24 March 2023

Before: Employment Judge Curtis

Representation

Claimant: Mr Hay (Counsel)

Respondent: Mr Randle (Counsel)

JUDGMENT

The judgment of the ET is that:

1. The Claimant's claim of unfair dismissal is not well founded. This means that Respondent fairly dismissed the Claimant
2. The Respondent was not in breach of contract by dismissing the Claimant without notice.
3. The Claimant's claim in respect of holiday pay is dismissed on withdrawal.

REASONS

Claims and issues

1. The Claimant brought three claims: unfair dismissal, wrongful dismissal and holiday pay. The holiday pay claim was withdrawn on the first day of the hearing and I have dismissed it on withdrawal.
2. The issues for the tribunal to consider were discussed and agreed at the start of the hearing, when it was agreed that the tribunal would first consider questions of liability, contributory fault and 'Polkey', as well as the wrongful dismissal claim. The issues to be determined are as follows:

Unfair dismissal

- 2..1. The parties agreed that the Claimant was dismissed for the potentially fair reason of conduct on 6 December 2019.
- 2..2. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? This usually involves particular consideration of:
 - 2..2.1. Whether the Respondent held a genuine belief that the Claimant had committed misconduct
 - 2..2.2. Whether there were reasonable grounds for that belief
 - 2..2.3. Whether, at the time the belief was formed, the Respondent had carried out such investigation as was reasonable in all the circumstances
 - 2..2.4. Whether the Respondent otherwise acted in a procedurally fair manner
 - 2..2.5. Whether dismissal was within the range of reasonable responses
- 2..3. If the dismissal was unfair, was there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed? If so, should the compensation be reduced and by how much?
- 2..4. If the dismissal was unfair, did he cause or contribute to his dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the compensatory award, and by what proportion?
- 2..5. If the dismissal was unfair, would it be just and equitable to reduce the basic award because of any conduct of the Claimant before dismissal? If so, to what extent?

Wrongful dismissal

- 2..6. The parties agreed that the Claimant was not paid for any notice period on termination of his employment.
- 2..7. What was the Claimant's notice period?
- 2..8. Was the Claimant guilty of gross misconduct?

Documents and evidence heard

3. I had witness statements from Mrs Ni Luanaigh (Matron), Ms Tiziana Ansell (Senior Quality Improvement Patient Lead, investigating officer), Ms Deborah Miller (Head of Nursing for Integrated Services at the material time, disciplinary hearing officer), Ms. Sarah Wilding (Director of Nursing Integrated Care at the material time, appeals officer), the Claimant, Mr Damilare Olorunnisola (Health Care Assistant) and Ms Bisola Olaofe (Health Care Assistant) and heard oral evidence from them.
4. I was provided with a bundle containing 334 pages

Fact findings

5. The Claimant commenced employment in February 2013 as a healthcare assistant.
6. The Respondent is a NHS Trust which provides a range of hospital services in London. The Claimant was employed on the Albert Ward, a general medicine ward in St Thomas's Hospital.

7. The Trust has a 'Values and Behaviours Framework' which it expects staff to follow (usually referred to as the 'Trust Values'). These include "*I am aware of and take responsibility for how my attitude and emotions can affect other people*" and "*I protect the privacy and dignity of patients, clients, visitors and colleagues*". Staff were made aware of these values through advertising throughout the trust, and through them being referred to on lanyards worn by staff. The Trust Values were also referred to in the Claimant's job description

