EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105124/2022

Final Hearing Held at Inverness on 22 - 25 May 2023, deliberation day on 1 June 2023

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Employment Judge A Kemp
Tribunal Member I Ashraf
Tribunal Member F Parr

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Mr M Harvie	**Claimant** **Represented by:** **Mr G Robinson,** **Lay Representative**
Scottish Ambulance Service Board	**Respondent** **Represented by:** **Mr G Fletcher,** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that

(i) **the claimant was unfairly dismissed under section 98 of the Employment Rights Act 1996,**

35 **(ii)** **the respondent failed to comply with its duty to make a reasonable adjustment for the claimant's disability under sections 20 and 21 of the Equality Act 2010,**

(iii) **the respondent was in breach of contract in dismissing the claimant without notice,**

40 **(iv)** **the total compensation awarded to the claimant and payable by the respondent is TWENTY TWO THOUSAND FOUR HUNDRED**

AND SIXTY EIGHT POUNDS THIRTY FIVE PENCE (£22,468.35) of which

(a) £16,503.68 is in respect of unfair dismissal,

(b) £1,712.00 is in respect of breach of duty in failing to make a reasonable adjustment, and

(c) £4,252.67 is in respect of breach of contract.

REASONS

Introduction

1. This was a Final Hearing of the claims of unfair dismissal, disability discrimination as to an alleged failure to make reasonable adjustments and breach of contract as to notice pay. A claim for notice pay was referred to in the Claim Form but had not been identified in the lists of issues prepared by each party. Mr Fletcher confirmed at the commencement of the hearing that there was no objection to that claim being made on the basis that the claim was purely for damages for the notice period, as it was.

2. The claimant's status as a disabled person by virtue of dyslexia at the material time being January to September 2022 was admitted by the respondent. The respondent accepted during preliminary discussions that it had knowledge of the claimant's disability from 30 May 2022 but not before that date. The claimant alleged that the knowledge was earlier than that, and was from the start of the most recent period of his employment with the respondent, he having earlier been employed after which there was a break in continuous service. The claims were defended save for those two concessions by the respondent. Certain points of detail were conceded during the evidence.

3. There had been a Preliminary Hearing on 14 November 2022, case management orders issued on 27 January 2023, and a further Preliminary Hearing on 3 April 2023 after which orders were issued. That had included the identification of the provision, criterion or practice relied on, which had

not been done, but which was discussed at the commencement of the hearing.

Issues

4. The Tribunal identified the issues for determination during the preliminary discussions at the commencement of the hearing, as the parties had not been able to agree the same. The discussion included that as to the breach of contract claim as above, and the matters relied on for the PCPs. The Judge drafted issues and gave parties the opportunity to comment on them. Those issues were:

   (i) What was the reason, or principal reason, for the claimant's dismissal?

   (ii) If potentially fair under section 98(2) of the Employment Rights Act 1996 was it fair or unfair under section 98(4) of that Act?

   (iii) When did the respondent know or ought the respondent reasonably to have known of the claimant's disability?

   (iv) Did the respondent apply a provision, criterion and/ or practice (the "PCP") to the claimant, being (i) the application of the respondent's disciplinary policy or (ii) the application of any policy to refer what was said in the investigation or disciplinary hearing to Police Scotland?

   (v) Did either PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability under section 20 of the Equality Act 2010?

   (vi) Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

   (vii) Did the respondent fail in its duty to take such steps as it would have been reasonable to take to avoid the disadvantage? The claimant alleges that the following adjustments to the PCP should have been made-

      (a) Obtaining the claimant's personnel file as part of the investigation.

(b) Granting the claimant's request for a written statement, or doing so in the question and answer process conducted as part of the investigation.

(c) Not conducting the disciplinary process when criminal proceedings in respect of the same incident were ongoing.

(d) Postponing the disciplinary hearing until the criminal case had been concluded.

(e) Granting the request for a solicitor to accompany the claimant during the disciplinary hearing.

(f) Obtaining an occupational health report prior to the disciplinary hearing.

(g) Reducing the numbers of persons allowed to remain in the disciplinary hearing.

(viii) Was the respondent in breach of contract in dismissing the claimant summarily?

(ix) If any or all claims are successful to what remedy is the claimant entitled? In that regard:

(a) what losses did or will the claimant suffer as a result of the dismissal,

(b) what award is appropriate for injury to feelings,

(c) might there have been a fair dismissal had there been a different procedure,

(d) did the claimant contribute to his dismissal

(e) has the claimant mitigated his loss and

(f) did either party fail to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

Evidence

5. Evidence was given by the respondent first, commencing with that of Mr Graham Cormack the investigating officer, and then Mr Euan Esslemont the dismissing officer. The claimant gave evidence himself and did not call any witness.

6. The parties had prepared a Bundle of Documents, most but not all of which was spoken to in evidence. The respondent provided three policy documents during the course of the hearing, by agreement. During the

course of the hearing the respondent made various objections to questions which were addressed at the time.

7. The claimant provided a Schedule of Loss which sought an award of around £200,000. The respondent had provided a Counter Schedule of Loss proposing a figure of nil.

8. The claimant was represented in the Claim including at the Final Hearing by Mr Robinson, who is not legally qualified or experienced in such hearings, although the claimant had the services of a solicitor during the disciplinary process with the respondent. Before the hearing of evidence commenced the Judge explained about the giving of evidence, the nature of questioning in examination in chief, the role of cross examination being to challenge evidence on fact given by the witness that was disputed and to put to the witness evidence he or she was aware of which the other party would give evidence about. He explained that documents produced in the Bundle should be referred to in oral evidence as otherwise they would not be considered, and that all aspects of remedy required to be addressed in evidence. He explained about re-examination being for matters raised in cross examination or questions from the Tribunal, and the need to ensure that all of the evidence is referred to as the scope to introduce new evidence after the conclusion of the evidence is very limited indeed. He also explained about the opportunity to make submissions.

9. The Tribunal was grateful to both representatives for the helpful and professional manner in which they conducted the hearing, and for their detailed submissions. That for the respondent was given orally. The Tribunal received the respondent's written submission at 2pm on the final day of the hearing. It read them and commenced its deliberations, but did not conclude them that day. It continued with its deliberations on 1 June 2023 and reached an unanimous decision.

Facts

10. The Tribunal found the following facts, material to the issues, to have been established:

Parties

11. The claimant is Mark Harvie. His date of birth is 4 May 1962.

12. The respondent is the Scottish Ambulance Service Board. It is constituted as a board, and is a part of the National Health Service ("NHS") in Scotland. It provides ambulances to transport patients to hospital, or from hospital. That includes doing so in emergency situations. It has several thousand employees (the precise number of which was not otherwise given in evidence).

13. The claimant was employed by the respondent as an Urgent Tier Ambulance Care Assistant. He had a role in driving an ambulance in emergencies. He did not have clinical experience and had not received training in clinical matters. He was accompanied either by a Paramedic, or an Ambulance Technician, both of whom had received clinical training, on emergency calls. He was the only Urgent Tier Ambulance Care Assistant at the Inverness Ambulance Station, where he was located.

14. He had continuous service with the respondent as an employee from 1 September 2008. He also had an earlier period of service with the respondent for about 16 years working in Glasgow until in or around 2005, at which point he moved from Glasgow to Inverness.

15. The claimant has had not any prior disciplinary matter raised with him during all of his service with the respondent, before that referred to below.

Disability

16. The claimant suffers from dyslexia. He disclosed that to the respondent at or around the time of his re-joining them in September 2008. A reference to that diagnosis is, or ought to have been, on the claimant's personnel file. The respondent has made adjustments for the claimant's condition since he re-joined their employment, including when undergoing training.

17. The impact of the condition on the claimant includes that he finds difficulty in communicating both in writing and verbally. He finds difficulty reading from a screen in particular, but also from written documents. Words can be read by him backwards. He can mix words up, and not use the correct

word when speaking. He can be confused by long words. He finds difficulty in processing information given to him. If he requires to write documents he has someone else do so. That includes dealing with claims for overtime or holidays, which his wife does for him. She is also an employee of the respondent.

18. He finds dealing with formal matters stressful, particularly if there are larger numbers of people present. He gets agitated in such situations.

Terms of employment

19. The claimant received a statement of terms and conditions of employment from the respondent (which was not before the Tribunal).

20. The respondent operates a Conduct Policy which was prepared by NHS Scotland. It defines gross misconduct as “deliberate wrongdoing or gross negligence by the employee which is so series that it fundamentally undermines the employment relationship. Gross misconduct entitles the employer to dismiss the employee without notice Read the Guide to expected standards of behaviour”. That Guide was not before the Tribunal. Under the heading “Criminal offences or police involvement” the Policy stated “Disciplinary action should not be taken automatically against an employee because they have been charged with or convicted of a criminal offence committed outwith the course of employment. Each situation should be considered individually on the basis of whether the employee’s conduct warrants action because of its employment implications or because of its impact on other employees……”

21. NHS Scotland has issued a Guide for Investigations Associated with Criminal Offences, which the respondent follows. It states “if it has been agreed that the internal investigation will proceed, the employee should be made aware that they may incriminate themselves as the employer may be asked to share evidence gathered with the police or CFS [Counter Fraud Services]………Cases that relate to the workplace do not require to await the outcome of any criminal proceedings, as the investigation relates to conduct in the workplace and evidence is available to the investigation panel”.

22. NHS Scotland has also issued a Workforce Policy Investigation Process, which the respondent follows. It includes guidance on the factual findings of investigation which includes that consideration should be given to

- “the evidence provided by the employee under investigation and any witnesses
- The physical evidence (if applicable)
- Conflicting evidence
- Why the investigating manager has accepted a particular line of evidence
- Reasons for the recommendations and findings.”

23. The respondent has a Violence and Aggression Policy. Its provisions include the following:

> “1.2 The Scottish Ambulance Service (The Service) considers all forms of violence or aggression against its staff to be unacceptable…..
> 1.6 Employees should be aware that their personal safety and that of their colleagues, takes precedence over anything else which may seem important at the time of a potentially violent incident.
>
> 2. The Scottish Ambulance Service defines violence as:
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> > ‘Any incident where staff are abused, threatened or assaulted in circumstances relating to their work, involving an explicit or implicit challenge to their safety, well-being or health.’
> > For the purpose of this document the term ‘violence’ will encompass physical aggression, verbal abuse or threats, or other forms of harassment to persons or property, which may cause distress, fear and/or physical injury to individuals.
>
> 2.1 Employees are expected to avoid placing themselves or their colleagues, deliberately at risk from violence. All reasonable steps must be taken by employees and managers to minimise the likelihood of violence……
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> 5.4 **Procedure for staff**

The personal safety of the crew is the first priority. Staff should carry out a dynamic risk assessment and where necessary request police attendance and await their arrival at a safe location. It is vital that the incident is not allowed to escalate by poor management. The following guidance is issued for use of crew staff:

- Be perceptive and read situations
- Avoid argumentative situations
- Exercise care in what you say – try to be polite and objective – speak calmly, slowly, quietly and firmly
- Offer alternatives: agree to talk at a later date. If approached leave the scene
- Make sure you understand the person has suitable space, as people can feel threatened if you stand too close to them
- Do not be provocative
- Try to ignore all provocation, since responding to it may lead to the situation escalating
- If the person becomes aggressive, skilful handling can allow them to back down without losing face
- Consider leaving the person alone, although do not ignore them completely. Let them know that you are going to leave them in peace.

5.5 **Procedure for Staff Should Violence Occur**

Irrespective of training, information or advice provided for the protection of staff the possibility of violence, assault or threatening behaviour cannot be totally eliminated. If staff find themselves facing violence they should –

- Raise the alarm
- Withdraw from the scene
- If a person is armed or carrying some sort of weapon do not attempt to disarm the person
- Avoid grappling with the person
- If you are attacked, try to break away and get some form of shelter between you and the attacker. If escape is not

possible, try to calm the person down by talking, but if you can get away, do so.

- If a person is actually damaging property, do not intervene, you should try to move away from the situation. Personal safety is always more important than property.
- If after a warning the person continues to exhibit violent behaviour, the Police should be called, this should be done without drawing it to the attention of the person.

Operational staff equipped with personal radios must carry these with them and use them to call for assistance if required."

24. The claimant was aware of the fact that there was such a Violence and Aggression Policy but had not read its terms prior to it being sent to him during the disciplinary process as hereinafter referred to. He had not received any form of training on it.

25. The claimant had received training in Conflict Resolution in or before 2012 (the details of which were not otherwise given in evidence).

Incident 25 January 2022

26. The claimant was on duty on 25 January 2022. He was working in an ambulance with two colleagues, George Beaton a Paramedic and Katrina Plunkett a Student Paramedic. He was in the uniform of the respondent. His shift started at 16.00. At around 19.30 he attended with a patient in the ambulance at the Emergency Department of Raigmore Hospital, Inverness. The patient had fallen whilst in a bar in Inverness and had a laceration to his head. The claimant was the driver of the vehicle. Mr Beaton and Ms Plunkett were in the saloon of the ambulance attending to the patient. As the claimant went into the Department he saw a man in the door area staggering who appeared drunk. The claimant went into the department to ascertain if the patient could be transferred to their care, and was informed that they could not at that stage by a triage nurse, who also told him that the man outside was not a patient but was drunk. When the claimant left the department he came across that man outside it, the same person he had seen when entering, who was slumped over a wall. The person wore a three-quarter length leather coat, had a facemask on,

and was wearing a "Peaky Blinders" type of cap. His leg protruded to block partly the access way to the department.

