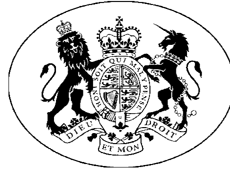

EMPLOYMENT TRIBUNALS

Claimant: **Mr D O'Mara**

Respondent: **Caretech Community Services Limited**

Heard at: **Liverpool** **On:** **10 11 and 12 January 2023**

Before: **Employment Judge Benson**
Mr A Murphy
Mr A Wells

Representation
Claimant: Mr J Searle - counsel
Respondent: Mr J Boyd – Counsel

JUDGMENT having been sent to the parties on 12 January 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

WRITTEN REASONS

Claims and Issues

1. The claimant brought claims of automatic unfair dismissal (section 100(1)(e) Employment Rights Act 1996 ("ERA"); wrongful dismissal in respect of notice and a claim of detriment contrary to section 44 ERA (health and safety). A claim in respect of holiday pay had been withdrawn earlier in these proceedings.

2. The issues in the case were agreed and a list of issues had been prepared at an earlier case management hearing.

3. The agreed issues were as follows:

   Automatic unfair dismissal (s.100(1)(e) ERA)

4. Was the sole or principal reason for the Claimant's dismissal because, in circumstances of danger which the Claimant reasonably believed to be serious and imminent, he took (or proposed to take) appropriate

steps to protect himself or other persons from the danger? In determining this, the following questions need to be asked:

i. Were there circumstances of danger?
ii. Did the Claimant believe that he or others were at risk of serious and imminent danger?
iii. If so, was the Claimant's belief reasonable?
iv. If so, did the Claimant take steps to protect himself or others from the danger?
v. If so, were those steps appropriate in the circumstances?

Detriment (s.44 ERA)

5. Was the Claimant subjected to any detriment(s) by any act, or deliberate failure to act, by the Respondent (as alleged within paragraph 19 ET1)?

6. The detriments alleged by the Claimant are: His suspension; and/or
   ii. The conditions imposed upon him with his suspension; and/or
   iii. The continuance (and length) of the suspension; and/or
   iv. The absence of any review of his suspension.

7. If so, was he subjected to those detriments because, in circumstances of danger which the Claimant reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger? In determining this, the following questions need to be asked:

i. Were there circumstances of danger?
ii. Did the Claimant believe that he or others were at risk of serious and imminent danger?
iii. If so, was the Claimant's belief reasonable?
iv. If so, did the Claimant take steps to protect himself or others from the danger?
v. If so, were those steps appropriate in the circumstances?

8. Were any of the acts or failures to act brought within three months (plus time added on as a result of early conciliation) of the date of the act or failure to act? In answering this question, the Tribunal will need to consider whether there were any continuing acts (or failures to act).

Notice pay

9. Did the Respondent (who dismissed the Claimant without notice) do so in circumstances where the Respondent was not entitled to dismiss without notice, such that the dismissal was wrongful?

Remedy

10. Should compensation be reduced following Polkey v AE Dayton Services Limited and, if so, by how much?

11. Should the basic and compensatory awards be reduced to reflect any culpable or blameworthy conduct by the Claimant which contributed to his dismissal?

12. Should compensation be increased or decreased to reflect any unreasonable failure to follow the ACAS Code? If so, by how much?

13. Has the Claimant failed to mitigate loss?

Reasonable adjustments

14. Adjustments were made to ensure the claimant could fully participate in the hearing. This involved a dimming of the lights in the hearing room and the claimant wore dark glasses at times.

Evidence and Submissions

15. Evidence was given by the claimant himself and a former colleague Ms J Baron. Ms J Withington (Locality Manager), Ms L Carragher (Registered Manager) and Mr B Martin (Locality Manager) gave evidence on behalf of the respondent. Written witness statements were provided for each.

16. The Tribunal had an agreed bundle of documents before it. Three photographs were admitted as additional disclosure by the respondent. There was no objection from the claimant.

17. The claims revolved around an incident involving the claimant on 9 October 2020. There was CCTV of that incident. The Tribunal was shown extracts of that CCTV in the form of two videos of the CCTV being played. The Tribunal and witnesses were taken to it at various parts of their evidence. The Tribunal was also able to view it on a number of occasions and stop it at relevant stages of the incident. As such the Tribunal was able to reach a view on the events from the videos, in additional to the witness evidence. The only witness who we heard from directly who was present during the incident on 9 October was the claimant.