Original complaint

8. On 3 September 2019 the Respondent received a complaint from a patient who said she had seen a male nursing assistant suddenly slap a female nursing assistant on the side of the face when he was talking to her. The patient said that the female nursing assistant's face changed and it was clear she was upset straight away. This account was recorded in writing by the Ward Sister, Hazel Steele, and signed by the patient [117].
9. In these reasons I will refer to the female nursing assistant as "NAX".
10. The incident was said to have happened at the nursing station during handover. Based on the evidence I heard from the witnesses, at handover there would have been around 15-20 staff present.
11. The Claimant gave an account of the incident on the same day [119]. In summary he said that NAX had previously told him that she felt she had been assigned a bay with a heavy workload and a colleague who didn't help out. The Claimant had gone to speak to her to say that she had been assigned the same bay again. He said that they had a relationship where they would normally joke and play a lot to make the shift run smoothly and ease tension; on this occasion NAX said "don't start this morning" so he "*joking tap her on her cheek*" and told her not to keep quiet about the workload allocation.
12. On 4 September the Claimant had a meeting with Maedhbh Ni Luanaigh. I accept Mrs Ni Luanaigh's evidence that in that meeting he was asked to demonstrate the physical contact which had taken place with NAX; the Claimant demonstrated by holding Mrs Ni Luanaigh's left forearm, drawing her closer. The Claimant told Mrs Ni Luanaigh that at this point NAX said "oh don't start". The Claimant said "come here" and drew the forearm closer, then released the forearm and used his right hand to make contact with the left cheek using a flat palm [122].
13. Mrs Ni Luanaigh suspended the Claimant.
14. NAX gave a written account of the incident on 4 September 2019 [120]. She said that the Claimant had approached her and said he wanted to tell her something, and then slapped her face. NAX said she told the Claimant not to touch her face as it was extremely inappropriate. She said she was extremely upset and shocked, and was comforted by colleagues. NAX also said that after the incident a patient said she had witnessed everything and had found it distressing and upsetting. NAX said that there had also been an incident on 1st September when the Claimant had slapped her on the head/face and she had told him to stop as it was annoying.

Formal investigation

15. An investigation was undertaken by Tiziana Ansell. The steps taken in the investigation included:
 - An investigation meeting with the Claimant on 17 September 2019
 - An investigation meeting with NAX on 18 September 2019
 - Obtaining statements from a number of potential witnesses
16. During the investigation the Claimant said that he had a playful relationship with NAX and that they would pinch each other from time to time. He said that he and many other team members liked joking with one another which would include physical touch-type of joking. He described the contact with NAX as him having *“gently tapped [NAX] on her cheek pointing at the allocation board and telling her that she should speak up”*.
17. The Claimant named five people who would confirm his account of the general culture; Ms. Ansell attempted to obtain accounts from each of them as part of the investigation.
18. In her investigation meeting, NAX explained that the contact happened when she was speaking to a colleague and the Claimant interrupted the conversation and slapped her to get her attention. NAX said it *“felt as if a small slap”*
19. One of the witnesses, Yasmin Couto, said she *“witnessed DU make contact with his hand on [NAX’s] face. [NAX] became very upset almost immediately and told DU “I just told you not to do this”. To this DU responded “I’m just joking””*
20. Other staff spoken to as part of the investigation confirmed the Claimant’s account that he tended to be playful and jokey on the ward.
21. One of the witnesses, Basantie Bridmohen, said that there had been a previous incident a day or two earlier when the Claimant slapped NAX in the lunch queue. On that occasion NAX tried to stop the Claimant’s hand and said “stop it”; the Claimant laughed. In Ms, Bridgmohen’s view it was clearly not a joke to NAX, as her eyes were watery after the incident and it was not fun for her.
22. An investigation report was produced, dated 18 October 2019 **[59]**. It recommended that the case proceed to a disciplinary hearing. There was communication between Ms. Ansell and Mrs. Miller once the report was produced; I accept the evidence of Mrs Miller that she did not assist with the drafting of the report and that the communication was to check that the case would still proceed to a disciplinary hearing in light of amendments to the report, and to organise the timing of the disciplinary hearing. That is entirely consistent with what the contemporaneous documents show, despite Mr Hay’s efforts to put a different interpretation on them.