27. The claimant bent down to speak to the person and said that he could go and get a seat. The person replied by swearing at him, and being abusive about the NHS. The claimant said that there was no need for that language and it was repeated by the person. When the claimant said that he would get security the person made further abusive comments, swearing as he did so. The claimant said something to the effect that he would waste no more time with the person and went back inside the ambulance, sitting in the driver's seat and closing the door.

28. The claimant began to speak to his two colleagues who were in the rear part of the ambulance, doing so through a hatch between the cab and saloon areas, to inform them that the patient could not yet be transferred to the hospital when the driver's door was suddenly forced open by the person. The claimant initially had his back turned to him. The person shouted at him words to the effect that he was not such a big man now, and that the claimant had to come out of the ambulance at some point and he would be waiting for him. The claimant felt threatened and vulnerable. His seated position was higher than that of the person standing on the ground, but the claimant thought that he could only use one arm to defend himself. He feared attack by the person. He very quickly decided to leave the ambulance, and got down from his seat to stand beside the open door, and when he did so the person moved backwards slightly. The claimant had his back to the driver's side of the ambulance, the open driver's door to his left, and the person standing about a foot away from him. The claimant asked him to move back from the ambulance. The person continued to abuse him verbally and swear at him, and said that the claimant was not so big now that he was out of the ambulance. The person waved his arms about erratically, and pointed his finger towards the claimant's face, without touching it but very close to it. The claimant told the person to get out of his face, swearing once when he did so. The claimant then perceived the person to come towards him and move his head backwards which he thought was in order to head-butt the claimant. The claimant put his left forearm up horizontally to act as a block to him

doing so, and struck the person with a short punch with his closed fist on his chin with his right hand. The punch was not delivered with much force, and was not sufficiently hard to cause material if any injury, or to cause the person to fall down. The claimant told him to get away. The person shouted that he had been assaulted. The incident had happened very quickly.

29. Mr Beaton came out of the ambulance when he heard the altercation, was told that it was the person's nephew who was the patient within it, and led the person away. He learned that the patient and his uncle were in Inverness for a funeral of a child the next day. He informed the claimant of that.

30. Three security officers also attended, having viewed the CCTV footage of the incident. They suggested that the person be reported by the claimant to the Police to be charged. The claimant did not wish to do so in light of the circumstance of a funeral the next day, and that the person was very drunk. A male staff nurse from the hospital also attended at about the same time, whom the claimant had not earlier seen. Mr Beaton sat the person down, and shortly thereafter the person fell asleep.

31. The claimant continued with his duties. He attended at the Ambulance Station in Inverness where word of the incident had reached. He did not report it to his line manager or other management at that time.

32. At around midnight on 25/26 January 2022 officers of Police Scotland attended on the claimant when he was again at Raigmore Hospital. They informed him that the person had made an allegation against him, that they had attended on him and saw a small nip on his lip, that they had viewed the CCTV footage of the incident, and they cautioned him and charged him with assault. They also gave him a Victim Care Card, stating that he had been abused by the person.

33. Very shortly thereafter the claimant telephoned the Ambulance Call Centre to report what had occurred. A transcript of the call is a reasonably accurate record of it. The claimant stated what the Police had told him, that he had been charged, and included comments that he had "nobbed him" "bopped him on the lip unfortunately" and "punched him on the lip".

34. On 26 January 2022 the claimant and his union representative met Mr Andrew Fuller, Head of Service (Highland) of the respondent, who informed him that he was suspended on full pay pending an investigation. That was confirmed in a letter to the claimant of the same date.

5 *Investigation*

35. The respondent appointed Graham Cormack, Area Service Manager, to undertake the investigation. He was assisted by Anna Morrison, HR Advisor of the respondent. The remit of the investigation was to consider two allegations –

10 (i) that on 25 January 2022 the claimant struck a member of the public whilst on duty, which may amount to an assault

(ii) that the claimant had received a caution from Police Scotland as a result of a complaint made by a member of the public.

36. Ms Morrison sought to recover the CCTV footage of the incident. It was 15 under the control of NHS Highland. NHS Highland is a different board to the respondent, both being boards within the NHS. Ms Morrison emailed Ms Ann Cornwall of NHS Highland on 24 February 2022 to seek the CCTV footage. She replied the same day that they were unable to release it to her due to the GDPR, being a reference to the General Data Protection 20 Regulation. Ms Morrison asked for a statement of what she (Ms Cornwall) had witnessed. Ms Cornwall replied to state that she was not in a position to supply a statement but was happy to provide the CCTV footage to the police. The respondent also sought to have access to the security guards who had watched the CCTV footage of the incident at the time, but NHS 25 Highland did not give them consent to do so. The respondent was not otherwise aware of their contact details.

37. On 8 February 2022 the claimant emailed Mr Cormack when an initial meeting was postponed to allow further enquiries. He did not at that stage refer either to his personnel file being obtained, or that he was dyslexic.

30 38. On 3 March 2022 the claimant attended before Mr Cormack for an investigation meeting. A transcript of the same taken by Ms Morrison is a reasonably accurate record of the same. The claimant attended with his

union representative Ms Sarah McIntosh. At the start of the hearing Mr Cormack informed the claimant words to the effect that if the claimant said anything that indicated that a crime had been committed the respondent may pass that to the Police. The claimant gave a description of the incident both by a prepared typewritten statement, and orally in answer to questions put to him. The claimant was asked about whether he had heard any more from the Police, and said that he had not, but that his criminal solicitor did not think that it would go anywhere, and had seen the CCTV footage. The claimant later informed the respondent that his solicitor had not in fact viewed the CCTV footage. Mr Cormack was not able to obtain the CCTV footage.

39. Mr Cormack obtained a written statement prepared by Mr Beaton himself, who he also spoke to by telephone both before and after receiving that statement, and a written statement from the said staff nurse, whose details were not provided. He was informed by Mr Cormack that Ms Plunkett the student paramedic had not seen anything of the incident, and had heard raised voices only. He did not seek to obtain a statement from her.

40. The identity of the person involved in the incident was not known to the respondent.

41. On 31 March 2022 Mr Cormack prepared an Investigation Report into the allegations. It had attached to it the statement and interview notes for the claimant, the written statements by Mr Beaton and the staff nurse, and the transcript of the call the claimant made to the Ambulance Call Centre. It summarised the evidence, and had a section headed “Mitigation”, which in turn referred to details in a section headed “Conclusions”. The conclusions section included the following comments

> “…..Without access to the CCTV images, we cannot say confidently that Mark’s response that evening was justified or otherwise. Mark has been cautioned and charged with assault by the Police who have had access to the CCTV footage. On balance, the Police must consider Mark’s actions that evening as serious enough to proceed with a charge of assault and that his actions

were not deemed to be in self-defense. The Police report is currently with the Procurator Fiscal for consideration……

The evidence gathered is that Mark has brought the service into serious disrepute with his actions on 25th January 2022. Mark has shown no remorse for what happened that evening despite having the opportunity to do so both within his written submission and during the formal interview. Mark has made no apology for striking the man. In fact, when asked during his investigation interview if, on reflection he would do anything differently his reply was a direct "probably not". This is also concerning and appears as if Mark is almost unaware of the seriousness of the situation."

42. The report recommended that the claimant be referred to a formal hearing.

43. Mr Cormack was not aware of the claimant's length of service or unblemished record, and did not ask Ms Morrison about that. Mr Cormack did not review the personnel file for the claimant, and was not aware of the claimant's dyslexia at that stage.

Dismissal

44. On 20 May 2022 Euan Esslemont the Deputy Regional Director of the respondent wrote to the claimant to state that he had received the Investigation Report and to invite him to attend a conduct hearing on 7 June 2022. The allegations made against the claimant were –

    1. It is alleged that on 25th January 2022 Mark Harvie struck a member of the public whilst on duty. This allegation may amount to:
        a. Physical assault
        b. Bringing the Scottish Ambulance Service into disrepute
    2. It is alleged that Mark Harvie has been charged by Police Scotland, as a result of a complaint made by a member of the public. This may amount to:
        a. Bringing the Scottish Ambulance Service into disrepute.

45. The Investigation Report and its appendices were provided, and the claimant was informed of the potential outcomes including dismissal. He was informed of his right to be accompanied.

46. The claimant's solicitor sent an email to Mr Esslemont on 30 May 2022 in which the claimant sought a postponement of the hearing, as the trial was set for 7 September 2022 with procedural hearings on 27 July 2022 and 9 August 2022, and adjustments for the claimant's dyslexia, which included seeking a report from occupational health on the extent of the disadvantage suffered by the claimant, and having a solicitor attend the hearing to assist him. The requests were all refused by Mr Esslemont.

47. Mr Esslemont had not received training on matters relating to disabled persons and was not personally aware of the terms of the Equality and Human Rights Commission Code of Practice: Employment. He did take advice from HR, the detail of which was not given in evidence. The hearing date of 7 June 2022 was postponed however to allow the claimant more time to prepare for the hearing.

48. Mr Esslemont decided to remove the second charge from the list of allegations at the stage of the hearing which was being re-arranged for 24 June 2022. That was done by letter dated 9 June 2022 which set out one amended charge as follows:

> 1. "It is alleged that on 25th January 2022 Mark Harvie struck a member of the public whilst on duty. Mark Harvie was charged by Police Scotland, as a result of a complaint by a member of the public. This allegation may amount to:
>   a. Physical assault
>   c. Bringing the Scottish Ambulance Service into disrepute."

49. That hearing on 24 June 2022 could not proceed as Mr Esslemont was self-isolating, and was arranged again for 15 July 2022. A letter was sent to the claimant to confirm those arrangements, which repeated the charge set out in the preceding paragraph.

50. The claimant's solicitor sent a submission in writing to the respondent by email on 16 June 2022.

51. On 7 July 2022 Mr Esslemont wrote to the claimant setting out key questions he intended to ask him at the hearing. A few days before the hearing he sent the claimant the Violence and Aggression Policy by email (which email was not before the Tribunal).

52. The disciplinary hearing took place on 15 July 2022. Mr Esslemont was accompanied by Siobhan Swanney, Regional HR Manager (North) of the respondent, and Ewan Murray as Interim Head of Support. They formed the Panel for the hearing, although the decision was one for Mr Esslemont alone. Mr Cormack attended to present the respondent's case, and Ms Morrison to assist him in HR matters in doing so. The claimant attended with his union representative. Those parties being in attendance is in accordance with the Conduct Policy.

53. A minute of that meeting taken by the respondent is a reasonably accurate record of it. At the conclusion of the hearing the claimant provided a typewritten closing statement which was read by Ms McIntosh. It concluded by arguing that he had acted solely in self-defence.

54. The Panel met immediately after the meeting, and again a few days later, to discuss what the findings would be. Although it had been said in the meeting that the claimant would receive the minutes to check their accuracy and respond before a decision was taken, that did not happen.

55. On 22 July 2022 Mr Esslemont wrote to the claimant to inform him of his decision to dismiss him summarily on the ground of gross misconduct. That was done by letter sent by email. The letter stated the view of the panel that

> "even when faced with this challenging scenario, you could have taken an alternative course of action that would have been safer and had a better chance of de-escalating the situation. These actions could have included putting an arm outstretched to usher the male back to create enough room to slide away along the side of the ambulance. Again, it is expected that you could have shouted for help at this point. It is the view of the panel that your actions were disproportionate to the threat posed by the male…..

> It is expected that all staff, and in particular those in front line operational roles, uphold their responsibility to provide high quality patient care to members of the public whilst conducting themselves with professionalism at all times. It is expected that you uphold the values of the NHS in all that you do whilst performing your duties and it is the view of the panel that your actions fell short of the standard required in this incident……
>
> After significant thought, reflection and deliberation, I have come to the conclusion that you did assault a member of the public whilst on duty and by doing so in a public location, you have brought the Scottish Ambulance Service into disrepute by your actions."

56. After referring to what was said in mitigation, the letter confirmed that the claimant was being dismissed summarily. He was offered a right of appeal. Very shortly after the email with that letter was sent, the claimant was sent a second email with the minutes of the meeting.

Criminal proceedings

57. The criminal proceedings against the claimant did not call in court on 27 July 2022 as the Procurator Fiscal had Covid. The preliminary hearing took place on 1 August 2022. The Procurator Fiscal stated in court that the CCTV had been viewed and clearly showed that the claimant had been acting in self-defence, and that the prosecution was withdrawn. The claimant was not in court but informed of that by his criminal law solicitor shortly after the case had called.

Appeal

58. The claimant sent an appeal in writing to the respondent on 3 August 2022. A hearing of that appeal was organised for 7 September 2022.

59. The claimant attended his GP on 5 August 2022 after suffering left arm and chest pains, who referred him to the Emergency Department at Raigmore Hospital. The claimant was concerned as he had had stents fitted. After tests were carried out there for about four hours he was informed that the pains were skeleto-muscular in nature and had been brought on by stress. After a discussion with his wife the claimant decided

not to continue with the appeal. On 17 August 2022 the claimant emailed the personal assistant of Milne Weir, Regional Director – North Region of the respondent, who was to have heard the appeal, stating “I would like to confirm that I will not be attending this appeal hearing on 7th September 2022”.

60. On 23 August 2022 Mr Weir wrote to the claimant noting that no reason had been given and asking if he was available on another date. The claimant did not reply.

Other matters

61. When employed by the respondent the claimant was in Band 3 and at the top of the scale, increment point 7. He had a gross basic salary of £25,808 per annum, and extra payments for overtime and allowances including for core duties and unsocial hours. His P60 for the year to 5 April 2022 provided for a total gross pay of £42,671.82, from which he made pension contributions of £5,441.13. (Details of national insurance contributions were not provided in evidence). His net pay in the twelve week period prior to the dismissal is reasonably estimated at £530.77 per week. He was also entitled to pension provision in a defined benefit scheme. (No details of that scheme or documentation in relation to it was provided in evidence).