18. Oral submissions were made by both Mr Searle and Mr Boyd (who also provided written submissions). I was grateful to both counsel for their assistance. The authorities provided were considered, particularly the decision of the EAT in Oudahar v Esporta Group Limited UK EAT/0566/10/DA which both counsel agreed was the key authority in a section 100(1)(e) case such as this.

Findings of Fact

19. The claimant was employed by the respondent as a Support Worker. He had two spells working for them. Firstly, between February 2018 and April 2020, and secondly from 23 June 2020 until 27 November 2020 when he was dismissed without notice. The claimant was diagnosed with Asperger Syndrome on 25 August 2015.

20. Throughout both periods of employment, the claimant worked at a specialist home operated by the respondent. The respondent provided care and support for children and adults with social needs.

21. The home where the claimant worked was secure accommodation providing care for 5 adults who had specialist needs in all areas of their daily lives. Four of the five service users lacked capacity and had a diagnosis of autism. The incident on 9 October involved one service user X. X is male and had a diagnosis of moderate to severe learning disability. He is between 5'10'' to 6' foot tall, 21 years old and in the region of 75-90kg in weight. His size can be seen on the CCTV. We accept the claimant's evidence that he was strong.

22. It was clear from the evidence that we were referred to including the personal care plan for X, risk assessments, and incident reports, that X had significant challenging behaviours which were well recognised by the respondent and its employees working with him. Further that when and what caused these to arise was difficult to predict.

23. These behaviours included regularly scratching staff on their hands, arms and other parts of their bodies. Possible outcomes were recorded in X's care plan. A risk assessment (at page 462 of the bundle) recorded that when staff were working with him, a whole range of potential physical injuries from minor to major, including hospitalization and potentially death were potential risks.

24. Ms Withington confirmed in evidence that some of the injuries identified in the risk assessments in context are serious and that death is an inherent risk. Injuries that had occurred when staff worked with X included of drawing blood, kneeing, headbutting and scratching.

25. In the months prior to the 9 October, there were a number of recorded incidents involving X's behaviour. There were further recorded incidents thereafter. These were detailed in the claimant's witness statement and were not disputed.

26. X's care plan required there to be a 2:1 staff ratio supporting him at all times when in the home. In practice this required there to be at two support workers with or in line of sight of X when in the unit. When in the community, a 3:1 ratio was needed. The claimant regularly worked with X as one of his support workers.

27. Staff were given training in MAYBO conflict management techniques.

28. These techniques start with seeking to disengage, distract and deescalate before any physical intervention. Thereafter there were techniques for physical restraint if other techniques were necessary. X's care plan had acknowledged that physical restraint and intervention may be required to maintain the safety of X and others. The claimant was trained in and had used MAYBO in respect of X but at times this was ineffective in resolving or controlling his behaviours.

29. Staff were also provided with PPE which included specialist hoodies which made it more difficult for service users to scratch staff and with hoods to stop their hair being pulled. They were also provided with anti-scratch gloves. All staff had walkie talkies to communicate with other

staff if issues arose. Two staff members were always in the office which had CCTV monitors showing the home.

9 October 2020

30. The claimant arrived at the unit just prior to his shift commencing at 9.00am. It was a secure unit such that he had to be admitted by a door entry system operated in the office. He rang on a couple of occasions. Whilst he was waiting, a new member of staff, who had attended for her first shadow shift joined him. She was a petite female. The door was released, and the claimant walked through first with the new starter behind him. The corridor had the office door to the right which was closed and a door to the left further down the corridor, which was being held open by Ms McMann who was standing with X. X had come from his flat and had approached the office door a short time before and Ms McMann was taking him back to his flat. Ms Jones had requested another member of staff to assist but at that stage no one had gone out to help.

31. X was reluctant to move as he could see shadows outside the entrance door. He appeared calm and had a soothing blanket over him which was one of his soothing methods. As the claimant came into the corridor, the claimant noted that Ms McMann was alone with X.

32. Ms McMann looked around towards the claimant and the claimant also turned his head and looked behind him where the new starter was coming through the entrance door. At the same time, the office door opened and a staff member came out with drinks in her hand. At that time no one was looking at X and he moved to his left to the side of Ms McMann. Ms McMann moved to her right to block his movement and released the door she was holding. The person who was coming out of the office retreated back into the office.