Disciplinary hearing

23. The Claimant was invited to a disciplinary hearing at which the allegation to be considered was *“Witnessed slap by yourself to the face of another nursing assistant”* [326].
24. The invite letter made clear that dismissal was a possible outcome. It informed the Claimant of his right to be accompanied. It also explained that Ms. Ansell would be presenting the findings of her investigation and that NAX would be in attendance as a witness.
25. The disciplinary hearing took place on 28 November 2019, when the Claimant was accompanied by Andrew Beckett. The hearing was audio recorded and there was a transcript of the recording in the ET bundle [188].
26. The disciplinary hearing was chaired by Mrs Miller. In the hearing Ms. Ansell presented the investigation findings, and Mrs Miller heard from Yasmin Clemente-Couto (a nursing assistant), NAX, and the Claimant.
27. In the hearing Ms. Clemente-Couto clarified that she had not seen the whole contact between the Claimant and NAX, so was unable to say whether it was a slap or punch or something else; she saw the hand coming away [207].
28. During the disciplinary hearing Mrs Miller asked the Claimant to demonstrate the contact with NAX on Mr Beckett. There is a dispute between Mrs Miller and the Claimant as to what was demonstrated. I accept Mrs Miller’s account that the Claimant demonstrated by grabbing Mr Beckett’s cheeks and forcefully turning his head. I accept Mrs Miller’s evidence that she was surprised with the force used, and saw a look of shock on Mr Beckett’s face when the Claimant grabbed him. The reasons I prefer the evidence of Mrs Miller to the Claimant are that the Claimant disputed this for the first time in his oral evidence and not in his witness statement, despite it having been described as a forceful grab by Mrs Miller in the appeal hearing [284]; and the Claimant has not put forward an alternative explanation of what happened.
29. In the disciplinary hearing NAX gave evidence. She described the slap as happening while she was talking to a colleague and being unexpected. She said *“I just felt like a hand go across my face and because it happened so quick I don’t know how to really explain how hard it was... it was a slap but it wasn’t a very hard one but it did hurt if that makes sense”* [202]
30. Towards the end of the disciplinary hearing there was a short break. Immediately after the break the Claimant said *“I’ve fully learned my mistakes from the incident that happened and I promise it will not happen again... I would like to apologise to [NAX] personally if she would like meet [sic] to apologise to her personally for when everything over”*. Mrs Miller, the dismissing officer, felt that this was not a genuine apology and that the Claimant did not have insight into whether his behaviour was wrong and, if so, why.
31. In his oral evidence to this tribunal the Claimant confirmed that the apology was false and that he had only said those things because his companion

had told him to say them. He believed at the time, and continues to believe, that he has not done anything wrong.

32. Ms. Beckett adjourned the meeting for 30 minutes to make her decision. She informed the Claimant that he was summarily dismissed for gross misconduct. The decision was confirmed in a letter dated 6 December 2019 (but not sent until 9 December 2019) [221]. In the conclusions Mrs Miller stated that she found that the Claimant touched NAX's face with enough force for it to be considered a slap, that the Claimant had been told not to do this on a previous occasion by NAX, and that the Claimant did not understand the inappropriateness of what happened. Mrs Miller considered that the conduct was against the Trust Values and met examples of gross misconduct in the disciplinary policy.

Appeal

33. The Claimant appealed the decision by way of letter sent on 23 December 2019 [225]. There were 10 numbered grounds of appeal. Mrs Miller put in a response to the appeal on 6 January 2020 [240], and the Claimant further responded in writing on 17 January 2020 [248].
34. An appeal hearing took place on 20 January 2020, chaired by Ms. Wilding. In the appeal hearing the Claimant called Mr Damilare Olorunnisola and Ms. Bisola Olaofe as witnesses to give evidence on his behalf.
35. The appeal outcome was sent to the Claimant in a letter dated 27 January 2020; the appeal was dismissed [292]. The letter went through each of the appeal grounds and provided a response. In oral evidence the appeal officer said that she did not think that one of the grounds of appeal was that the contact had been wrongly described as a slap instead of a grab or vice-versa, and she did not make a specific finding as to whether it was a slap or a grab; she simply found that it was unwanted contact.
36. In the appeal outcome letter, Ms. Wilding referred to her concern that the Claimant wouldn't over step the boundaries with patients at times of stress. In oral evidence, which I accept, Ms. Wilding said that this did concern her, but the primary reasoning was the golden thread from Mrs Miller's case around boundaries between the Claimant and other colleagues.

Claimant's account of the contact

37. In his oral evidence before me, the Claimant said that he had approached NAX to speak to her. He had called her name a couple of times but she had not heard or answered. He had then decided to tap her cheek to get her attention as he did not want to say more words or interrupt her conversation. He accepted that he could have spoken to NAX louder, or made himself physically visible as alternatives to tapping NAX's cheek.
38. He disputed Mrs Miller's account of how he demonstrated the contact in the disciplinary hearing, but did not provide his own explanation of what he did. He did not recall demonstrating the contact to MS. Ni Luanaigh.
39. The Claimant maintained that there was nothing wrong with what he had done, and said that he and NAX had a playful jokey relationship. He said

that he had only apologised in the disciplinary hearing because his companion told him to.