62. The contractual notice period was for 12 weeks (no contract of employment or statement of particulars was before the Tribunal but the point was not in dispute). No payment was made by the respondent for the same.

63. Those in the claimant’s position were awarded a pay increase effective from 1 April 2022 of £2,205 per annum on 23 December 2022, which amounted to a pay increase for those in the claimant’s position of 9.34%. Had the claimant remained in employment with the respondent at that time he would have received net pay of £580.34 per week, backdated to be with effect from that date.

64. After dismissal the claimant applied for about 20 other posts. He did not receive any benefits. He made an application for access to his NHS pension on 18 August 2022. He commenced work as a valeter with Parks

Automobiles in Inverness on 1 September 2022. He had a net pay of £323.07 per week. He did not join a pension scheme when employed there. He secured a similar position at Arnold Clark in Inverness on 1 November 2022, which was better paid. The gross basic salary in that position is £24,824 per annum. His net pay was and remains £408.88 per week. The employment has a defined contribution scheme (the detail of which was not given in evidence), and the total of employer and employee contributions is 8%.

65. His application for access to his NHS pension was granted in December 2022 and he commenced to receive £580 per month from that. The claimant will suffer a loss of pension benefits from the dismissal.

66. The claimant suffered a measure of anxiety and concern at the conduct hearing not being postponed as he had sought.

Early Conciliation

67. The claimant commenced early conciliation in relation to the respondent on 15 August 2022. The Certificate in relation to the same was issued on 31 August 2022. The present claim was presented to the Tribunal on 15 September 2022.

Submissions for respondent

68. The following is a summary of the oral submission made. At the heart of the matter is whether the decision to dismiss was a reasonable one. He referred to the statutory test and the authorities of ***Burchell*** and ***Iceland***, and with regard to the ability to proceed without awaiting the outcome of criminal proceedings to the authority of ***Gregg***. The claimant had contacted the Ambulance Call Centre about four hours after the incident, and that was the most accurate version of what happened. It was only done after the Police involvement. He admitted striking a member of the public on the chin or lip. The respondent's position is that the claimant admitted behaviour, he did so in a written statement given the next day, and most of the facts were not in dispute. It was clear what had happened and the evidence did not materially change. Although court dates had been given, it was possible that there would be delay to them. The

respondent had decided to progress the disciplinary hearing, and it was reasonable to do so. Delay was requested but was not connected to the claimant's disability. A later finding of innocence to criminal charges does not lead to an unfair dismissal – ***Harris Ipswich Ltd v Harrison [1978] IRLR 1256.***

69. It was accepted that self-defence could be a defence to an allegation of assault. The standard was not as for criminal proceedings. The key element was that it was to be used as a last resort. Mr Esslemont considered that the claimant did have other options to take. The investigation process was adequate. The respondent had correctly advised that information given could be passed to the police. Mr Cormack had sought the CCTV footage. There was a problem with the evidence from the staff nurse, and Mr Esslemont did not give it significant weight as it was so obviously erroneous. It was a reasonable inference from the actions of the Police in charging the claimant that there had not been self-defence, as they had viewed the CCTV footage. Although knowledge of dyslexia was that of the respondent, Mr Cormack did not know and it was reasonable to expect the claimant or his representative to mention it. Adjustments were made by Mr Esslemont. There had been no real evidence as to why the claimant needed a solicitor to attend, and the claimant had not said in the meeting that Mr Cormack should leave. The adjustments sought were not necessary.

70. Mr Esslemont considered that the claimant had engaged with the person unnecessarily. He had been asked to be left alone, but the claimant did not do so. The claimant could have stayed in the ambulance, and not doing so inflamed the situation. He swore at the person. He struck the person which could not be de-escalation. There was long service and good conduct, but the claimant said that he would probably do the same again. He was in uniform at a hospital, and did not treat the person with care and compassion. The respondent was entitled to dismiss him summarily. The claimant failed to recognise that his actions were inappropriate.

71. The grounds of appeal do not mention many matters founded on. The Tribunal was invited to find that the respondent's evidence was consistent,

credible and reliable, but that of the claimant was not. If an award was made, the loss ended 7 days after the date of the appeal, as there was a probability that had the appeal proceeded the claimant may have been re-instated. Any basic and compensatory awards should be reduced to nil for the claimant's culpable conduct. If there is found to be breach of the 2010 Act the award for injury to feelings should be £2,000.

72. Finally, the Tribunal was asked to consider being at a hospital to visit a person or as a patient, seeing a member of ambulance staff in uniform strike someone, and was asked how that would make it feel. The respondent's staff should help those in need, and are not supposed to strike out.

Submissions by claimant

73. The following is a brief summary of the detailed written submission provided. Mr Robinson was given the option to add to it orally but confirmed that he did not wish to do so. It was accepted that the reason for dismissal was gross misconduct. The dismissal was unfair under section 98(4), and reliance was placed in effect on the test in ***Burchell***. The investigation was not fair and objective to establish essential facts. The allegation was wrong, it should be whether the claimant unlawfully assaulted the person. If a person is charged by the Police that does not mean the person is at fault. It was known when the case would be in court, and the evidence had not been tested. The conduct of the investigation was fatally flawed in a number of respects, which were set out in the written submission. That included failing to appreciate that self defence is not mitigation, but a defence to the allegation, and that mitigation was not fairly addressed.

74. The decision to dismiss was unfair. It was taken in the absence of all relevant evidence, particularly the CCTV footage. A discretion to postpone exists and should be exercised reasonably. There was misplaced reliance on the earlier interaction with the person, and was not in the investigation report or letter calling the hearing. Mr Esslemont had not applied the concept of self-defence properly. The conclusion that there were alternative choices that could have been made fails to grapple with the

real issue, that of self-defence. It was perverse to disregard all of the staff nurse's statement. There was a wholescale failure to consider the impact of the person's behaviour. The findings are in direct conflict with those of the Procurator Fiscal. The provocation that there was was not taken into account as a mitigating factor. The sanction was excessive. The reasonable adjustments claim had been made out. The dyslexia was not taken into account on the assessment of the claimant's responses or behaviour on the night of the incident. It was reasonable to have a solicitor present, to delay the hearing, and for Mr Cormack and Ms Morrison to have withdrawn after their presentation. The claimant's personnel file should have been obtained, and permission to give a written statement provided. Occupational Health should have been asked to report on the position. There was also a breach of contract. An award should be made in accordance with the Schedule of Loss.

Law

(a) Unfair dismissal

(i) The reason for dismissal

75. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

> "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."

76. These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

77. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Fair reasons include conduct.

(ii) Fairness

78. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> "(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

79. The terms of sub-section (4) were examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

80. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

    (i) Did the respondent have in fact a belief as to conduct?
    (ii) Was that belief reasonable?
    (iii) Was it based on a reasonable investigation?

81. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

"in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

82. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal:

"in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

83. Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett 1988 IRLR 497,*** that "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase." It was also held in ***A v B [2003] IRLR 403*** that the more serious the allegation the more it called for a careful, conscientious and evenly-balanced investigation.

84. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and the law summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387***. What is required is

consideration of that which is reasonable in all the circumstances, as explained in ***Shrestha v Genesis Housing Association Ltd [2015] IRLR 399.*** In ***Sharkey v Lloyds Bank plc UKEATS/0005/15*** the EAT explained that not all flaws in the procedure render a dismissal unfair, only doing so if it is or they are significant, and further added that

> "…procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together."

85. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In ***London Ambulance Service v Small [2009] IRLR 563*** Lord Justice Mummery in the Court of Appeal said this;

> "It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

86. The band of reasonable responses was held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

87. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

88. Where there is the possibility of criminal proceedings the employer has a discretion, subject to the band of reasonable responses, as to whether to postpone the internal process: ***Secretary of State for Justice v Mansfield UKEAT/0539/09***. In ***North West Anglia NHS Foundation Trust v Gregg [2019] IRLR 570*** the Court of Appeal summed up the

position in the related but different circumstance of an application for an injunction (interdict) against a disciplinary process continuing as follows:

> "(a) An employer considering dismissing an employee does not usually need to wait for the conclusion of any criminal proceedings before doing so;
> (b) *a fortiori*, an employer does not usually need to wait for the conclusion of criminal proceedings before commencing/continuing internal disciplinary proceedings, although such a decision is clearly open to the employer;
> (c) the court will usually only intervene if the employee can show that the continuation of the disciplinary proceedings will give rise to a real danger (and not merely a notional danger) that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene."

89. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. It includes the following provisions:

> "4. Employers should carry out any necessary investigations to establish the facts of the case…..
>
> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification…
>
> 12. …….. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be

given an opportunity to raise points about any information provided by witnesses. ……

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence…

24. Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as ……physical violence…..

31. If an employee is charged with, or convicted of a criminal offence this is not normally in itself reason for disciplinary action. Consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do the job and their relationship with their employer, work colleagues and customers”

90. The Code of Practice is supplemented by a Guide on Discipline and Grievances at Work, which is not a document that the Tribunal is required to take into account but which gives some further assistance in considering the terms of the Code of Practice. Under the heading “Investigating Cases” the following is stated:

“When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee’s case as well as evidence against.”

91. The Guide also has a section headed “Criminal charges or convictions” which commences “An employee should not be dismissed or otherwise disciplined solely because he or she has been charged with or convicted of a criminal offence. “ The issue was considered in ***Securicor Guarding Ltd v R [1994] IRLR 633,*** in which it was held that an employee ought not to be dismissed solely because a charge is pending, even where the

allegations were of sex offences against children and the employee was employed as a security guard for an important customer.

92. The employee should be given reasonable notice of the allegation, and what may be relevant is exactly what the employee was charged with at the hearing: ***Strouthos v London Underground Ltd [2004] IRLR 636.*** In that case the Court of Appeal also said the following about the relevance of length of service when assessing the reasonableness of penalty:

> " … it all depends on the circumstances. The statements in ***McLay*** and ***Cunningham*** do not, in my judgment, exclude a consideration of the length of service as a factor in considering whether the reaction of an employer to conduct by his employee is an appropriate one. Certainly there will be conduct so serious that, however long an employee has served, dismissal is an appropriate response. However, considering whether, upon a certain course of conduct, dismissal is an appropriate response, is a matter of judgment and, in my judgment, length of service is a factor which can properly be taken into account, as it was by the employment tribunal when they decided that the response of the employers in this case was not an appropriate one."

93. Whether or not a matter might be regarded as one of gross misconduct has been the subject of authority. It must be an act which is repudiatory conduct ***Wilson v Racher [1974] ICR 428.*** The question is whether it was reasonable for the employer to have regarded the acts as amounting to gross misconduct – ***Eastman Homes Partnership Ltd v Cunningham EAT/0272/13.*** If the employer's view was that the conduct was serious enough to be regarded as gross misconduct, and if that was objectively justifiable, that was a circumstance to consider in assessing whether or not it was reasonable for the employer to have treated the conduct as a sufficient reason to dismiss. What is gross misconduct is a mixed question of fact and law: ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09.***

94. A finding that there was gross misconduct does not lead inevitably to a fair dismissal. In ***Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR***

854 the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and a previous unblemished record. The law in this area was reviewed in ***Hope v British Medical Association [2021] EA-2021-000187***.

95. The Tribunal was not able to find any authority on how self-defence may be assessed in the context of unfair dismissal. None was cited to it. There is some commentary in ***JP Morgan Securities plc v Ktorza UKEAT/0311/16*** in which the EAT emphasised that the statutory language in section 98 refers to 'conduct', not 'misconduct', and that at the stage of identifying the reason for dismissal there is no legal requirement to show that the employee was culpable, particularly in the criminal sense of having been subjectively intentional or reckless. In that case the Employment Tribunal had effectively elided the two tests in each of section 98(1) and 98(4), which was not permissible, such that the appeal was granted. It was stated that how culpable or otherwise the conduct was may be relevant at the section 98(4) stage in deciding whether the decision to dismiss was within the band of reasonable responses in all the circumstances.

96. Three EAT cases indicate that the striking of a person may not always result in a fair dismissal for gross misconduct. The first two are ***Capps v Baxter and Down Ltd EAT 793/78*** and ***London Borough of Ealing v Goodwin EAT 121/79***. In the former case the employee had assaulted a foreman who had questioned the fidelity of the employee's wife. The circumstances of provocation and his length of service were taken into account in holding the dismissal unfair. In the latter case a road sweeper had been at odds with his supervisor for some time before matters came to a head. Following an argument, the employee struck the supervisor. The EAT held the dismissal unfair. Although the assault was quite a minor one, and the EAT said it is never trivial for an employee to strike a superior, it was held that there were exceptional circumstances as the employee was disabled and had 23 years' unblemished service, which were factors rendering the dismissal unfair.

97. The third case is ***Taylor v Parsons Peebles NEI Bruce Peebles Ltd [1981] IRLR 119,*** in which the claimant had been involved in a fight, had 20 years' service and was dismissed as there was a policy to do so for fighting. The Tribunal held it fair, but that was overturned by the EAT, sitting in Scotland. The question it said was not one of the policy of the employer but the reaction of a reasonable employer, having regard to equity and the substantial merits of the case. That included factors such as the length of service and previous record. Lord Macdonald added

> "We accordingly feel that it is open to us to approach the question of whether or not, having regard to the history of the appellant, a reasonable employer would have dismissed him in the circumstances. Our conclusion is that he would not. This is not to say that the conduct can be condoned but to apply a rigid sanction of automatic dismissal in all circumstances is not in our view what a reasonable employer would have done."