33. The claimant was conscious that the new female starter was behind him, and he moved towards X and Ms McMann to assist. X moved forward towards the claimant past Ms McMann and grabbed at the claimant. The claimant took hold of X's right wrist and pushed it down with his two hands. At that stage Ms McMann was also holding X's right arm and X then brought his left arm up towards the claimant and they grappled together. The claimant at the time had a heavy backpack on his right shoulder, which he let slip onto the floor and this together with X's strength caused him to lose his balance and they both fell against the wall.

34. At that stage Ms McMann removed the scarf which she had around her neck and threw it into the office door. As the claimant's bag came off, X grabbed the claimant under his T shirt and dug his nails deeply into the claimant's chest causing him pain. He stated that he was surprised at how much it hurt. As X grabbed the claimant, the claimant sought to gain control with his right hand whilst trying to remove X's hand from his chest and his right arm went up and behind X's shoulder and back for a short moment, in part because X bent forward.

35. Cath Jones came out of the office at that moment and from her perspective saw the claimant's arm over the back of X's shoulder. This was not a headlock nor an attempt to put X in a headlock. It was fleeting and happened in an instant. X started to calm down with Ms Jones' arrival and the claimant was able to remove X's grip on him.

36. As X's grip was released, Ms Jones told the claimant to go back into the office which he did. At some stage when X had his nails in the claimant's chest, the claimant swore saying 'get the fuck of me X'. And at some stage was also scratched by X on his hand in addition to the injuries to his chest.

37. X was returned to his room and the claimant was shocked by the incident and took time to recover in the office.

38. We do not accept that a 'red mist' descended upon the claimant as suggested by Mr Boyd, or that the claimant was aggressive in his conduct.

39. We accept that the claimant sought to engage MAYBO techniques but was unsuccessful.

40. The whole incident lasted approximately 18 seconds.

Investigation

41. An investigation was conducted on 9 October by Ms Withington. The claimant was interviewed shortly after the incident and a statement taken from him. He admitted that he had sworn and had said 'get the fuck off me X'. He provided an explanation of events including that X had injured him both on his left hand and his chest with scratching. He apologised for swearing.

42. Ms Withington also spoke to Tania McMann, support worker and Cath Jones, team leader. Both provided their written statements of the incident. Ms Withington viewed the CCTV. None of the staff involved were shown it including the claimant. Both Ms McMann and Ms Jones referred to X being put in a headlock by the claimant, that the claimant had sworn at X, had used not MAYBO techniques and was aggressive. Neither referred to X having his nails in the claimant or causing him any injury. Ms Jones referred to the claimant pulling at X's arms to get him off his tee-shirt. Neither Ms Jones nor Ms McMann could see from where they were standing that X had his nails in the claimant's chest area. This was however clear from the CCTV. Ms Withington also spoke to Michelle Woodcock and a statement was taken from her. The claimant was suspended verbally pending completion of the investigation and left the premises by 9.30am.

43. The terms of the suspension letter which was sent on 23 October refer to the claimant not contacting anyone connected with the investigation or to discuss the matter with any other employee.

44. The police were notified of the incident as a possible physical assault. Towards the end of October, the police confirmed to the respondent that

they had completed their enquiries. No action was taken by the police. The respondent also reported the matter to CQC as a safeguarding issue.

45. Ms Withington prepared an investigation report towards the end of October/beginning of November and recommended disciplinary action.

46. The allegations were set out in a letter inviting the claimant to a disciplinary hearing dated 11 November. These stated:

    a. that you verbally abused a service user;
    b. that you used a non approved MAYBO technique,
    c. that you physically assaulted a service user.

47. There was no review of the claimant's suspension between the suspension and the disciplinary hearing and his ultimate dismissal. This was not part of the respondent's procedures or normal practice. He was not contacted during this period by the respondent, though a letter appears to have either gone astray or inadvertently was not send. This caused him considerable anxiety.

Disciplinary hearing

48. The disciplinary hearing was conducted by Ms Carragher. She did not feel it necessary to view the CCTV prior to the meeting with the claimant. She relied upon the statements taken at the time and the claimant's answers provided in the hearing. At the hearing, the claimant gave a full explanation of the events and his reasons for his actions. In general, these accorded with our findings above in relation to the incident.

49. The claimant admitted swearing as he had in his original meeting but denied any other comments allegedly made by him.

50. The claimant asked to see the CCTV. He was not given the opportunity to view it at the hearing. He viewed it in early December. Ms Carragher also viewed it. She considered that it supported the statements of the other members of staff who had been present and the view of the investigating officer.