The Law

40. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.
41. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.
42. In this case it is not in dispute that the respondent dismissed the claimant because it believed she was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).
43. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.
44. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in Burchell v British Home Stores [1978] IRLR 379 and Post Office v Foley 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, and London Ambulance Service NHS Trust v Small [2009] IRLR 563).
45. It is important in disciplinary proceedings that the allegations (or charge) is precisely framed, and evidence should be confined to the particulars in the charge (Strouthos v London Underground Ltd [2004] IRLR 636, CA at paragraph 12). Linked to this, it is an elementary rule of natural justice and disciplinary proceedings that the individual must know the case he has to

meet and in particular must know whether or not the allegation is one of dishonesty (*Brito-Babapulle v Ealing NHS Hospital NHS Trust* [2014] EWCA Civ 1626, unreported, at paragraph 17).

46. When determining whether a reasonable investigation has been carried out, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations of criminal misbehaviour, where they are disputed, must always be the subject of the most careful investigation (*A v B* [2003] IRLR 405, EAT at paragraph 60). The potential consequences on the employee's career is a relevant factor when considering the thoroughness of the investigation. The employer ought to look for exculpatory evidence as well as evidence pointing towards proving the charges, particularly where the employee is suspended and unable to contact potential witnesses.
47. In cases where there are diametrically opposing accounts of an alleged incident of misconduct, with very little other evidence to provide corroboration one way or another, then the employer is not obliged to believe one employee and disbelieve another. It is open to the employer to say that they cannot resolve the conflict of evidence, and so the allegation is not proved (*Salford NHS Royal Foundation Trust v Roldan* [2010] IRLR 721, CA at paragraph 73)

Analysis and Conclusion

Unfair dismissal

48. There was no dispute that the reason for dismissal was conduct.

Genuine belief

49. It is clear to me that the Respondent had a genuine belief that the Claimant had committed misconduct. I reject any suggestion that the dismissing officer and the appeals officer had a preconceived view and were simply going through the motions; I accept Mrs Miller's evidence that this was the first occasion on which she had imposed a sanction of dismissal, and MS. Wilding's evidence that she had previously overturned disciplinary outcomes.
50. It was clear from the evidence I heard from the witnesses, as well as the contemporaneous documentary evidence, that the dismissing and appeal officer each formed the view that the Claimant had made contact with NAX's face in circumstances where it was unwanted and inappropriate. That was the misconduct in the mind of the dismissing and appeal officers.
51. The allegation in the disciplinary invite letter, and the finding in the outcome letter, was that the Claimant slapped NAX. In fact, the evidence from the dismissing officer was that she accepted the Claimant's account that he grabbed NAX's face and turned it, albeit the dismissing officer described that as a slap. In my judgment the difference in description (grab vs slap) does not affect the fairness of the dismissal. At all times the Claimant was aware that the allegation related to his contact with NAX's face; whether it was described as a grab or a slap did not affect the fairness of the disciplinary process. I have taken into account the fact that the suggestion of a grab came from the Claimant, and only arose at the disciplinary hearing.

Grounds for belief

52. There was no dispute that the Claimant made contact with NAX's face. It was described by the Claimant as a 'light tap' and demonstrated as either a slap or a grab. There were clearly grounds on which the Respondent could form the belief that the contact occurred. It was open to the Respondent to find that it was either a slap or a grab, as there was evidence to support both findings from the Claimant and from NAX.
53. As to whether the contact was unwanted and inappropriate, the Respondent was entitled to rely on the previous incident in the canteen in which NAX had made it clear to the Claimant that she did not want him to hit her around the head or face. I do not accept that relying on this as part of the background to the case was in some way unfair to the Claimant: he had an opportunity to give his account of that event, he had the accounts of NAX and Basantie Bridgmohen prior to the disciplinary hearing and it was explicitly referred to in the 'conclusions' section of the investigation report [67]. Given that part of the Claimant's defence was that this conduct was not unwanted, the previous incident necessarily formed part of the relevant background.
54. The Respondent also had the evidence of NAX, both in writing and in the disciplinary hearing, from which it was entitled to conclude that the contact was unwanted and inappropriate.
55. At the appeal stage the Claimant raised an allegation that the patient had previously used racist words against the Claimant, and that the complaint had been made out of spite. The appeal officer found that putting the patient's allegation to one side there was still sufficient evidence to find that the allegation was proven. That must be correct, given that the Claimant accepted that he made contact (either by slapping, tapping or grabbing). Whilst the appeal officer erroneously stated that the contact with witnessed by other staff, I do not believe that undermines the fairness of the dismissal in light of the other surrounding evidence (including the Claimant's admissions).

