EMPLOYMENT TRIBUNALS

Claimant: Mr Murphy

Respondent: Lewisham and Greenwich NHS Trust

Heard at: London South (hybrid) **On:** 13-17 May 2024 and 17-18 June 2024

Before: Employment Judge Hart, Mr Ghotbi-Ravandi, Mr Hutchings

Appearances
For the claimant: Mrs Murphy, lay representative
For the respondent: Mr Boyd, counsel; Mr Rose, solicitor

JUDGMENT having been sent to the parties on 20 June 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. These are our unanimous reasons in relation to Mr Murphy's claims for unfair (constructive) dismissal, wrongful (constructive) dismissal, health and safety detriment and unlawful deduction of wages.

2. Mr Murphy was involved in an incident at work. He complains that the respondent's decision to suspend him for being involved in a physical altercation, conduct a disciplinary investigation and other related acts and omissions culminating in a first written warning, were detriments done on the grounds that he had taken appropriate steps to protect himself in circumstances of danger (acting in self-defence). Further or alternatively they were breaches of the implied term of trust and confidence resulting in his decision to resign on 28 November 2021.

THE HEARING

3. The parties and their representatives attended in person (except on the last day when they attended by CVP for oral judgment and reasons). Employment Judge Hart and Mr Hutchings attended in person, Mr Ghotbi-Ravandi attended by CVP. Mr Murphy was represented by Mrs Murphy, his mother, who did extremely well in difficult circumstances given the personal nature of the subject matter. The respondent was represented by counsel, who took his duty to the tribunal and litigants in person seriously and is to be commended.

4. We were provided with the following documents:
   4.1 a joint agreed hearing bundle which by the end of the hearing amounted to 638 pages, the references to page numbers in this judgment are to the pages in this bundle;
   4.2 a witness statement bundle; and
   4.3 an agreed chronology, cast list, reading list and list of issues.

5. The claimant's witnesses were: Mr Murphy, on his own behalf; Mr P Murphy, his father; Ms Caldwell (previously Jones), a workplace colleague; and Ms O'Lone, Head of Nursing.

6. The respondent's witnesses were: Mr Briggs, Divisional Director of Nursing and Governance; and Mrs Chambers, Employee Relation Manager. The witness statement of Ms Francis, Clinical Service Manager, was relied upon as hearsay.

7. On completion of the evidence both parties provided helpful written submissions, supplemented by oral submissions. The respondent's submissions on the law were largely adopted and the following additional cases were discussed: Gogay v Hertfordshire County Council [2000] IRLR 703 (CA); Crawford v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138 and Accattatis v Fortuna Group (London) Ltd [2024] EAT 25 (health and safety case).

8. We deliberated on 17-18 June 2024, the parties returned on the afternoon of 18 June 2024 for oral judgment and reasons. Written judgment was sent to the parties on 20 June 2024. The respondent requested written reasons on 26 June 2024.

<u>Issues during the hearing:</u>

9. The respondent intended to call Ms Francis who had conducted the disciplinary investigation. Unfortunately on day 3 she had a bereavement and could not attend. The respondent applied to proceed in her absence and for her statement to be accepted as hearsay. Mrs Murphy initially opposed this application since she wanted to cross examine Ms Francis. The tribunal decided to continue with the rest of the evidence to enable the parties time to consider their position and take instruction. On completion of the evidence the respondent renewed its application and Mrs Murphy agreed to continue on this basis; it having been explained to her that because she had not had the opportunity to cross-examine the witness, this would be taken into account

when considering what, if any, weight to place on Ms Francis' evidence. This meant that we were able to complete the evidence and submissions within the allotted time.

CLAIMS / ISSUES

10. The claims and issues were agreed at a Preliminary Hearing on 26 January 2023: **pg 40.** These were confirmed at the outset of this hearing as the issues in this case and are attached as Appendix A.

FINDINGS OF FACT

11. We have only made findings of fact in relation to those matters relevant to the issues to be determined. Where there were facts in dispute we have made findings on the balance of probabilities. We confirm that we have taken into account all the documentation and evidence that we were referred to during the hearing. If something is not specifically mentioned that does not mean that we have not considered it as part of our deliberations.