(iii) Remedy

98. In the event of a finding of unfair dismissal, the tribunal requires to consider firstly whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996 or for re-engagement under section 114. The orders are further addressed in section 116.

99. The tribunal requires also to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996 respectively, the latter reflecting the losses sustained by the claimant as a result of the dismissal. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant.

100. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** When assessing the amount of loss, account should be taken of the requirement to mitigate loss. The tribunal should decide when the employee would have found work and take into account any income which the tribunal then considers she would have received from that other source (***Peara v Enderlin Ltd [1979] ICR 804***; ***Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498***). The issues that arise are: (a) what steps were reasonable for the claimant to have to take to mitigate their loss; (b) did the claimant take reasonable steps to mitigate their loss; and (c) to what extent would the claimant have mitigated their loss had they taken those steps? That approach was confirmed by the EAT in ***Savage v Saxena [1998] IRLR 182*** and ***Hakim v Scottish Trades Unions Congress UKEATS/0047/19.***

101. In respect of the assessment of the compensatory award it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but that a fair dismissal would have taken place had the procedure followed been fair. That was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed.

102. In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP Packaging Ltd UKEAT/023/13.)*** The contributory conduct did not need to

amount to gross misconduct to be taken into account – ***Jagex Ltd v McCambridge UKEAT/0041/19***

103. A Tribunal should consider whether there is an overlap between the ***Polkey*** principle and the issue of contribution (***Lenlyn UK Ltd v Kular UKEAT/0108/16).***

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104. If there is a breach of the ACAS Code the Tribunal may consider an increase in compensation. An unreasonable failure by the claimant to follow it may lead to a reduction in compensation. The provision is found in section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, as follows

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> "**207A Effect of failure to comply with Code: adjustment of awards**
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
>
> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.
>
> (3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employee has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,

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the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes………"

105. There is a limit to the award of compensation for unfair dismissal under section 124(IZA) of the Employment Rights Act 1996, which is of "52 multiplied by a week's pay". The limit is applied after any appropriate adjustments and grossing up of an award in relation to tax – ***Hardie Grant London Ltd v Aspden UKEAT/0242/11.***

(b) **Discrimination**

106. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that disability is a protected characteristic. The Act re-enacts large parts of the predecessor statute, the Disability Discrimination Act 1995, but there are some changes.

107. Section 20 of the Act provides as follows:

"20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage……

The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in

comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

108. Section 21 of the Act provides:

> **"21 Failure to comply with duty**
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…."

109. Section 39 of the Act provides:

> "**39 Employees and applicants**
> …….
> (2) An employer (A) must not discriminate against an employee of A's (B)—
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment.
> ………."

110. Section 136 of the Act provides:

> "**136 Burden of proof**
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

111. Section 212 of the Act states:

> "**212 General Interpretation**
> In this Act - ……….
> 'substantial' means more than minor or trivial".

112. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5 as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

113. The Directives referred to are retained law under the European Union Withdrawal Act 2018.

(i) PCP

114. The first issue in relation to a reasonable adjustments case is the provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In ***Hampson v Department of Education and Science [1989] ICR 179*** it was held that any test or yardstick applied by the employer was included in the definition. Guidance on what was a PCP was given in ***Essop v Home Office [2017] IRLR 558***.

115. In ***Ishola v Transport for London [2020] IRLR 368*** Lady Justice Simler considered the context of the words PCP and concluded as follows:

> "In context, and having regard to the function and purpose of the PCP in the ***Equality Act 2010***, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that

although a one-off decision or act can be a practice, it is not necessarily one."

(ii) Adjustment

116. Guidance on a claim as to reasonable adjustments required was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, and in ***Newham Sixth Form College v Saunders [2014] EWCA Civ 734,*** and ***Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith v Churchill***. The need to focus on the practical result of the step proposed was referred to in ***Ashton***. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.***

117. The Court in ***Saunders*** stated that:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

118. The duty to make reasonable adjustments does not extend to a duty to carry out any kind of assessment of what adjustments ought reasonably to be made. A failure to carry out such an assessment may nevertheless be of evidential significance. In ***Project Management Institute v Latif [2007] IRLR 579*** the EAT stated that

> "… a failure to carry out a proper assessment, although it is not a breach of the duty of reasonable adjustment in its own right, may well result in a respondent failing to make adjustments which he ought reasonably to make. A respondent, be it an employer or qualifying body, cannot rely on that omission as a shield to justify a failure to make a reasonable adjustment which a proper assessment would have identified."

119. In ***Tarbuck v Sainsbury Supermarkets Ltd UKEAT/0136/06/*** stated that "the only question is, objectively, whether the employer has complied with his obligations or not… If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant."

120. The duty may however involve treating disabled persons more favourably than those who are not – ***Redcar v Lonsdale UKEAT/0090/12.*** When considering the issue of reasonable adjustments, the Tribunal can consider those made as a whole – ***Burke v College of Law and another [2012] WECA Civ 37.***

121. The EAT has emphasised the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in ***Newcastle City Council v Spires UKEAT/0034/10.*** The adjustment proposed can nevertheless be one contended for, for the first time, before the Tribunal, as was the case in ***The Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16.*** Information of which the employer was unaware at the time of a decision might be taken into account by a tribunal, even if it emerges for the first time at a hearing – ***HM Land Registry v Wakefield [2009] All ER (D) 205.***

122. Guidance on the making of adjustments is given in Chapter 6 of the Equality and Human Rights Commission Code of Practice: Employment, which sets out some of the factors to take into account as follows:

> "whether taking any particular steps would be effective in preventing the substantial disadvantage;
>
> - the practicability of the step;
> - the financial and other costs of making the adjustment and the extent of any disruption caused;
> - the extent of the employer's financial or other resources;
> - the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
> - the type and size of the employer."

123. It gives some examples of adjustments in practice, one of which is as follows:

> "**Modifying disciplinary or grievance procedures for a disabled worker**
>
> **Example:** A worker with a learning disability is allowed to take a friend (who does not work with her) to act as an advocate at a meeting with her employer about a grievance. The employer also ensures that the meeting is conducted in a way that does not disadvantage or patronise the disabled worker."

(iii) Burden of proof

124. The application of the burden of proof is not as clear in a reasonable adjustments' claim as in a claim of direct discrimination. The basic principles of the burden of proof were reviewed by the Supreme Court in ***Royal Mail Group Ltd v [2021] IRLR 811***. In ***Project Management Institute v Latif [2007] IRLR 579***, the EAT gave guidance on the specification required of the steps relied upon. ***Jennings v Barts and the London NHS Trust UKEAT/0056/12*** held that ***Latif*** did not require the application of the concept of shifting burdens of proof, which 'in this context' added 'unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided' as to whether the adjustment contended for would have been a reasonable one.

(iv) *Remedy*

125. In the event of a breach of the 2010 Act compensation is considered under section 124, which refers in turn to section 119. That section includes provision for injured feelings under sub-section (4). The first issue to address is injury to feelings. Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> "i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases,

such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

5 ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to
10 be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

126. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award for injury to feelings needed to be increased to reflect inflation. The top of the lower band would go up to £6,000; of the middle to £18,000; and of
15 the upper band to £30,000.

127. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any
20 inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2022, the Vento bands include a lower
25 band of £990 to £9,900, a middle band of £9,900 to £29,600 and a higher band of £29,600 to £49,300.

128. Consideration may also be given to an award in respect of financial losses sustained as a result of the discrimination. This is addressed in ***Abbey National plc and another v Chagger [2010] ICR 397***. The question is
30 "what would have occurred if there had been no discriminatory dismissal …….. If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss."

129. It was stated in ***Chief Constable of Northumbria Police v Erichsen 2015 WL 5202327*** that what was required was an assessment of realistic changes, not every imaginable possibility however remote and doing so "taking into account any material and plausible evidence it has from any source".

130. There is a duty of mitigation, being to take reasonable steps to keep losses sustained by the dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof – ***Ministry of Defence v Hunt and others [1996] ICR 554***.

131. In ***Chapman v Simon [1994] IRLR 124***, the Court of Appeal emphasised the importance for tribunals to consider only the act of which complaint is made. The Editors of ***Harvey on Industrial Relations and Employment Law*** consider that "the same principle must apply to any assessment of compensation for discrimination—the loss must be attributable to the specific act that has been held to constitute discrimination, and not to other acts showing discrimination of which complaint has not been made."

132. Where loss has been caused by a combination of factors, including some which are not discriminatory, the award may be discounted by such percentage as reflects the apportionment of that responsibility - ***Olayemi v Athena Medical Centre [2016] ICR 1074***. The employment tribunal should focus on the divisibility of the harm. In ***BAE Systems (Operations) Ltd v Konczak [2017] IRLR 893***: the Court of Appeal held that "'the question is whether the tribunal can identify, however broadly, a particular part of the suffering which is due to the wrong".

133. The concept of contribution to discrimination was addressed by the EAT in ***Way v Crouch [2005] ICR 1362***, which held that "compensation in a sex discrimination case (and by analogy in other discrimination claims) is subject to the [1945] Act" In ***First Greater Western Ltd (2) Mr J Linley v Miss R Waiyego UKEAT/0056/18*** however the EAT held that the Act referred to, the Law Reform (Contributory Negligence) Act 1945, can apply to some discrimination claims, but that reduction of an award for contributory negligence would rarely, if ever, be justified because of the difficulties in applying the concept of "fault" to the victim of a discrimination

claim and the fact that the discriminator may have acted without "fault" in the sense of the 1945 Act. It considered that ***Way*** expressed a view that was too broad. It suggested that compensation can be addressed as an issue of mitigation.

5 134. Interest is to be applied to certain elements of the award under the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Different provisions apply to different aspects of the award. The awards made can include for injury to feelings, and for past financial losses. No interest is due on future losses.

10 (c) **Breach of contract**

135. Jurisdiction for a claim of breach of contract was given by the Industrial Tribunals (Extension of Jurisdiction) (Scotland) Order 1994. Where there is a summary dismissal it is for the respondent to prove, on the balance of probabilities, that the claimant was in repudiatory breach of contract such 15 that it was entitled to do so. The issues arising in such a matter were considered in the case of ***Hovis Ltd v Louton EA-2020-000973.*** The damages for breach are the losses sustained during the notice period and are subject to a duty of mitigation.

(d) **Grossing up**

20 136. Where the total of the awards made exceeds £30,000 it may require to be grossed up to account for the incidence of taxation under the Income Tax (Earnings and Pensions) Act 2003 sections 401 and 403 as explained in ***Shove v Downs Surgical plc [1984] IRLR 17***.

Observations on the evidence

25 137. Our assessment of each of the witnesses who gave evidence is as follows:

(i) Mr Cormack

138. The Tribunal had some concerns over Mr Cormack's evidence. His understanding of some of the concepts of disability discrimination was not full. He did not have what we considered to be an accurate understanding 30 of what constituted self-defence, and that where that occurred an assault

had not occurred. He considered that self defence was mitigation, whereas it is exculpation. Mitigation is something that may be relevant to penalty after a finding of the alleged conduct is made, and can include elements such as provocation and length of good service, but we consider that he did not understand that that was the case. His understanding of its scope was also at best limited. In the report he prepared he put forward one sentence of mitigation, being self-defence. He omitted a series of factors that would ordinarily be regarded as mitigatory, most obviously the length of unblemished service, but also some of the details of the incident as raised with him in cross-examination.

139. We were also concerned that his investigation was not a balanced and fair one. The impression he gave in evidence was that as the claimant had admitted striking the person on the chin, that was and could only be an assault, and that the issue was the extent of remorse. He further gave the impression that the fact that the claimant had been charged by the Police with assault was sufficient of itself to found an allegation of gross misconduct. He confirmed that he had himself framed the second charge set out in the remit to the report.

140. Here was a suggestion from the evidence that there had been a form of pre-judgment in this regard. There was not we consider a sufficiently balanced approach to the matter, with evidence of innocence or the full aspects of mitigation being sought. Where there were factors from the evidence that supported the claimant, they were either down-played or omitted in the conclusion section. The reasoning for not accepting that there had been self defence was missing from the report, although the Guide indicated that that reasoning should be considered at the least. In evidence Mr Cormack explained that he had not believed the claimant when he said that he had been in fear of his life, but otherwise had believed him.

141. This was however all in the context of someone who had not before prepared an Investigation Report of this kind, had not had training on that, and had not had as much support from his HR colleague as he might have had. That colleague, Ms Morrison, did not give evidence before us.

(ii) Mr Esslemont

142. Mr Esslemont was we considered a credible witness. He was clear and candid in his evidence. We accepted that the sole reason he decided on dismissal was his genuine belief that there had been gross misconduct. He is an experienced manager within the respondent, and had had lengthy experience in front-line roles similar to those conducted by the claimant. He was entirely open in his evidence as to the position as he saw it. His evidence was entitled to considerable respect. There were nevertheless certain aspects of it that caused us some concern:

(i) He had a view expressed in his evidence to the effect that it was fundamentally against the principles of the respondent for a member of staff to strike a member of the public. He said that in evidence in examination in chief, and qualified it to an extent by saying that doing so would only be appropriate if all other options had been exhausted. We considered that that was an incomplete understanding of what the interplay properly was between an allegation of assault and self-defence. We address that further below.

(ii) He took into account matters of which the claimant had not been directly made aware. That included firstly the claimant's use of language in the initial conversation with the person, which Mr Esslemont said did not de-escalate but inflamed the situation, his coming out of the ambulance when he could have remained within it, his use of swearing when having done so, and the need for care and compassion for all those with whom the respondent comes into contact. These were matters of which the claimant had had no notice in the allegations against him.