51. She concluded that the claimant's conduct amounted to gross misconduct. As requested by the claimant, she called the claimant's mother on 27 November to advise that the claimant was dismissed without notice for his conduct on 9 October.

52. She confirmed her decision by letter dated 15 December 2020. We find that letter provides the best understanding of what it was about the events of 9 October which she considered amounted to gross misconduct. That letter appears at page 597 of the bundle. The allegations are set out at the beginning of the letter. They are stated to be his verbal and physical abuse of a service user while using a non-approved MAYBO technique.

53. Ms Carragher's outcome letter makes little reference to verbal abuse. The physical abuse and failure to engage MAYBO techniques for which

Ms Carragher says the claimant was dismissed, focuses on the incident after X had gone to grab the claimant. There is nothing about the period before the claimant was grabbed by X.

54. We found the evidence of Ms Carragher vague. We find that she relied upon the statements of the other staff members and didn't properly address the allegations or the claimant's explanation for the events. Further she says there was no mitigation, but this was later accepted not be correct. She had no knowledge of X's history of challenging behaviours and confined her decision to the particular event on 9 October without seeking to understand its context. This was also the position of the appeal officer.

55. The claimant appealed against that decision and set out his grounds of appeal in a letter dated 19 December 2020.

56. On 8 January 2021, the police advised the claimant that there would be no action taken against him.

57. An appeal hearing took place on 16 February 2021 before Mr Martin. By this stage the claimant had seen the CCTV and he took Mr Martin through his explanation of how events had unfolded.

58. Mr Martin provided his decision by letter of 1 March 2021. He upheld the decision to dismiss the claimant and dismissed the appeal. He dealt with each of the claimant's grounds of appeal.

59. One of the claimant's grounds of appeal was that he felt that the CCTV did not show any evidence of actual abuse. Mr Martin drew the claimant's attention to the dismissal letter where it confirmed that the claimant had used a non MAYBO technique against X. He stated that in his view any physical contact which amounts to a restraint, which is not approved by an accredited scheme can be classed as abuse. He also refers to the comments of the respondent's MAYBO specialists. That is critical of the claimant's techniques but does not mention that X has his hand inside the claimant's clothing and is scratching his chest such the claimant is in pain and trying to free himself.

60. Further there is no mention by Mr Martin in the outcome letter that the claimant is himself being attacked by X and in pain.

61. A further ground of appeal was that the claimant felt he took appropriate steps to defend himself and keep himself safe. Mr Martin stated that he disagreed with this on the basis that the claimant should have de-escalated the situation by initially not engaging with X and instead stepping back. Further that moving towards X and engaging in a physical alteration would not amount to defending himself. Mr Martin does not refer to the claimant seeking to defend himself after X had grabbed the claimant and what impact that has had upon his decision to reject this ground of appeal.

62. The claimant was reported to the DBS as having been dismissed for physical and verbal abuse of a service user. As such this is reflected on his DBS checks.

The Law

Unfair Dismissal

63. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

64. Section 100 renders a dismissal automatically unfair if the reason or principal reason is within the following:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) …

(b) ….

(c) ….

(d) ….

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.”

65. According to the EAT in Oudahar v Esporta Group Ltd 2011 ICR 1406, EAT, a two-stage approach is appropriate under S.100(1)(e) ERA. First, the tribunal should consider whether the criteria set out in that provision have been met as a matter of fact. Were there circumstances of danger that the employee reasonably believed to be serious or imminent? Did he or she take or propose to take appropriate steps to protect him or herself or other persons from the danger? If these criteria are not satisfied, then S.100(1)(e) is not engaged. However, if the criteria are made out, the second stage is for the tribunal to consider whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take appropriate steps. If so, the dismissal must be regarded as unfair.

66. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to

dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

67. Where the claimant contends for a reason which would be automatically unfair, but the respondent contends for a fair reason, the proper approach is set out in paragraph 47 of the decision of the EAT in Kuzel v Roche Products Limited [2007] ICR 945, approved by the Court of Appeal at [2008] ICR 799.

68. In many cases where these provisions are relied on there will be a dispute between the employer and the employee as to the real reason for the dismissal.