Policies and procedures

12. The respondent had the following policies:
    12.1 Guide to Reporting Incidents at Work which stated that '*If necessary, the incident should also be reported to police*': **pg 240.**
    12.2 Sickness Absence Policy provision on notification which stated that '*it is expected that sickness absence is reported by an employee to their line manager (or nominated deputy) as early in advance of the working shift and possible*': **pg 95.**
    12.3 Disciplinary Policy which stated that a first written warning is '*Where minor misconduct is confirmed it is usual to give a first written warning which will remain on an employee's file for a period of 12 months':* **pg 163.**

Events prior to the incident

13. On 10 November 2017 Mr Murphy commenced employment with the respondent, an NHS Trust, as a bank worker.

14. On 23 September 2019 Mr Murphy was appointed as an administrator working in the reception of the respondent's A&E Department on a 6 month fixed term contract due to end on 22 March 2020.

15. On 16 March 2020 Mr Murphy's employment was terminated. On 17 March 2020 Mr Murphy was re-employed as a bank worker doing the same work and covering the same shifts that he had been doing as an employee. On 1 April 2020 Mr Murphy was employed on a further 6 months contract. This was for the same shifts and work that he would have been covering had his previous fixed term contract continued.

16. On 1 December 2020 Mr Murphy was employed in the same role on a permanent basis.

17. On 10 May 2021 Mr Murphy's hours were increased from 23 hours a week to 34.5 hours a week: **pg 307.**

18. In June 2021 Mr Murphy applied for two apprenticeship roles in plumbing and gas fitting at Greenwich Council. His intention was that if successful he would continue to work on for the respondent for 11.5 hours a week or to resign and work as bank worker.

The incident

19. On 14 July 2021 there was a physical altercation between Mr Murphy and a CIS Security Guard.

Our findings on the reliability and credibility of the evidence relating to the altercation

20. We find that the claimant was trying to be a truthful witness. He had a reasonable memory of what occurred in the lead up to the physical altercation, but was traumatised by the altercation itself and he admitted that his memory about it was 'very fuzzy'. Mr Murphy accepted in evidence that the statement that he wrote shortly after the incident was likely to be the most accurate: **pg 397.**

21. The incident was witnessed by three other security guards (Ms Pintea, Mr Orr, Mr Owori) and a police officer. We were not provided with an account from the security guard involved in the incident (who we refer to as the security guard) nor were we provided with an account from the police officer. Ms Pintea, Mr Orr and Mr Owori wrote initial statements on or around 14 July 2021 using a standard template; these statements were unsigned and undated. Mr Outhwaite, their manager, assisted them. However, contrary to the claimant's case there was no evidence that Mr Outhwaite manipulated these statements to absolve the security service of accountability for the incident because they did not intervene soon enough. Mr Murphy's evidence as to the time it took for them to intervene is unreliable: his memory is fuzzy and it is likely that the traumatic experience has affected his sense of time. Mr P Murphy's (Mr Murphy's father) evidence is of little assistance since he was not present. But even if Mr Murphy and his father's suspicions are correct, it does not follow that Ms Pintea, Mr Orr and Mr Owori would not be telling the truth as to what they saw, but would only make their evidence unreliable as to their own response. Nor was there any evidence that Mr Outhwaite manipulated any of these statements to put the blame for the incident onto Mr Murphy. Their statements do not suggest that Mr Murphy and not the security guard was the aggressor. We do however find that it was likely that they were advised not to express any opinion or apportion blame. This would explain why none of the statements express the view that Mr Murphy was 100% acting in self defence. Further it explains the following comment that Ms Pintea made at the disciplinary hearing as to what was her 'personal opinion': **pg 438**.

'I saw it and I did not like it. They were both my colleagues and it does not matter if it is one from security and one not……..In my opinion, Ben [Mr Murphy] was defending himself and that is normal if someone is hitting you. Obviously that is all I have to say, it is my personal opinion. Ben was defending himself. That is my personal opinion and I see everything that happened. [The security guard] jumped on Ben and you would defend yourself if someone jumps on you. That is normal'

The possibility that Ms Pintea, Mr Orr and Mr Owori had been told not to express a 'personal opinion' falls far short of the allegation made by Mr Murphy that they were told to provide false factual evidence.