Investigation

56. The test is that the Respondent undertake such investigation as is reasonable in all the circumstances of the case. The range of reasonable responses applies to this, as to all the other parts of the "*Burchell guidance*".
57. I have taken into account the guidance set out above in A v B. In the Claimant's case, whilst the allegations were nowhere near as serious as those in A v B, a finding of gross misconduct had the potential to end his career as a Healthcare Assistant. I have borne in mind that the gravity of the charges and the potential effect on the Claimant is only one of the very many circumstances which go to the question of reasonableness. In my judgment the Respondent sought to carry out an even-handed investigation, which included seeking accounts from witnesses suggested by the Claimant.
58. Mr Hay criticised the Respondent's decision not to interview the patient who made the initial complaint as part of the formal investigation process. One must remember that at this stage the patient had already given an oral

account to Hazel Steele, which was recorded in writing and signed by the patient as accurate. The patient was not an employee of the Respondent and did not witness the incident in the course of any employment. Further, there was no dispute that the Claimant had used his hand to hit NAX's cheek. In my judgment it was within the range of reasonable responses for the Trust to decide not to re-interview that patient once they had given their initial account.

59. Mr Hay also highlighted that the allegation was worded differently in letters to the Claimant when compared with letters to potential witnesses. Potential witnesses were told that what was being investigated was the Claimant "*making unwanted physical contact to a colleague's face*", whereas the Claimant's invite letter said that NAX had made an allegation that "*you against her wishes, made forceful physical contact with her face*". It was suggested by Mr Hay that there is some significance in the addition or removal of the word "forceful".
60. In my judgment, the invite letters to the potential witnesses were perfectly proper. At that stage the Respondent was seeking to understand what others had (or had not) seen in relation to the incident. Phrasing the incident in a neutral way, without describing the contact as "forceful", is good practice. To describe the contact as "forceful" in the invite letter could have risked unintentionally influencing the memory of the potential witnesses.
61. There was also no difficulty with the Respondent telling the Claimant that the allegation was that the contact was "forceful". The Claimant was the person accused and so was in a very different position to potential witnesses. He needs to be able to properly defend himself against the allegations, which includes knowing what the allegations are. Whilst it is not always necessary to give detail at the investigation stage, there is absolutely nothing wrong with the Respondent telling the Claimant that in this case the allegation was that it was a forceful slap and not simply touching of NAX's face.
62. The extent and manner of the investigation was, in my judgment, reasonable in all the circumstances of this case.

Range of reasonable responses

63. The Claimant had an unblemished record and had been employed for a number of years. This was the first disciplinary sanction.
64. The dismissing officer felt that dismissal was the only appropriate sanction and placed significant weight on the fact that the Claimant did not appreciate that he had done anything wrong. There was also reference to relevant parts of the Respondent's disciplinary rules relating to gross misconduct.
65. In light of the Claimant's lack of insight, it was within the range of reasonable responses to dismiss for this misconduct.

Other procedural fairness

66. There was a suggestion on behalf of the Claimant that this was really a case of capability rather than conduct: a "can't do" rather than "won't do". This was based on the fact that the Claimant had had a playful, physical

demeanour around the workplace prior to this point with no significant challenge or sanction from the Respondent.