(iii) He also stated that in his letter of decision that the response to the situation was disproportionate. What his letter did not do was explain why it was disproportionate. That was set out in his evidence, but his view of what was proportionate was that the circumstances required to be that of the last resort before striking someone could be justified. He gave what was we considered an extreme example of when that might operate, which we come to below, which had been given to him

in the training that he himself had undertaken. It appeared to us from his evidence that those were kind of circumstances that were required before the defence of self-defence was met. We did not consider that any reasonable employer would have approached the issue of self-defence in that way, as addressed below. In summary, it set the standard at substantially too high a level. That sense of the standard for self defence having been set unreasonably high was repeated during the disciplinary hearing when Mr Esslemont said “So what I need to get to is I am maybe suggesting that I think that maybe its not reasonable at any time for us to be doing that but what I need to understand is if there is enough mitigations….” That gave the impression, fortified by his other evidence, that he had formed the view from the Investigation Report that what had happened was an assault, could not be self-defence, and was only an issue of mitigation. He said in evidence that there was no doubt that the claimant had struck a member of the public and that would be deemed an assault. It is not necessarily an assault dependent on the circumstances. No reasonable employer would consider that the position was as simplistic as that, where self-defence is put forward as exculpation, as here.

(iv) He explained that he had rejected the request for postponement as he had read the Investigation Report and he did not see anything different emerging from the CCTV footage. Later on however he accepted that viewing it could give more detail than he had been aware of. The footage may have shown the detail of the event such as to inform what the threat to the claimant more precisely was, and whether his response was necessary and proportionate. If it was not available, and if the hearing was to proceed without waiting for the outcome of the criminal proceedings, the absence of what could well have been material evidence in exculpation was significant, but not something we consider Mr Esslemont had proper regard to.

(v) He had not addressed the application for an occupational health report made by the claimant’s solicitor in his email of 30 May 2022. No reason for not doing so was given at the time, and when asked about

it in examination in chief he did not directly provide an answer. It appeared to us that although not seeking a report is not determinative evidence, and doing so is not of itself a reasonable adjustment as explained below, the failure to do so was surprising in the circumstances of this case. The respondent was not, as a result, fully aware of what the disadvantage suffered by the claimant from his dyslexia was. A suggestion that the letter to call the disciplinary hearing referred to the facility to contact OH for support was sufficient was not we considered correct. That was an entirely different matter, although it is true that the claimant did not act on that. He had no real knowledge of the terms of the EHRC Code, and although he had taken advice from HR that was not explained in evidence, and no one from HR gave evidence before us.

(iii) The claimant

143. In our view the claimant was in general a credible and reliable witness. He has accepted from the beginning of matters that he struck the person, that he had sworn at him, and that he had not reported the matter immediately. His evidence before us was we considered consistent with the earlier evidence he had given on matters. We accepted his description of how the events of the incident unfolded, the fear that he felt, the level of that, and his reaction in the heat of that moment. There were some aspects of the detail of his evidence that the respondent attacked. The call to the Ambulance Call Centre had some comments that were not identical with those made later, such as that the Police had told him that the person had suffered a small nip to his lip. That requires however to be set in context. The claimant had not long beforehand been charged with assault by the Police. They had told him that the person had that nip on his lip. The claimant has dyslexia. He does not always use the most apposite word. He used a number of words for the incident. He has however always accepted both that he struck the person, and that he swore at him. His evidence to us was we considered candid.

Discussion

144. This was not a simple matter to decide. Both parties had strongly argued their positions. Each genuinely believed that its position was reasonable. As a body performing such a vital and highly respected public service the reputation of the respondent is a matter that, entirely properly, it guards very carefully. The claimant had a total of 29 years of unblemished service and was confronted with a situation that the respondent accepted was terrifying for him, during which he, as he accepted from the start of the matter, struck a member of the public. He claims that that person, who was drunk, had threatened him and that he acted in self-defence. In essence the respondent did not accept that as it considered that he could have avoided doing so, and that the actions taken were not proportionate. It believed that he had committed an act of gross misconduct and that in all the circumstances dismissal should be the outcome.

145. That very brief description of the main aspects of the case belies some complexity which we shall come to, but it does suggest both that the claimant was placed in a very difficult position during the incident, and that the respondent was also placed in a very difficult position thereafter. What is apparent to us however is that the person who acted in the manner described in the incident, whose identity was not known to the parties, acted appallingly. He abused, threatened and terrified a member of the Ambulance Staff who was engaged in caring for his nephew. It was for others to assess whether that behaviour by the person was criminal conduct. Our focus is on the employment law implications of what happened, and what followed it. We make our decision applying the law as we understand it to be to the facts that we have found.

146. The Tribunal addresses each of the issues that were identified above as follows:

(i) What was the reason, or principal reason, for the claimant's dismissal?

147. The Tribunal was readily satisfied that the reason for dismissal was the respondent's belief in the misconduct of the claimant. In that regard it accepted the evidence of Mr Esslemont. The claimant accepted that that

was the position in his submission, although it had been an issue in the list of issues.

(ii) *If potentially fair under section 98(2) of the Employment Rights Act 1996 was it fair or unfair under section 98(4) of that Act?*

5 148. Conduct is a potentially fair reason. We required then to assess whether there was a fair dismissal or not under section 98(4). There is no onus on either party in this regard. We cannot substitute our view for that of the respondent, and must apply the band of reasonable responses. It applies to all aspects of the investigation and disciplinary process, as well as to
10 the penalty of dismissal. The real issue in this case is the extent of that band. The respondent is clearly a large employer with substantial resources, and we take into account the nature of its role in provision of ambulance support which includes to those in need of emergency care, that it is a public body, and that it provides its service to members of the
15 public.

149. We accepted that the respondent, through Mr Esslemont, did have in fact a **belief** that there had been misconduct by the claimant.

150. We then addressed whether or not there had been a **reasonable investigation**, being one that a reasonable employer could have
20 conducted. It is relevant to note in this context that we require to assess the whole process, and not just the terms of the Investigation Report itself. There were a number of criticisms of how the respondent conducted matters, some of which we accepted and some not. Those not accepted included an argument that Mr Cormack ought not to have conducted the
25 investigation given his limited experience, and that he had been on duty on the night of the incident. Whilst having someone else undertake it so as to be entirely uninvolved we did not consider that the decision to appoint him to the role was one that was outwith the band of reasonable responses. Another was that a check had not been undertaken that the
30 police or Procurator Fiscal were content with the disciplinary investigation and hearing taking place, as the Guide referred to, but Mr Cormack gave evidence that as he understood it that had been done by Mr Fuller. Another was that the statement of the staff nurse ought to have been

accepted in part. We consider that Mr Esslemont was entitled to place little if any weight on it, as it was materially flawed as the parties had agreed. Another was on the information gathering. Whilst it would have been better practice to seek a full statement from Mr Beaton rather than rely on his own statement, supplemented if at all by a telephone call with him, and to obtain a statement directly from Ms Plunkett than to rely on what Mr Beaton said that she had seen and heard nothing material, good practice is not the test. In these respects we considered that what had been done did fall in the band of reasonable responses.

151. In our view, the investigation carried out by the respondent was outwith the band for the following reasons:

(i) The Investigation Report was not full and fair, nor was it evenly-balanced, as it had not equally considered either exculpation or mitigation evidence with that for guilt. Where the claimant had made comments that were at the least mitigatory, they were not included within the mitigation section which referred only to self-defence and did so very briefly. That is not mitigation, but exculpation. The reason for that being in the mitigation section is that Mr Cormack did not understand the distinction, and we did not consider that Mr Esslemont understood it fully either. In any event, issues of mitigation that could and should have been in the Investigation Report were not included. That included for example the long unblemished service, which ought to have been apparent to anyone undertaking a basic investigation of such an obvious matter. If Mr Cormack did not know it, he should have made enquiries to find that out, and all reasonable employers in undertaking such an investigation would have done so. The details that were mitigatory from the provocation of the incident, if it were not self-defence, were not addressed adequately in our view at the stage of the disciplinary hearing and decision. Those details are addressed further below. Both for the Investigation Report and during the hearing the focus was placed by the respondent on the claimant's guilt of the allegation, which we consider arose from its application of a standard for self-defence that no reasonable employer would have applied.

(ii) The Investigation Report, and letter with allegations for the disciplinary hearing, referred to the charge by the Police of assault in terms which inferred that that meant that the claimant was likely to be guilty of that allegation. A second allegation as to disrepute was later removed, but the wording as to that charge inserted into the first allegation. We consider that no reasonable employer would regard the fact of a charge after viewing CCTV footage to be a fact from which an inference of guilt of assault could properly be made in the circumstances of this case. A criminal charge is an allegation. It may or may not be justified, and it is obvious that a person is innocent until guilt is established. At that point the matter had not even reached the stage of a decision by the Procurator Fiscal. Against that was the claimant's evidence of self-defence, and that the security staff who had seen the same CCTV footage suggested that he should have the person charged. That body of evidence clearly indicated a contrary view to the claimant's guilt. We consider that it was not within the band of reasonable responses to rely on such an inference where the CCTV footage was not available to be viewed, and where there was such contrary evidence to the drawing of that inference. In short the fact that such footage existed but had not been obtained, given the other evidence overall, was a factor that all reasonable employers would have considered to outweigh the ability to draw an inference of guilt from the fact of a criminal charge intimated by the Police on the night of the incident.

(iii) The fact that CCTV had shown the incident, that the claimant sought time to obtain it as he believed that it would support his position, that he referred to that in the conduct hearing in which he stated that the CCTV should be provided by the first calling of the case in court on 27 July 2022, and that an extension of time was not allowed, was a separate and material factor that all reasonable employers would have taken into account. Mr Cormack stated in his Report that without the CCTV footage one could not confidently say whether there had been an assault by the claimant, or on him such that he acted in self-defence. The evidence that there was before Mr Esslemont was therefore less full than it could have been, and

was less than full and fair to use the words in ***Polkey,*** or evenly-balanced to use the words in ***A v B***. Employers do have a discretion on whether to proceed or not where criminal proceedings are also current, and usually do not require to wait for their conclusion, but it is not always the case and not a discretion that is untrammelled. Here the CCTV evidence would reasonably have been expected to become available at least to the claimant and his solicitor within two weeks of the conduct hearing itself, from the comments made by the claimant at the disciplinary hearing. We consider that all reasonable employers would have agreed to wait for that relatively short period of time to see if it could be obtained, of something of the order of up to four weeks. We appreciate that the claimant was on full pay, and that his absence from work could cause operational difficulties, but that had been the position since the incident itself over five months earlier, and in all the circumstances we consider that all reasonable employers would have waited for that relatively short period of time before making a decision on dismissal for an employee in such circumstances as those of the claimant.

(iv) The failure to postpone the disciplinary hearing until the position with the criminal proceedings had been clarified for such a period was also we considered particularly material given the terms of the allegation referring to the criminal charge. If the claimant was not convicted, or if the proceedings did not continue, that was a matter that stood in his favour in regard to the wording of the amended allegation. It was not conclusive, but it was a relevant fact in circumstances where the respondent had chosen to put the charge by the Police as a relevant fact in that amended allegation. It had not required to do so. It could have simply referred to the facts of the incident itself, but having made the charge a part of the allegation all reasonable employers would consider the reasonable prospect of a relatively imminent answer to whether it was upheld or not. The first hearing in the criminal proceedings was to be a week after the decision taken to dismiss, and as it turned out the charges were in effect withdrawn a few days after that. There would have been little delay to ascertain how such matters played out. Whilst some of that

appears in hindsight, as the charges were dropped, the timing of what was liable to happen in resolving the charge was tolerably clear from the email of 30 May 2022, with a trial date set in September 2022, and made more so during the disciplinary hearing itself. If there had been no progress in a four week deferment, should that have happened, a decision could have been taken at that stage. Separately if the proceedings were concluded a further attempt to obtain the CCTV footage could be made.

(v) There was also we considered an inherent contradiction in the respondent's position in relation to the charge that had been made by the Police. If it was relevant to any extent so also was what became of it, particularly where there appeared to be a reasonable prospect of that outcome becoming apparent in the relatively near future, as evident from the email of 30 May 2022. When the prosecution did not proceed on 1 August 2022, and it was stated in court that the CCTV clearly showed that there had been self-defence, that was something that was founded on by the respondent to argue that if the appeal had proceeded it would probably have resulted in re-instatement.

(vi) The policy on Violence and Aggression was not referred to in any way in the letters calling the disciplinary hearing but Mr Esslemont explained in his evidence that he had considered that its terms were relevant as showing the need for dynamic risk assessment and de-escalation steps that could have been taken both in the events leading up to the striking of the person, and at the point in time of the strike as well. That is also shown from the dismissal letter which stated "During the hearing, the Panel were keen to explore whether the initial interaction at the entrance to the ED was absolutely necessary and whether that engagement with the male had contributed to the incident which occurred at the ambulance door". That had not however been part of the allegation, which was of assault, not of failing to de-escalate the situation or words to that effect. A similar comment was made in that letter about exiting the ambulance and whether the claimant had considered any alternative

actions, which was also not part of the allegation. The extent to which the claimant had been made aware of the terms of the Policy was not investigated at the conduct hearing. It was provided to the claimant shortly before the conduct hearing as the Minute of that makes clear: “we understand that you won’t have had that many days”. It had not been referred to at all in the Investigation Report and we consider had been added to the hearing arrangements by Mr Esslemont as he wished to focus on issues that were described as de-escalation given his views that self-defence did not apply. The evidence was that the claimant was only aware of the fact that there was a policy on Violence and Aggression, he had not seen it, in any event he is dyslexic and there was no suggestion in the evidence that he had had any form of training on it such that he was aware of steps that he should or might take if subject to provocation. If an employer wishes to set a particular standard for behaviour, such as that in that Policy or that physical contact on a member of the public can be used only as a very last resort and in a situation similar to that described by Mr Esslemont, that at the very least must be made clear to the employees in advance, and sufficient training given to them, refreshed with sufficient and reasonable regularity, to equip them to deal with the kind of scenarios they may face. That, and nothing approaching it, had not been done in the claimant’s case, but there was no investigation of such issues or any evidence of them being taken into account.