22. We note that Ms Pintea, Mr Orr and Mr Owori give slightly different accounts of what they had seen; these differences can be explained by difference in memory, perspective and level of distraction. Of the three, we consider that the statement of Ms Pintea was likely to be the most accurate and reliable. She clearly stated that she saw the whole incident and that she saw how the fight started. There was no evidence that she was distracted. She was consistent across her initial statement, at the investigation meeting and at the disciplinary hearing and repeatedly confirmed that the security guard had initiated the physical altercation: **pg 375, 377** and **436**. Whereas according to his statement Mr Orr had turned around to talk to a patient and therefore did not see who threw the first punch (**pg 380; pg 382**) and Mr Owori said he saw the security guard approaching Mr Murphy and then he was talking to a patient, he turned around when he heard a bang and saw the security guard with his hand around Mr Murphy's throat: **pg 386 and 388.**

<u>Our findings on the incident</u>

23. On the basis of evidence from Mr Murphy and that of Ms Pintea (and to a lesser extent Mr Owori and Mr Orr) we find that Mr Murphy was involved in banter with the security guard that got increasingly inappropriate. It started with personal comments about each other such as the security guard calling Mr Murphy 'fat' and Mr Murphy called the security guard 'bald'. It then escalated into making personal comments about each other's girlfriends. Mr Murphy accepted that he did not walk away because he thought it was just banter between friends. He realised that it was escalating and stated to the security guard that 'this was getting out of hand and it needed to stop'. The security guard did not stop. Instead of walking away Mr Murphy then said something along the lines of '*Don't get your mothers knickers in a twist'.* Whilst we consider that this was an inappropriate and provocative statement by Mr Murphy he could not have anticipated the response. The security guard snapped and physically attacked Mr Murphy: putting his hands round Mr Murphy's throat, nearly strangling him and banged his head against the wall three times. Mr Murphy provided evidence which we accept of how scared he was: he could not breathe and thought he was going to die. We find that in relation to this physical attack Mr Murphy acted in self defence. He responded by initially putting the security guard into a headlock, the security guard broke free and continued to grab at Mr Murphy's face and neck and in response Mr Murphy threw punches. The physical altercation was broken up by Ms Pintea, Mr Orr and Mr Owori.

24. We do not find that Mr Murphy used the words ‘slag’, ‘retard’ or ‘cunt’ during the banter leading up to the physical altercation. Mr Murphy under cross examination denied that he used those words. Mr Orr was the only witness who referred to this being said and did not attend this hearing to give evidence, therefore we place little weight on his statement. Mr Murphy’s evidence was that this was a word used by the security guard, and we consider that Mr Orr misheard and misattributed the person using that word to the claimant and not the security guard.

25. The police officer, who was present because he was attending a patient, informed Ms Casserly that if he had intervened in a professional capacity he would have arrested both Mr Murphy and the security guard. He suggested that the matter be dealt with internally. We do not conclude from this comment that this was evidence that Mr Murphy was equally to blame for the physical altercation. This is because we do not have any statement from the police officer, we do not know whether he saw the whole altercation (and how it started) or whether he just saw the end.

Events following the physical altercation

26. Ms Casserly, the Nurse in Charge, sent Mr Murphy home because he was ‘obviously injured and distressed’; **pg 391.**

27. The security guard was employed by CIS, an outside agency, and was summarily dismissed by Mr Outhwaite (the CIS security manager) after the incident.

28. Approximately 15 minutes after the incident, one of the security guards (who at the time wished to remain anonymous but we now know to be Ms Pintea) approached Ms Casserly and stated that it was ‘100% the fault of the security guard’ and that the other security guards were scared of the security guard, who was known to bully people and had a previous history of similar incidents: **pgs 391; 393.**

29. Ms Casserly completed an incident report which was emailed that evening to Ms O’Lone, Head of Nursing, at 7:41pm: **pg 329.** The report was emailed to a number of persons employed by the respondent including Mr Briggs (Divisional Director for Nursing and Governance) and Mr Outhwaite. The security service did not complete its own security incident report: **pg 464**. The respondent accepted that it did not report the matter to the police.

30. On 15 July 2021 at 7am, Mr Murphy attended A&E due to his injuries. It was accepted that Mr Murphy was not recorded as being off sick. He was paid over this period. In evidence, Mr Murphy accepted that he had not reported in sick in accordance with the respondent’s Sickness Absence Policy provisions on notification: **pg 51**.