69. In these circumstances, if the employee has sufficient qualifying service to bring an ordinary unfair dismissal claim (i.e. has at least two years' continuous service), the burden of proof is on the employer to prove the reason for the dismissal on the balance of probabilities. This was established by the Court of Appeal in Maund v Penwith District Council 1984 ICR 143, CA, in relation to a claim for automatically unfair dismissal on trade union grounds under S.152 TULR(C)A. The Court went on to hold that once the employer has shown a reason for dismissal, there is an evidential burden on the employee to produce some evidence to show that there is a real issue as to whether or not the reason given is true. Once this is done, the onus remains on the employer to prove the real reason for dismissal.

70. Where, however, an employee does not have enough qualifying service to bring an ordinary unfair dismissal claim, the burden of proof is on the employee to show an automatically unfair reason for dismissal for which no qualifying service is required.

71. The Tribunal was also referred to the decisions in Ashcrost v Servicestand Ltd t/s Designer Foods [2000]EAT/435/00; Hamilton v Solomon and Wu Limited [2018] UKEAT/0126/18/RN and Horton v IKEA [1999]EAT/644/98 and Bolton School v Evans [2006] EWCA Civ 1653 which we considered.

Detriment

72. The law provides protection for employees who have been subjected to a detriment by their employer in specified circumstances.

73. Section 44 ERA states

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) – (e) ……..

(1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—

(a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or

(b) in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.

(2) For the purposes of subsection (1A)(b) whether steps which a worker took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) A worker is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1A)(b) if the employer shows that it was (or would have been) so negligent for the worker to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4) . . . This section does not apply where the worker is an employee and the detriment in question amounts to dismissal (within the meaning of Part X).

Notice Pay

74. Subject to certain conditions and exceptions not relevant here, the Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.

75. An employee is entitled to notice of termination in accordance with the contract (or the statutory minimum notice period under section 86 Employment Rights Act 1996 if that is longer) unless the employer establishes that the employee was guilty of gross misconduct. The measure of damages for a failure to give notice of termination is the net value of pay and other benefits during the notice period, giving credit for other sums earned in mitigation.

Decision

76. The first issue which we must decide is whether in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger. We take the staged approach set out in Oudahar v Esporta Group Ltd (above).

Were there circumstances of danger?

77. In the environment in which the claimant and his colleagues worked there were circumstances of danger every time he went into work with X. That was reflected in the risk assessments and care plans to which we were referred. Therefore, as he stepped into the corridor on 9 October such danger existed. This included a whole range of potential

physical injuries from minor to major, including hospitalization and potentially death.

Did the Claimant believe he or others were at risk of serious and imminent danger?

78. We find that at the time that the claimant walked into the corridor he was alert to potentially increased dangers, but it was not until X moved towards him and went to grab him that he considered that the risk of such dangers had become serious and imminent. Until then he believed X's behaviour was controlled and he appeared calm with Ms McMann. Although he was aware of the potential risk of increased danger in that he looked back to the new starter when he saw X with Ms McMann, at that stage we do not accept that he considered the dangers to be any more heighted than normally in the home. This changed when X went to grab him. At that stage and during the physical interaction with X, in light of X's unpredictable and recognized behavioural challenges of which the claimant was well aware and had experienced, we accept that the claimant believed that there was a serious and imminent risk of danger certainly to himself and possibly others.

Was that belief reasonable.

79. We find that it was. X's risk assessment clearly identifies the potential risks to staff described above. Although the reference to death by the claimant might be thought to be dramatic, it is stated as a risk in the assessment and accepted by the respondent as possible. Further, other staff appeared to recognize on 9 October that there was a serious risk of danger. Ms McMann removed her scarf and threw it into the office, a staff member coming out the office retreated. Ms Withington accepted that risks associated with X were drawing blood, kneeing, headbutting and scratching and that these in context are serious and that death is an inherent risk. Ms Carragher accepted that working with X involved risks up to loss of life.

80. X's behaviour was known to be unpredictable and in the situation on 9 October when the claimant was physically grappling with X, the situation could have escalated quickly and unpredictably. X was physically strong and it is clear from the CCTV that viewed objectively, the claimant's belief that there was a risk of serious and imminent danger was a reasonable one.

Did the claimant take appropriate steps to protect himself or others from the danger?

81. We consider that he did. In considering this question, we must judge it by reference to all the circumstances including, in particular, the claimant's knowledge and the facilities and advice available to him at the time.