67. I find that the Respondent was entitled to treat this as a conduct issue. The allegation was that the Claimant had slapped NAX to the face. That is clearly something which falls into conduct and not capability. In my judgment it was within the range of reasonable responses to proceed on the basis that playful, jocular behaviour is somewhat different to slapping someone to get their attention.
68. It was put to each of the Respondent witnesses in cross-examination that they had formed a dim view of the Claimant prior to discussing the case with him, and they were determined that he would be dismissed no matter what. In my judgment there is no merit in that suggestion. I found that each of the Respondent witnesses genuinely wished to explore the conduct issue with the Claimant, and came to the process with an open mind. I base this on the considered answers given in cross-examination as well as the documentary evidence which shows that the Respondent sought to undertake a thorough investigation, including speaking to witnesses suggested by the Claimant, and gave the Claimant the opportunity to call relevant witnesses at the disciplinary and appeal hearings.
69. It was also suggested that the Respondent ought to have decided that the allegation was not proved, as this was a case similar to *Salford NHS v Roldan*. In my judgment the Respondent was entitled to find the allegation proved. This was not a case of two diametrically opposed accounts with little or no corroborating evidence: the Respondent had an agreed account that there had been physical contact with the face; it had corroboration from the patient, and there was corroborative evidence from Ms. Couto in terms of what she saw immediately after the contact. Further, the Claimant demonstrated the contact on multiple occasions to various employees of the Respondent. Even if the Claimant was right and this was a case with little corroborating evidence either way, it is still permissible for the Respondent to prefer the account of one employee over another. *Roldan* is authority for the proposition that the Respondent does not have to make such a finding, but such a finding remains a permissible outcome even where there are two diametrically opposed accounts.
70. My Hay submitted that the charge was not clear, or failed to meet the guidance in the case of *Strouthos* referred to above. In my view the Claimant knew perfectly well what allegation he faced throughout: slapping the face of NAX. This was not a case where it was unclear whether dishonesty was in play, or where the framing of the charge made a difference to the Claimant's ability to present his defence.

Conclusion on unfair dismissal claim

71. For all of these reasons set out above, I conclude that the dismissal was fair and the Claimant's claim of unfair dismissal fails.

Wrongful dismissal

72. Unlike the unfair dismissal claim, this requires me to form my own view as to whether the Claimant committed an act of gross misconduct.

73. I find that the Claimant slapped NAX on her cheek to get her attention. That is consistent with the contemporaneous account given by NAX. Whilst the Claimant's initial account was that he was already talking to NAX at the time that he slapped her, in his oral evidence to me he was clear that NAX was speaking to a colleague and he did not want to interrupt so he tapped NAX's cheek to get her attention.
74. I am satisfied that the contact is properly described as a slap rather than a grab. The suggestion that it was a grab arose for the first time in the disciplinary hearing and it is inconsistent with the accounts given at the time and in oral evidence to me, so I reject it.
75. Pausing there, regardless of the force involved the claimant ought to have appreciated that this was not an appropriate way to get a colleague's attention. At the time NAX was speaking to a colleague. Rather than wait for her to finish or call her name or ask to interject, the Claimant slapped her cheek to get her attention. That was contrary to the Trust's values, particularly protecting the dignity of others. It can properly be described as physical assault for the purposes of the Trust's Disciplinary Rules, in that it is physical contact with another which is without consent, unnecessary and avoidable. There is no requirement in the disciplinary rules that the contact include threatening or menacing behaviour.
76. There were other ways for the Claimant to get NAX's attention such as speaking louder, or making himself more physically visible, as was suggested to him in cross-examination. The Claimant's response to this was concerning: he said that he had called NAX's name but she had not heard, he did not want to interrupt her and so he thought what he did was the most appropriate course.
77. In my judgment the level of force was not severe (this was not what Mr Hay characterised as a "Will Smith Oscars slap"), but it was sufficient force to hurt and upset the Claimant.
78. Whilst it may be the case that the Claimant had a physical, jokey manner with his colleagues, there is a vast difference between reciprocal physical contact done in jest (whether that is described as pinching or similar), and slapping someone's face to get their attention. The latter is demeaning, rude and ought to be obviously unacceptable in any workplace regardless of whether there are specific Trust Values. It was an act which is properly described as gross misconduct.
79. In my judgment, the Respondent was entitled to terminate the Claimant's employment without notice due to an act of gross misconduct.
80. The wrongful dismissal claim therefore fails.

Employment Judge **Curtis**

24 April 2023
Date