31. On attending the hospital Mr Murphy spoke to Ms Brundish, Emergency Department Flow Co-ordinator. Whilst they were speaking about the incident two of the security guards approached Mr Murphy to ask if he was ‘okay’ and

then said that it was '*100% not his fault, and that he would be backed (sic) him all the way as it wasn't his fault and they could not believe what had happened to him'*: **pg 572**.

32. Mr Murphy was informed by these two security guards that Mr Outhwaite wished to speak to him. Ms Brundish advised Mr Murphy not to attend on his own and he called Mr P Murphy. During the meeting with Mr Outhwaite, Mr P Murphy challenged Mr Outhwaite as to why Ms Pintea, Mr Orr and Mr Owori had not intervened to de-escalate the situation. There were no minutes taken of this meeting. In evidence both Mr Murphy and Mr P Murphy stated that at the time they had been happy for the meeting to go ahead.

33. On 15 July 2021 Ms O'Lone informed Ms Lewis-Towler (Director of Operations) and Mr Phil Briggs of the incident and the actions that she had taken which included removing Mr Murphy from the Emergency Department to do non-clinical work until she had spoken to everyone involved: **pg 575**. To the extent that Mr Briggs' account differs from that of Ms O'Lone, we prefer the evidence of Ms O'Lone. We found that Mr Briggs' evidence was vague and that he had poor recollection of what he was informed and when.

34. At 6pm Ms O'Lone was approached by one of the male security guard witnesses and informed that the security guard had been the one at fault. She was informed that the security guard involved in the altercation was very angry about the loss of his job and stated that '*If I was Ben [Mr Murphy] I would watch my back, as he knows where he can find Ben and catch him in the car park*' and that the security guard had a previous history of violence: **pg 575-576.**

35. On 16 July 2021 (the next morning) Ms O'Lone went to see Ms Lewis-Towler and Mr Briggs to inform them of the information she had received the previous evening and that she felt that Mr Murphy should be suspended for his own safety: **pg 576**. We accept Mr Murphy's evidence was that he was suspended on this date. Mr Briggs denied this stating that Ms O'Lone did not have authority to suspend Mr Murphy and he only made the decision to suspend on 19 July 2021. However Mr Murphy's evidence was supported by the rota which recorded that he was suspended from the 17 July (**pg 525)** and the 'initial assessment form that Mr Briggs completed which recorded that '*a decision was made to suspend the member of staff on 16/7/21, the suspension taking place on 20/7/21*': **pg 317.** Further at the meeting on the 19 July 2021 Mr Murphy was handed a pre-drafted suspension letter dated 16 July 2021 (**pg 312).**

36. On 18 July 2021 Ms Casserly provided a statement which included the account of the conversation that she had had with Ms Pintea: **pg 391**.

37. On 19 July 2021 Mr Briggs completed the initial assessment form. He referred to four witness statements (which we find were those of Ms Pintea, Mr Orr, Mr Owori and Ms Casserly) which 'corroborate that an altercation occurred'. He then stated that '….*alternatives to suspension were considered but were not felt to be satisfactory in the circumstances. Ben Murphy could potentially pose a risk to others, colleagues and patients. Also the CIS Security Guard who was involved was instantly dismissed and it is feared that he may seek retribution*

for this, against Ben. This case was discussed with Vicky Tyler, Head of Employee Relations, prior to the suspension': **pg 317.** We note this document made no reference to the comment of the police officer, which Mr Briggs has relied upon as part of his rationale in evidence before us. Nor did it make any reference to Mr Murphy's case of self defence.

38. In addition to the decision to suspend, Mr Briggs recommended 'option 2' (formal investigation under the disciplinary policy): **pg 317**. In reaching this decision he used the steps in the 'decision tree': **pg 316**. We accept that Mr Briggs made an error when completing this tree in suggesting that Mr Murphy had been involved in a previous discussion / action plan. However we consider that had Mr Briggs correctly followed the steps in the decision tree he would have still recommended 'option 2'.