82. This incident happened quickly and without warning. The claimant was aware from working with X and from the risk assessments of his unpredictable behaviour and that the situation could quickly escalate. The risk assessment and care plans allowed for physical intervention if required to ensure the safety of X and others. The respondent argues

that the claimant's steps were not in line with MAYBO and therefore were inappropriate. We have had only general descriptions of what MAYBO permits. We have found that there was no headlock or an attempt to headlock which we understand would not be MAYBO compliant. In view of our findings above, the claimant was seeking to engage MAYBO techniques but the size of X, the speed at which things happened, his bag slipping off his shoulder and his stumbling all resulted in his attempts to use them to fail. Further he was himself being assaulted by X at the time. These are relevant factors in the consideration of what steps are appropriate. We have had the benefit in this case of being able to view and re-view on a number of occasions the CCTV of these events and we find that the steps taken by the claimant were appropriate to protect himself from the danger he faced.

83. From the time that X went to grab the claimant, circumstances of danger existed sufficient for section 100 and section 44 to be engaged.

Section 100(1)(e) Unfair dismissal

84. Was the sole or principal reason for dismissal that the claimant took those steps?

85. The burden is on the claimant as he has less than two years continuous service with the respondent.

86. The stated reasons for the claimant's dismissal were that he verbally and physically abused a service user while using a non-approved MAYBO technique.

87. The claimant has shown us that the principal reason in Ms Carragher and Mr Martin's minds when dismissing him was the claimant's conduct during the physical contact between him and X. There has been suggestion in this hearing that it was the earlier failure to follow MAYBO techniques in de-escalation and disengagement when the claimant saw X and Ms McMann in the corridor which amounted to the MAYBO failure. Although that might have played a part in their decision, we do not accept that this or indeed the verbal abuse was the reason or principal reason for the decision to dismiss the claimant.

88. The focus during the investigation and the disciplinary hearing was on the physical exchange, particularly the alleged headlock. Ms Carragher doesn't mention the potential non-physical interventions and makes only a passing reference to verbal abuse in her outcome letter.

89. Mr Martin conducted a review of Ms Carragher's decision based upon the grounds of appeal put forward by the claimant. It is our view in reading his outcome letter as a whole, that he concurs with Ms Carragher that the principal concern and reason for not upholding the appeal is the claimant's conduct after X tries to grab him. He does mention swearing but simply points out that this is also an abusive act.

90. The principal reason for the claimant's dismissal were the steps he took to avert the serious and imminent danger he believed was in. As such the dismissal is automatically unfair. We do not accept Mr Boyd's

arguments that this case is analogous to the Court of Appeal decision in Bolton School v Evans [2006] EWCA Civ 1653. In the claim before us, the steps which the claimant took and the conduct for which we find he was dismissed were one and the same.

91. This claim succeeds.

Section 44 – Detriment

92. The claimant relies upon the alleged detriments of the continuance and length of his suspension, the conditions imposed upon him during his suspension and the absence of any review. He alleges that he was subjected to these alleged detriments on the ground set out in section 44(1A)(3) ERA which replicates section 100(e) ERA.

93. It was accepted by the claimant that his suspension was an appropriate act at the stage that the investigation was commenced. Conditions were imposed but only such as were required to allow a fair investigation of the matter. We accept that there was a short delay in reverting to the claimant and that there was no review. The respondent has shown that there were reasons for that delay in that it considered that they needed to await the police investigation. We accept that it is not the practice or policy of the respondent to review any suspensions. There were no attempts to do so, but in any event the claimant was not suspended for a lengthy period. The incident took place on 9 October and the disciplinary hearing was 11 November. It is difficult to say that the claimant's suspension and the other failures relied upon could not amount to a detriment. Although suspension is a neutral act, it had a detrimental impact upon the claimant.

94. In a detriment claim, the respondent has the burden of showing the ground upon which any act or deliberate failure to act was done. Although the allegations of misconduct for which the claimant was suspended were in respect of the steps he took to protect himself from danger, that does not mean that any delay, conditions and failure to review the suspension were necessarily on those grounds. The respondent has shown that there were separate reasons unconnected with the allegations themselves for the decisions which it took or failed to take in relation to his suspension.

95. These claims therefore fail.

96. As these claims fail there is no requirement for us to consider whether they were presented within the requisite time frames.

Wrongful dismissal

97. In view of our findings, we conclude that the claimant's conduct on 9 October was not sufficient to amount to a fundamental breach of his contract such that he could be summarily dismissed.

98. This claim succeeds.

Employment Judge Benson

Date: 25 May 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: 7 June 2023

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FOR EMPLOYMENT TRIBUNALS