152. Related to that point on the reasonableness of the investigation but separate to it is that of whether there was a **reasonable belief** that there had been gross misconduct, which fell within the band of reasonable responses. In our view, it was not. Mr Esslemont said that he did not disbelieve any of what the claimant had said to him. That evidence was to Mr Esslemont’s credit. The claimant had stated throughout that he acted to prevent an assault on him that was imminent. It is not easy to square the acceptance of the claimant’s evidence by Mr Esslemont with the conclusion he reached. We consider that the reason for Mr Esslemont’s decision is that he did not have a proper understanding of what was meant

by the word "assault" in the context of this case, and in particular what self-defence was in that context.

153. There is nothing in the concept of self-defence, as all reasonable employers would understand it, that requires the victim to wait for physical contact before responding. We have not found any case on how self-defence is to be viewed in the employment law context. The test that all reasonable employers would apply is we consider one that is based on the test of self-defence in the civil law, but where the standard is that of reasonable belief which is substituted for proof on the balance of probabilities applied in civil law.

154. The position in the civil law is set out in ***Walker*** on ***Civil Remedies*** at page 40 (with citation of authority in footnotes which is not repeated) as follows:

> "A person assaulted by another may defend himself, provided the force and the means of defence he uses are no greater than reasonably necessary for his own protection. This extends to both assaults with intent to harm, and technical assaults, such as kissing a girl without her consent…..What is reasonable force is a question of fact in each case. If the person uses excessive force or a weapon or other means seriously disproportionate to that, if any, with which he was assaulted, or if he persists in using force after the time necessary for is own defence, his conduct may be held to be, not self-defence, but a substantive counter-assault. But the court will not judge too strictly the conduct of one assaulted and put in a position of danger……It is a question of what was reasonable in the circumstances……"

155. The factors that any reasonable employer would have considered relevant to the decision in the present case as to whether or not there had been self-defence included (i) that the person was very drunk and had been abusive and aggressive, (ii) he had made direct threats against the claimant verbally, (iii) he had opened the driver's door suddenly to confront the claimant, being again abusive, threatening and aggressive, pointing his finger very close to the claimant's face, (iv) he had remained very close to the claimant and had not moved away, and (v) he had been perceived

by the claimant to be on the point of head-butting him, when the person drew back his head when they were standing in very close proximity to each other. In such a situation, de-escalation which is what Mr Esslemont concentrated on can be very hard indeed if not impossible to achieve and self-defence is not necessarily excluded if the intended victim takes some form of action to prevent the perceived harm. This was a situation of a perceived threat, and what was accepted by Mr Esslemont to include genuine fear.

156. What we consider required to be asked by Mr Esslemont, and would be asked by any reasonable employer in such a situation as that in this case, were these questions, or something reasonably close to them –

(a) What threat did the claimant perceive there to be from the person?
(b) Was that perception reasonable in the circumstances?
(c) Did he do that which was reasonably necessary to avoid the threat?
(d) Was what he did reasonably proportionate to the threat?

157. If the employer had a reasonable belief that the perception of threat was unreasonable, that what had taken place was not reasonably necessary (or to put it another way that there was a reasonable opportunity of escaping from the threat) or that what was done went beyond what was reasonably proportionate, the employer could permissibly hold the view that there had not been self-defence and that what had happened had been an assault by the claimant. It appeared to us that this, or something reasonably close to it, was the standard for self-defence that any reasonable employer would apply. It is an aspect of whether or not there was a reasonable belief in there having been gross misconduct, and as the authority above makes clear that is a mixed question of fact and law.

158. If it were as Mr Esslemont explained in his evidence an employee would require to await an actual assault before being able to defend him or herself. That in our view cannot be, and is not, right and that belief is outwith the band of reasonable responses.

159. Our concern was that Mr Esslemont did not ask something like those questions, but considered what he would have done. Mr Esslemont decided the matter in the context that his description of what would be self-defence was, in summary, that it arose if he was cornered in a position where he was not on his feet, being struck by someone, and could not get up to his feet without using force to do so. That is not in our view how the concept of self-defence in this context could be viewed by any reasonable employer, and it is at the more extreme end of the spectrum of what may fall within a reasonable definition of self-defence. The decision-maker considering whether the employee had acted in self-defence is also taking the decision in a calm environment and not when in the heat of the moment in the circumstances of genuine fear which arose suddenly for the claimant. As the quotation above suggests, any reasonable employer would make appropriate allowance for that when assessing the reasonableness of whether what was done was necessary and proportionate.

160. The view as to what was self-defence that Mr Esslemont held came, as stated above, from the training he had received, which he had called "Maybo". He did not know what the initials stood for. Mr Esslemont's experience during the training may have been different from that of the claimant as the training the claimant had received he said had been Conflict Resolution Training, not Maybo. There were no further details of what each of the claimant and Mr Esslemont had received by training, no documentation from either training course had been provided to us, and it was not established in evidence whether they had been at the same course, similar ones, or different ones. Mr Esslemont's course had also been something of the order of 10 or more years earlier, as had the claimant's training. Mr Esslemont did not know how often any such training should have been given. He himself had not had refresher training. There was no evidence therefore of how often such training was intended to have been given, and there is nothing in the Policy to state that.

161. He proceeded, it appeared to us, not just on the basis that striking a member of the public who had not struck the employee was an assault, and that it could not be self-defence, but also that alternative methods of

addressing the matter existed, which essentially were ones that could have de-escalated it to avoid the perceived head-butt, using the word "could" to describe the options available in the decision letter. That, in our view, is not properly addressing the point, nor would it be the manner in which any reasonable employer would consider it. There are always alternatives that could have been taken to any course of action. The point that all reasonable employers would have considered is whether what was done, in the circumstances, properly amounted to self-defence, and that essentially meant considering the questions set out above. Whist Mr Esslemont had addressed some of them to some extent, his doing so was in the context of the view he held as to what was required. That was we considered far too restrictive a view, and not one any reasonable employer would have taken.

162. There was we considered in both the evidence of Mr Cormack and that of Mr Esslemont a degree of prejudgment of the issue. Each of them appeared to us to consider that in the circumstances related by the claimant, including in his written statement given initially, what he had said happened could not amount to self-defence as they understood it, therefore he had acted as alleged and that was gross misconduct. For the reasons given in this Judgment we do not consider that any reasonable employer would have come to such a view.

163. If someone acts in genuine self-defence, in our view all reasonable employers would consider that such a situation cannot properly be regarded as an assault, or something that brings the respondent into disrepute. No reasonable employer would regard a situation where an employee acts in self-defence as amounting to gross misconduct. We did not understand Mr Fletcher to argue that if self-defence was established there would not be an assault or gross misconduct.

164. In our view any reasonable employer required first of all to consider whether or not this was a case in which the claimant had, as he claimed, acted in self-defence, answering essentially the four questions above. The respondent did not. Whilst the reasons for doing so are understandable given Mr Esslemont's view of what self-defence is, that is not sufficient of

itself. The test is not a purely subjective one. It is subject to the standards set out in section 98(4).

165. In our view, having regard to the circumstances known at the time of the disciplinary hearing, all reasonable employers would have concluded that the claimant had acted in self-defence. That was on the basis that the evidence from the claimant was credible, as Mr Esslemont accepted, that he had been in fear of being head-butted at the least (the fear was greater than that as he was concerned that the person may have had a concealed weapon). There was a reasonable basis for that fear. He did what he thought was necessary in the circumstances he faced at that time - where he could not escape because of his position between the ambulance side, the open driver's door, and the other person who was standing about a foot away from him, and where the person drew back his head in what was perceived to be the start of the head-butt. We consider that all reasonable employers would have concluded that he did what was reasonably necessary. The punch was not a full blow, and was described in the conduct hearing as "very minimal….like a forceful push", such that it either caused no or no material injury, at worst what was described to the claimant by the Police as a "wee nip to the lip". Mr Esslemont accepted the claimant's description, and in the letter of dismissal referred to a punch on the chin, not the lip. On that matter we accepted the claimant's evidence that the strike had been to the person's chin, and although it is possible that that in turn caused an injury to the lip (addressed below) it is not at all clear that it did. What is we consider material is that the strike was with a limited degree of force such that it was proportionate, as it is likely to have prevented the claimant from being head-butted, which if that had happened is likely to have resulted in materially more severe injury to him than the claimant's actions caused, and we consider that all reasonable employers would have come to such a view.

166. We considered then the issue of **procedure**. We should state firstly that we did not consider that the respondent had been in material breach of the ACAS Code of Practice. We considered however that in the circumstances all reasonable employers would have deferred the disciplinary hearing for a reasonably short period to await the outcome of

the criminal proceedings or it becoming available, or both, or would have given the claimant the benefit of the doubt where CCTV evidence was not, at that stage, available, and held that there had not been the assault alleged because of self-defence. This failing was we considered of such materiality as to meet the ***Sharkey*** test. We also considered that the inclusion of issues beyond that alleged of the assault in the decision to dismiss was also a procedural failing that was material in the same sense.

167. We then considered all such issues in the round. Taking all of the evidence available to the respondent at the time of the decision to dismiss we considered that the belief that there had been an assault which was a disciplinary offence was not a reasonable belief, nor was it one founded on a reasonable investigation. It was outwith the band of reasonable responses to find that there had been an assault, or circumstances amounting to gross misconduct, on the basis alleged given the circumstances amounting to self-defence. On that ground we considered that the dismissal was unfair under section 98(4).

168. We then considered the issue of **penalty** if we were wrong on that matter, on the hypothesis that self-defence had been permissibly excluded and the respondent did have a reasonable belief that there had been gross misconduct on the part of the claimant by virtue of his assaulting the person. It is in this context that further factors that were relevant were in our view not taken into account by the respondent in the manner all reasonable employers would have done.

169. The first and most obvious is the very high degree of provocation. If the circumstances were not self-defence, they were very close to it. We did not consider that it had been taken into account in the manner all reasonable employers would have done. It appeared that once the respondent decided that there had been gross misconduct, the issue was whether the claimant's lengthy service and good record would outweigh that. Provocation was not it appeared to us from the evidence we heard a factor addressed as material mitigation. That view which we formed from the oral evidence was we considered supported by the letter of dismissal which referred to the "challenging scenario". That is putting matters at so low a level as significantly to underplay the threat that the claimant

perceived. The letter did not fully set out all the detail of the incident that was relevant in this context, which included the fear felt by the claimant that in general terms his life was in danger, the fear of being head-butted when the person's head moved to be in a position to do so, the threats issued orally, the movement of the person's arms, which included pointing a finger directly in his face, the person's proximity to him, and the position of being between the side of the ambulance, the open driver's door, and the person standing in front of him. It also included the fact that the person was clearly very drunk, and acting aggressively and erratically. That such points of detail were largely missing from the letter of decision was we considered supportive of our assessment that they had not been taken into account in the manner all reasonable employers would have done.

170. The second aspect of mitigation was that the service had been continuous for 13 years and overall was 29 years. That service had been without blemish. As the cases of ***Strouthos, Brito-Babapulle*** and others make clear, that is a factor that may be relevant. We consider that that is so particularly in what may be described as a marginal case, and at the worst for the claimant this was such a marginal case and would so have been viewed by all reasonable employers. In the Investigation Report the length of unblemished service was not mentioned, and in the dismissal letter mitigation was referred to in brief terms. In evidence we were not satisfied that its significance, as all reasonable employers would have seen it, had been fully and fairly understood.

171. The focus of the decision-making was the perception of the public to an event where a member of staff of the Service, on duty and in uniform, struck a member of the public. From purely one perspective, that of the Service itself closely guarding its reputation, we can understand why such a view may be held. We also accept that Mr Esslemont had a concern that the claimant did not show remorse or an understanding of learnings from the incident in the manner he would have confidence in.

172. Fairness requires however a balance between the interests of employer and employee. It requires consideration of equity and the substantial merits of the case. That includes length of service and record which can be factors that may lead to what may otherwise be a dismissal being less

than that, as the three cases referred to above, and other authorities referring to length of service, make clear. Each case is decided according to its own facts, but it was we considered relevant that in two of those other cases in which long and good service had been a factor to render the dismissal unfair there had been some form of striking of a person, in the third there had been a fight between two people, and each case there was not the level of provocation from the threats and perception of a head-butt that there was in this case.

173. In the present case the third aspect of mitigation to consider was the extent to which there had been communication to the employee of what standard of behaviour in the context of self-defence was thought appropriate by the respondent, and the extent to which there had been training on that. Unless employees are sufficiently made aware of a higher standard that must apply to them they can expect to act on standards of behaviour ordinarily required of anyone. Here the training that had been given to the claimant was over ten years old, and what it consisted of was not given in evidence. He had forgotten its details and his position is liable to be affected by his dyslexia. There was no evidence of training on the Violence and Aggression Policy. There was no evidence of the claimant being given the skills to deal with the kind of behaviour exhibited by the other person in the incident by such training.

174. The factors to consider include the size and resources of the employer, which are very substantial so far as the respondent is concerned, with the number of employees in the several thousand although no specific figure was given in evidence (or in the Response Form), and also the context of it providing a public service, including its view as to its reputation. No single factor is determinative, but all must be weighed in the balance and tested against the terms of section 98(4).