39. On 19 July 2021 Mr Briggs met with Mr Murphy and gave him the pre-drafted suspension letter: **pg 313.** We do not accept Mr Briggs' evidence that the purpose of the meeting was for him to hear Mr Murphy's account of what had occurred and that he only made the decision to suspend following this meeting. Following the meeting Mr Briggs emailed Ms O'Lone and Ms Caldwell stating '*more that like for a hearing - however Bens story is quite strong and given Claire the sn should be able to match his story - the bit where the security female guards tell Claire I mean':* **pg 318***.* We find that this was a reference to Mr Murphy's case of self defence and that 'Claire the sn' was a reference to Ms Casserly's account of what Ms Pintea had informed her.

40. The suspension letter stated that Mr Murphy's suspension was '*pending an investigation into allegations of gross misconduct made against you',* referred to his involvement in a physical altercation with the security guard and informed him that he was being suspended '*due to the serious nature of this incident*'. The letter contained standard text on pastoral support available from Mr Thompson and the employee assistance programme.

41. Mr Murphy was suspended on full pay. However we find that during the period that he was suspended he received less pay than he would otherwise have earned over the period: both because of the method for calculating unsocial hours enhancement (averaging over three months rather than based on what he was earning at the point that he was dismissed) and because he was no longer permitted to do bank work.

42. On 21 July 2021 Mr Murphy was informed that the respondent had commenced its investigation and that Ms Francis, Clinical Services Manager, had been appointed the investigator: **pg 319**. Mr Murphy was again informed that Mr Thomson was his pastoral support.

43. We find that throughout the period of his suspension, Mr Thomson only contacted Mr Murphy on two occasions at the start of the process: contact was by means of a text followed by a short 2-minute phone call. The respondent did not dispute that this was the extent of the contact. Ms O'Lone informed us that she had spoken to Mr Thompson and informed him that Mr Murphy was struggling and encouraged him to make more contact. We accept Mr Murphy's

evidence that the reason he did not initiate contact with Mr Thompson was because Mr Thompson had told him he would keep him updated and to await his contact.

44. On 23 July 2021 Mr Murphy provided a statement for the investigation. He stated that he had acted in self defence: **pg 398**

45. On 30 July 2021 Ms Pintea, Mr Orr and Mr Owori attended investigation meetings with Ms Francis: **pg 376, 380 and 387.**

46. On 2 August Ms Casserly attended an investigation meeting with Ms Francis: **pg 391.**

47. On 5 August 2021 Ms Francis invited Mr Murphy to attend an investigatory meeting: **pg 331.**The letter contained the standard paragraph about pastoral support available from Mr Thompson and the employee assistance programme.

48. On 10 August 2021 Mr Briggs reviewed and extended Mr Murphy's suspension for a further 14 days as the investigation was ongoing: **pg 334.** The letter contained the standard paragraph about pastoral support available from Mr Thompson and the employee assistance programme.

49. On 13 August 2021 Mr Murphy attended an investigation meeting with Ms Francis: **pg 336.** During this meeting Ms Jones (now Caldwell) raised that Mr Thompson was on leave and it was agreed that Ms O'Lone take over pastoral support in the interim: **pg 342.**

50. On 2 September 2021 Mr Briggs reviewed and extended Mr Murphy's suspension for a further 14 days as the investigation was ongoing: **pg 355**. The letter contained the standard paragraph about pastoral support available from Mr Thompson and the employee assistance programme.

51. On 10 September 2021 Mr Murphy was invited to an interview with Greenwich Council to be a apprentice gas fitter: **pg 569.**

52. On or around 30 September 2021 the investigation report was completed: **pg 366.** It concluded that there was a case to answer in relation to the allegation that Mr Murphy was involved in a physical altercation and that it was for senior management to decide if any further action would be required: **pg 373**. It stated that the purpose of the investigation was not to apportion blame or decide whether Mr Murphy had acted in self defence: **pg 368.** Mr Briggs accepted that he was involved in the decision not to consider self-defence at the investigation stage.

53. On 1 October 2021 Mr Briggs informed Mr Murphy that the matter would proceed to a disciplinary hearing. He extended Mr Murphy's suspension until the hearing: **pg 412**. The letter contained the standard paragraph about pastoral support available from Mr Thompson and the employee assistance programme.