175. We were conscious of the width of the band of reasonable responses. We accept that the claimant was on duty at the time, and in uniform, and that the events took place in public at a hospital. We also took account of the circumstance of the respondent being a public body providing a health service to the public. The band of reasonable responses is not however unlimited, as the authorities we have referred to make clear. Whilst in

submission it was asked rhetorically how does it look where a member of the respondent's staff strikes a member of the public, that was too simplistically put in our view. Fairness and reasonableness require all circumstances to be considered. We consider that no reasonable employer could conclude that someone acting genuinely in self-defence, or in the circumstances of this case if not fully sufficient to fall within that defence, caused or could cause material or justifiable harm to its reputation. No evidence of actual harm to reputation, or any impact other than the allegation by the person involved which led to the charge by the Police, later withdrawn by the Procurator Fiscal, was put before us.

176. We concluded that if self-defence was not reasonably believed, given all those circumstances, no reasonable employer would have dismissed the claimant given the very high level of mitigation founded on the combination of the very substantial degree of provocation, the substantial and unblemished service, and the limited evidence of training, such that the decision to impose the penalty of dismissal was outwith the band of reasonable responses.

177. It follows that we would have found that the dismissal was unfair, in breach of section 98(4) of the 1996 Act, on that alternative basis.

(iii) When did the respondent know or ought the respondent reasonably to have known of the claimant's disability?

178. The respondent accepted that it had knowledge on 30 May 2022 from an email from the claimant's solicitor. The issue is whether that actual or imputed knowledge arose from any earlier date. The real issue is for the period from 26 January 2022 onwards. The claimant's evidence was that the respondent knew of his dyslexia from the time of his employment re-commencing and beyond, and that they had made adjustments for training and other issues. There was no contrary evidence. We accepted the claimant's evidence on that. We therefore find that the respondent knew of the claimant's dyslexia from September 2008. We accepted that Mr Cormack was not himself aware of that fact, but the issue is the knowledge of the respondent, rather than Mr Cormack as an individual.

Mr Esslemont was aware personally from the time of that email, and therefore was aware of the matter by the time of the disciplinary hearing.

(iv) Did the respondent apply a provision, criterion and/ or practice (the "PCP") to the claimant, being (i) the application of the respondent's disciplinary policy or (ii) the application of a policy to refer what was said in the investigation or disciplinary hearing to Police Scotland?

179. It is clear that the respondent did apply its Conduct Policy to the claimant, and that that amounted to a PCP. It was referred to in a number of letters including the dismissal letter. That policy in turn referred to the Workforce Policy Investigation Process and the guide for investigations associated with criminal offences.

180. The respondent accepted that it did state to the claimant something to the effect that it may refer what was said to Police Scotland. It is referred to in the note of the investigation meeting with the claimant on 3 March 2022. That was a policy that applied in general, as spoken to in evidence particularly by Mr Cormack, and although it may have been based on the fact that the police could recover documents as part of the criminal investigation we consider that it went beyond that as it indicated that the respondent would do so proactively. This was we concluded a PCP also.

(v) Did either PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

181. Whilst there was limited evidence as to the effect of the impairment on the claimant from his dyslexia we were satisfied that he had shown that he had difficulty processing information, particularly in writing. When speaking he could use the wrong word. He became anxious. That all put him at a substantial disadvantage, as that term is understood having regard to the definition in section 212. For the first matter of the Conduct Policy that referred to an investigation process, which in turn generated a report and attached documentation. The claimant was placed at a disadvantage that was not trivial or minor in comparison with someone not suffering dyslexia as he was less well able to understand and process the documentation passed to him, which included a statement from the staff nurse provided on the day before the investigation meeting. The

documentation also included relevant policies of the respondent. Matters were made more complex by the fact of an outstanding criminal investigation and process, the claimant having been charged by the police, but not convicted of an offence.

5 182. What was not clear however was what if any effect the second PCP had on how the claimant conducted himself at the disciplinary hearing. From the minute of it, and the evidence we heard, we did not find anything showing us that there was in fact disadvantage. The claimant spoke freely and fully. Nothing was not said by him of which we were made aware in 10 his evidence because of the impending criminal proceedings. We were not satisfied that disadvantage had been proved in this case for the second PCP.

(vi) Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

15 183. The respondent knew from the email of 30 May 2022 that the claimant had dyslexia, and a suggestion was made of obtaining an occupational health report to be advised about reasonable adjustments required. The respondent did not do so. The suggestion is not determinative of the matter but the respondent cannot use its own failure to be properly advised 20 as a shield. The Tribunal was satisfied that the respondent ought reasonably to have known that someone with dyslexia was likely to be placed at the disadvantage at a disciplinary hearing. That was so particularly where there was a reasonable amount of documentation to consider, where the circumstances were not straightforward, where there 25 were a number of policies of the respondent which were potentially or directly relevant, and where there were to be key questions of the claimant as he was forewarned of in a letter sent before the hearing. If it had sought that advice from OH it would have been informed of the fact and extent of the disadvantage, and advised of steps to avoid it. In our view it ought to 30 have done so. The statutory duty to make adjustments lies on the respondent. Mr Esslemont did not appear to be aware of that, at least fully. He was not aware of the terms of the EHRC Code. We answer this issue in the affirmative.

(vii) *Did the respondent fail in its duty to take such steps as it would have been reasonable to take to avoid the disadvantage? The claimant alleges that the following adjustments to the PCP should have been made-*

(a) *Obtaining the claimant's personnel file as part of the investigation.*

(b) *Granting the claimant's request for a written statement, or doing so in the question and answer process conducted as part of the investigation.*

(c) *Not conducting the disciplinary process when criminal proceedings in respect of the same incident were ongoing.*

(d) *Postponing the disciplinary hearing until the criminal case had been concluded.*

(e) *Granting the request for a solicitor to accompany the claimant during the disciplinary hearing.*

(f) *Obtaining an occupational health report prior to the disciplinary hearing.*

(g) *Reducing the numbers of persons allowed to remain in the disciplinary hearing.*

184. It is relevant to note that once an employer becomes aware of disability, or ought reasonably to be aware of disability, it is the employer's duty to make reasonable adjustments. We address each of the proposed steps as follows:

(a) We did not understand Mr Cormack's reluctance to obtain the personnel file, or at least to consider what may be within it, once the issue of disability became known to him, which at the latest was by the time of the disciplinary hearing. We accepted however that as an individual Mr Cormack had not been aware of it when carrying out the investigation. He was concerned that he might be prejudiced by it, but did not appear to consider whether the claimant was or might be prejudiced if he did not find out details of the claimant's service. If that was the case, someone else such as from HR could not have done so. That was an obvious matter to consider if a full and fair investigation was to be conducted. It would then have disclosed the disability. Had Mr Cormack been better informed of the claimant's

disability and the extent of the disadvantage that created for him, that may have affected the terms of a further Investigation Report had one been undertaken. But rather like seeking an Occupational Health report as addressed below, of itself we did not consider that this was an adjustment under the Act. Of itself, it would not have avoided the disadvantage created by the PCP relied on. We therefore do not consider that this proposed adjustment falls within the statutory provision.

(b) The claimant did provide a written statement as part of the investigation process, and made a written submission through his solicitor with one provided before the hearing and a final statement at the end of it. We did not consider that this point had merit.

(c) This point is related to the following point. We consider that not commencing the disciplinary hearing was not a reasonable step in the circumstances, partly as some of the detail (set out below) was given at the disciplinary hearing. The issue in the context of section 20 is whether the delay to the start of the disciplinary hearing by deferring it until after the criminal proceedings were concluded was a reasonable step to take to avoid the disadvantage. It is not a point on which the EHRC Code offers direct assistance, although there are proposed factors listed to take into account. Mr Cormack was concerned, he said in evidence, that a criminal proceeding may take two years. But in the email of 30 May 2022 the claimant's solicitor gave a timeline including preliminary hearings in July and August 2022 and a trial in September 2022. That was known to Mr Esslemont to whom it was addressed, and was a relatively short period of delay in the context of the disciplinary hearing taking place on 15 July 2022. During that hearing the claimant stated that the CCTV was to be shown to him prior to the first calling of the case on 27 July 2022. As Mr Cormack stated in his report the absence of the CCTV was material, as without it one could not be sure of whether the defence of self-defence applied or not. There is no need to be "sure" being the word Mr Cormack used, but the CCTV footage was at least potentially highly relevant to whether or not there had been self-defence, and if not what the degree of provocation was, as well as the degree of force used in the punch, and the precise circumstances of that taking place. Being charged with an

offence neither creates a presumption of guilt nor provides a safe basis to find that a disciplinary offence has been committed. It is a fact, but if it was thought to be material by Mr Cormack when framing the allegation initially, and Mr Esslemont when framing the allegations as amended, what may become of the charge in criminal proceedings was also a relevant fact. Separately, after they had been concluded, another attempt to secure the CCTV footage could have been attempted. Innocence of criminal charges does not mean innocence of the disciplinary allegations but may be something to take into account given the terms of the amended allegation. In the context of the claimant's disability, including his impaired ability to articulate matters, a short delay to the conclusion of the disciplinary hearing of up to a month was we concluded reasonable step to have been taken under section 20. That is not exactly the same as not commencing the hearing at all, but is a lesser variation of it, and we consider that it is appropriate to specify that more restricted provision given all the circumstances of the case (which include both the claimant's dyslexia, and that he is represented before us by a lay representative, who also was the representative when the Claim Form was prepared)

(d) See above, where the same considerations apply. This again is a variation of the adjustment proposed, which we consider is in essentials the same as for the preceding paragraph, such that there is but one adjustment that was reasonable to have taken.

(e) Mr Esslemont refused the request as the policy did not provide it. That is not in our view a sufficient answer, however. The statutory provision can require an amendment to a policy, and can require something more beneficial for a disabled person than the provisions for someone not. The respondent did take some steps, such as offering regular breaks, key questions in advance, and conducting the hearing slowly. The EHRC Code gives one example of allowing a non-staff member or union representative attend. That is not an exhaustive example but it is instructive that it does not mention having a solicitor or some other legally qualified person attend. The claimant had his union representative present, and although that is far from the same as having a solicitor in attendance there was the ability to request a break so as to take legal advice. There is no case law we have found in this

context of a section 20 claim in relation to permitting a solicitor to attend such a hearing (there is case law on judicial review in other circumstances which we do not consider of assistance). It would be a very unusual step to have a solicitor present for such a hearing, and as the onus of proof falls on the claimant we would normally expect to see something to support such a position independently of the claimant himself. No medical evidence was led, nothing was produced for example something from the solicitor stating what difference his or her being there would have made, and there was little detailed evidence from the claimant on what difference having a solicitor present would have meant, other than being able to explain terms to him and assist him in commenting. But he did set out his position fully in the conduct hearing, the difficulty for him was that the respondent did not accept what he said, not that he failed to state something. In our view it was not a reasonable adjustment to grant the claimant's request to have his solicitor present.

(f) In our view this is not an adjustment per se, as seeking such a report does not avoid any disadvantage. It informs the decision on whether adjustments should be made and if so to what extent. This point we did not consider had merit in this context accordingly, although it was a factor to consider for some other proposed adjustments.

(g) We did not consider that in all the circumstances this was a reasonable adjustment. The practice followed at the hearing was in accordance with the policy and normal practice. Each had their own role, and it was reasonable for both Mr Cormack and Ms Morrison to attend throughout in order to hear what the claimant's case was and respond to it.

185. Our conclusion on the claim under section 20 is that it was a reasonable adjustment to have deferred the conclusion of the disciplinary hearing to on or around 15 August 2022 to ascertain the position in the criminal proceedings and whether or not the CCTV footage could have been viewed by the claimant, and provided to the disciplinary hearing as evidence that was potentially material. The respondent did not do so. It is we find therefore in breach of the duty under section 21 of the 2010 Act.

(viii) Was the respondent in breach of contract?

186. We considered that the respondent had not proved that the claimant had committed an act which amounted to repudiation, such that it was entitled to terminate the contract summarily. This matter is for determination on the balance of probabilities, and the onus of proof falls on the respondent, rather than under the band of reasonable responses. The real issue was whether or not the circumstances breached an implied term of contract that the employee will not act in a manner likely seriously to damage or destroy the relationship of trust and confidence between employer and employee. It is not necessary that the claimant prove a defence of self-defence, although if he does that will mean that he did not act in a repudiatory manner. Something that may be close to self-defence but not that, where other factors are sufficiently present, can mean that the implied term is not breached. It is a question of fact and degree.

187. We accepted the claimant's evidence of what happened. So indeed had Mr Esslemont. He had been threatened by a person substantially drunk, who had used abusive words, and issued threats towards him which amounted to a threat of using violence against him. Those who are substantially drunk are notoriously liable to act on such threats, and be unpredictable in how they behave. The person not only issued verbal threats, he forcibly and suddenly opened the driver's door. The claimant felt threatened and we consider that it was reasonable to move from where he was, behind the steering wheel and side on to the person, in order to defend himself more effectively. When the claimant sought to have the person move away when they were both standing on the ground level, he did not do so but was abusive again, and threatened him again. We accept that the claimant was in genuine and reasonable fear of his safety, to the extent of fear to his life as he had a concern of a concealed weapon, and then acted on the spur of the moment when he reasonably feared that he was about to be head-butted. He put up his left forearm to defend himself and threw what amounts to a punch, but it was limited in force, not a full one. It was described in the conduct hearing as "very minimal….like a forceful push", and was such that the person moved back one or two paces, did not fall, and suffered at worst a small injury to his lip, not a

material injury of any kind. The evidence as to the injury, if any, appeared only from what the Police told the claimant, which he reported to the Ambulance Control Centre when he called them. The claimant was clear in his evidence to us that he had struck the person on the chin, that is what he said at the conduct hearing, and what was stated in the letter of dismissal. We cannot know whether there was no injury to the person from the punch of the claimant which did not impact the lip at all (the small injury to it having occurred at some other time), whether it had occurred because the person in effect bit his lip on being struck on his chin, whether the claimant had rather struck him on the lip, but it did not appear to us that that detail affected materially our decision.

188. We are also able to take account of two other facts, although we did not have sight of the CCTV footage. Firstly at the time security staff who had seen the incident on the CCTV said that the claimant should have the person charged. Secondly, the Procurator Fiscal said in court that it clearly showed that the claimant was acting in self-defence. Given the role of the Procurator Fiscal that is very powerful evidence in favour of the claimant.

189. Given all those facts it was our view that the respondent had not proved that it was an act that amounted to repudiation of the contract such as to justify summary termination. It was therefore in breach of contract in terminating the contract without notice.

(ix) If any or all claims are successful to what remedy is the claimant entitled? In that regard

- *(a) what losses did or will the claimant suffer as a result of the dismissal*
- *(b) what award is appropriate for injury to feelings*
- *(c) might there have been a fair dismissal had there been a different procedure*
- *(d) did the claimant contribute to his dismissal*
- *(e) has the claimant mitigated his loss and*
- *(f) did either party fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?*

190. Each of these matters is to be assessed independently against each claim, as the law for each of them is different. We were not provided with all of the evidence that we could have been. Payslips or other evidence of payments from the respondent and the two subsequent employers was not provided save for one payslip of the current employer. There was no documentation showing pension provision either with the respondent or the current employer. We have addressed matters as best we could on the basis of the evidence led before us, but there was a limit as to what we could award.

191. We shall address matters in a different order to the claims above for ease of calculation and to follow the chronology of the claims –

Breach of contract

192. The claim is quantified for the 12 weeks of the notice period due under contract and statute. The claimant was not working for the period to 1 September 2022, when he started work as a valeter. That is a period of one day less than six weeks. He had income during the next two months and therefore the balance of the six weeks period from his first job as a valeter. We did not consider that the claimant accessing his pension, which he had earned from his service at the respondent, affected the calculation of his loss. If he had not been dismissed in breach of contract he would not have done so. The respondent helpfully confirmed that no point as to mitigation of loss was taken.

193. We calculate the loss against that background, subject to the issues of pension loss and regarding the appeal discussed below, as follows –

(a) 22 July 2022 to 31 August 2022 at £530.77 per week = £3,108.62
(b) 1 September 2022 to 14 October 2022 at (£530.77 - £323.07 = £207.76) = £1,305.92
(c) TOTAL £4,414.54

Unfair dismissal

194. The claimant did not seek re-instatement or re-engagement.

195. The **basic award** is calculated not on the basis of what would be paid on redundancy, as it was in the claimant's Schedule of Loss, but on the basis of the provisions above. The claimant's gross pay was the equivalent of £820.81 per week. This is capped at £571 per week. The claimant had 13 years' service, all over the age of 41, and the calculation is 1.5 x 13 x £571 = **£11,134.50**. That is subject to consideration of contribution, assessed below.

196. The **compensatory award** is more complex. The first 12 weeks is covered by the breach of contract claim above. We shall deal first of all with an argument from the respondent that the claimant should have proceeded with his appeal, and that if he had he would probably, or possibly, been re-instated given that the criminal proceedings had ended. We did not consider that that argument should be accepted. Firstly there was no positive evidence to support it, either from those who gave evidence or the person who would have heard the appeal. Secondly, there is nothing from what we heard in evidence from the respondent to support such a conclusion. Thirdly the respondent decided to proceed in the face of a request for delay, and in light of court dates, and made a decision on the basis that we have described above. That was the evidence the respondent chose to put before us, which included its view as to the impact on reputation, set out also during its submission. None of that gave any indication that the appeal might have led to the re-instatement suggested. We therefore did not limit the loss to on or around 14 September 2022 as submitted by the respondent.

197. The loss we consider commences on 15 October 2022 in light of the award for the notice period. In December 2022 there was a retrospective pay increase, which the claimant would have received had there been no dismissal. We calculate the position as follows.

(i) The income net is £530.77 per week before the increase awarded. The loss for that period requires to take account of the pay increase for the period from 1 April 2022, which would have been paid to the claimant had he not been dismissed after the award made in December 2022. The only evidence of what that award would have been for the claimant is of the gross annual figure, and that the

percentage increase was 9.34%. All we can do is estimate what the net pay would have been, which we assess using that same percentage increase on the net income prior to the increase, which increases net pay to £580.34 per week. The differential for the period from 1 April 2022 is £49.57 per week. In the period to 14 October 2022 the loss is for 28 weeks and the total for that period is **£1,387.96**

(ii) From 15 October 2022 to 31 October 2022 the loss is £580.34 less the net pay received of £323.07 = £257.27 per week, a loss of **£624.79**.

(iii) From 1 November 2022 the loss is £580.34 per week less the pay from the new employment which is £408.88 per week = £171.46 per week. The period is to the date of assessment, 1 June 2023, which is 30 weeks and 3 days. The loss for this period we assess at **£5,217.28.**

(iv) We then assess the future loss. We consider that an appropriate time for that, taking account of the claimant's age, circumstances, and the position generally which includes the reasonably long period of time to the date of assessment from the date of the dismissal, is for a period of 12 months. Having regard to the weekly loss set out above the loss we assess at **£8,915.92**.

(v) We assess loss of statutory rights at **£500**.

(vi) We turn to **pension loss**. We are aware that there are detailed calculations in the Schedule of Loss, but the source material for them was not put before us, and the claimant could not give evidence on the detail of it. Against that background we concluded that the claimant had not proved the quantification of the pension loss in the manner sought. We concluded that we could proceed only on the basis of the evidence we had. That was that the claimant had made pension contributions to the respondent's scheme of £5,441.13. That is the equivalent of £104.64 per week. We consider that it is within judicial knowledge that a defined benefit scheme is more generous than a defined contribution scheme, such that the pension position of the claimant was materially more advantageous with the

respondent than it has been with his current employer. We considered that for the period of past and future loss, we should provide for the pension contributions the claimant had made which had reduced his net income with the respondent and led to the figure for net weekly pay set out above. We did so for the period from 22 July 2022 to 1 June 2024 (we appreciate that some of that is for the period of the contract claim). That is a period of over 97 weeks, having regard to the delay from the promulgation of this Judgment. The total in that regard is £10,150.08. Of that the first 12 weeks is within the breach of contract claim, and is £1,255.68. The balance for the compensatory award is **£8,894.40.**

Total compensatory award **£25,540.35**

(vii) The next potential issue is whether there could have been a fair dismissal from a different procedure, often called a ***Polkey*** deduction. Mr Fletcher did not argue for this in his submission, and we are not satisfied that there could have been.

(viii) The next issue is whether there should be a **contributory conduct** deduction either to the basic award, or the compensatory award, or both. Whilst allowance must be made for what is sometimes described as the agony of the moment, the situation of fear of assault he was in, from someone very drunk, who had threatened him and continued to act in a threatening way which he perceived to be commencing to attempt to head-butt him, there were four aspects in which we consider that the claimant had contributed in a blameworthy manner. The first is that in the initial contact with the person, the claimant had said that he was not going to waste more time on him, or words to that effect. That was at an early stage, before direct threats, when the person was obviously drunk. It was not an appropriate comment, and was one liable to make matters worse. The second was at around the same time, when the claimant could have alerted security staff to the problem created by the person, whose job it was to address such matters. The third was after the claimant had left the ambulance when the person was pointing his finger at his face, when the claimant swore at him. That was not

appropriate, and the claimant appeared not to dispute that at the conduct hearing. The fourth was that the claimant did not report the incident at the time, but only did so after the charge by the Police over four hours later. It appeared to us that it was, or ought to have been, obvious to the claimant that when there was such an incident with a member of the public in the circumstances that there were that it ought to be reported to the respondent at the least orally, if the claimant could not complete a record in writing for it because of his dyslexia. The respondent suggested to him in cross-examination that he was the aggressor, and in submission that as he had struck the person there should be a reduction to nil. The onus of proof is on the respondent in this regard. We did not accept that argument. In that connection, we are we consider entitled to take account of all of the evidence. That includes what the Procurator Fiscal said in court as to what the CCTV evidence clearly showed, which supports the claimant's position entirely. We did not therefore accept that the deduction should be 100% as proposed by the respondent, nor that it should be reduced to take account of the fact of the claimant striking the person as that was in self-defence as we consider it to be, but that there should be a deduction for contribution for the four elements set out above, and in all the circumstances we assessed that at 20%. For the avoidance of doubt we make it clear that the matters in respect of which there is held to be contribution do not individually or cumulatively approach the standard of conduct that a reasonable employer could regard as gross misconduct.

(ix) The next issue is whether to make any reduction to the compensation as the claimant did not proceed with the **appeal**. That, on the face of it, is a breach of the ACAS Code. The issue for us is whether or not that was unreasonable. In this regard he had given no advance notice of the evidence he sought to give of having four stents, and then suffering pains that led to referral to Raigmore Hospital Emergency Department. The respondent objected to the evidence, which we allowed under reservation as to whether or not to accept it. We have concluded that we should accept it, given both that the claimant is not represented in this action by a solicitor, and

that he is dyslexic. But there was no medical evidence to support him with regard to this matter. He did not proceed with an appeal but did at about the same time begin to undertake Early Conciliation and then presented this Claim. He has attended to give evidence before us. It appeared to us that that whole process was no less stressful than an internal appeal would have been. If he felt that he could not attend the appeal personally, he could have both sought a report from his GP and proceeded with his appeal in writing, or through his union representative, for example. His decision to proceed no further with it was taken after the calling of the criminal case in court, when the Procurator Fiscal made the comments referred to above. That was obviously a material fact, and one on which the appeal could be based. It is impossible to know what effect that that may have had on such a process, and what the outcome of it would then have been, but we consider that the statutory provision is intended by Parliament to give employers and employees the opportunity of addressing matters other than in Tribunal proceedings and was intended to apply to a case such as the present. When assessing what the deduction should be, we did consider that the fact of his dyslexia, and the anxiety that was spoken to in evidence, as well as all the facts of the case. The claimant's arguments are not easy to reconcile however with his proceeding with early conciliation and the present claim. We concluded that the claimant ought to have proceeded with the appeal, and that doing so in the circumstances of this case was just the kind of situation that the statutory provision was intended by Parliament to cover. We consider that it is just and equitable to reduce the level of compensation awarded to the claimant, and assess the appropriate level of that at the maximum permitted of 25%.

(x) The total of the reductions is therefore 45%. That reduces the basic award to **£5,010.52**, and the compensatory award to **£11,493.16**. The total awards for unfair dismissal are therefore **£16,503.68**.

(xi) We then assessed whether the statutory cap requires to be applied. It did not.

Discrimination

198. We require to try to assess what the discriminatory conduct caused. In our opinion if the disciplinary hearing had been adjourned, the claimant would then have reported the comments during the calling of the case. The claimant and respondent may or may not have sought the CCTV footage successfully. We do not know what it shows, as it was not made available to us, no application for a document order having been made. Given the evidence of Mr Esslemont to us, we consider that had he been aware of the outcome of the criminal proceedings that would not have made any difference to his decision. He would still have held the view that the claimant had not taken the only course of action or the very last resort that in his view amounted to self-defence. We did not consider that the dismissal would have been affected by the postponement of the hearing save to delay its date by something of the order of a month. That has been compensated for in the award for breach of contract, and unfair dismissal if there is a residual loss. We do not consider that any financial loss has been proved to have flowed from the breach of duty. We consider that the claimant did commit contributory conduct, and that it is appropriate to take account of that in the assessment of the award for discrimination. In that regard we prefer the reasoning in ***Way,*** and do not consider that in the circumstances of this case that the conduct referred to can fall within mitigation, which is a concept of the losses sustained after the dismissal, and cannot be relevant to what happened before that dismissal.

199. That leaves assessment of the award for injury to feelings. Very little evidence on this was presented, and no medical evidence. In our view the award should be within the lower Vento band, and less than the mid point of it, and we assess the award at £2,000. We award interest on that from 15 July 2022 to the date of our assessment, which we assess at £140. We consider that the same deduction for the failure to proceed with the appeal should be made as for unfair dismissal compensation, and that reduces the award to **£1,712.**

200. We have made the same reduction to the claim for breach of contract.

Totals

201. The effect of the awards above is as follows –

(a)	Breach of contract	£4,414.54	
	Add pension loss	£1,255.68	
	Total	£5,670.22	
	Reduce by 25% for failure to appeal		£4,252.67
(b)	Basic award after deductions		£5,010.52
(c)	Compensatory award after deductions		£11,493.16
(d)	Injury to feelings after deductions		£1,712.00
	TOTAL		**£22,468.35**

202. That award does not require to be grossed up.

Conclusion

203. In light of the findings made above, the Tribunal finds that the claimant was unfairly dismissed, that the respondent breached its duty to make reasonable adjustments in one respect, and was in breach of contract. It makes the award set out above.

204. We have referred to certain authorities not commented upon by the parties in their submissions. We considered that it was in accordance with the overriding objective to issue this Judgment without holding a further hearing to allow such representations, but if either party considers that they have suffered an injustice by that they can make an application for reconsideration under Rule 71 and set out the submissions they seek to make on those authorities when so doing.

Employment Judge: A Kemp
Date of Judgment: 14 June 2023
Date Sent to Parties: 15 June 2023