54. On 14 October 2021 Mr Murphy was invited to attend a disciplinary hearing to be chaired by Ms Wicks, Head of Outpatients: **pg 418-419.** He was informed that the allegation was *'Whether you were involved in a physical altercation with a member of the CIS Security Team, whilst on duty, on Trust Premises on Wednesday 14th July 2021*' and that if upheld, the allegation may constitute 'gross misconduct'. He was provided with information about the hearing and informed of his right to be accompanied.

55. On 11 November 2021 Mr Murphy attended the disciplinary hearing accompanied by Ms Caldwell as his workplace representative: **pg 429.** Mr Murphy makes no criticism of this hearing. During the disciplinary hearing Ms Caldwell apologised on Mr Murphy's behalf for the way in which he had reacted and stated that 'both *parties were name-calling and you had said you had learned from this':* **pg 467.**

56. On 19 November 2021 Ms Wicks informed Mr Murphy that he was to be issued with a first written warning for misconduct: p**g 458-468**. She informed him that '…*the reason for my decision is that you have admitted to acting in a manner not commensurate with Trust values i.e. respect and dignity to colleagues in the workplace.*
I stated that you accepted that you have reflected upon your actions and now recognised reasons why those circumstances escalated in the way they did and will take steps to respond and act with more consideration in future': **pg 468**.

57. Whilst the outcome letter does not explicitly state that Ms Wicks accepted that Mr Murphy had acted in self defence, we consider that this was implicit in the fact that the most minor sanction was imposed and that the reason was due to not acting within Trust's values and acceptance that Mr Murphy had reflected on his actions. The sanction would have been far more serious had it been found that Mr Murphy initiated or contributed to the physical altercation in any way. We therefore find that the first written warning was for Mr Murphy's actions prior to the physical altercation, the banter and not taking steps to de-escalate which he should have done. Mr Murphy admitted before us that banter without the physical altercation could constitute minor misconduct and he accepted that he fell short of the Trust's values. He further accepted that Ms Wicks had listened to his case. Mr Murphy did not appeal her decision.

58. The same day Mr Murphy emailed Mr Briggs stating that Ms Wicks had advised him to take 2 weeks off work to prepare to return to work and that she had offered him bank work to work from home: **pg 457.** During a telephone conversation with Mr Murphy on 22 November 2021 Mr Briggs agreed Ms Wicks' proposal and suggested that Mr Murphy speak to Ms O'Lone: **pg 471**

59. On 22 November 2021 Mr Murphy attended the hospital and whilst he was there received a parking ticket. He blamed Mr Orr for this because Mr Orr had told him he could park without a ticket or permit for a few minutes which had resulted in him getting the ticket.

60. On 25 November 2021, Mr Murphy emailed Ms Fuller, his line manager, to say that he was due to return to work the following week and that he had not heard

from her: **pg 478**. Ms Fuller responded the next day, apologised for not being in touch and stated that she had spoken to Mr Briggs and was under the impression that Ms O'Lone was to be in touch: **pg 477.** Ms O'Lone responded and recommended that Mr Murphy be referred to occupational health and that he return on a phased return to work: **Pg 476.**

61. On 28 November 2021 Mr Murphy resigned by letter to Ms O'Lone: **pg 481**. He requested that he be permitted to leave without working his four weeks' notice: **pg 482.** He also referred to Ms Wicks giving him the opportunity to continue to work from home (as a bank worker) whilst he looked for alternative employment.

62. In his resignation letter he referred to the fear that he had experienced as a result of the 'violent attack', and that he still struggled with the fact that he was 'suspended for defending myself'. He stated that during his suspension he felt he had not been treated as a victim of a violent attack. He was critical of the statements of Ms Pintea, Mr Orr and Mr Owori which he considered had not supported him. He went on to state that he had thought long and hard about returning and that at the disciplinary hearing Ms Wicks had made a number of proposals to support his return to work, that she had reassured him that he would receive support and that he was grateful to her. He referred to subsequently not receiving the support he expected from Ms Fuller and his view that Mr Orr was responsible for his parking ticket. He then stated that he could not *'face going through being suspended and treated like I was criminal, and having to defend why I defended myself'.* He concluded by stating that that: '*I would like to take this opportunity to thank you Annie [Ms O'Lone] and Susan [Ms Wicks] for all the support you have shown me and for listening to my case and treating me with the upmost respect by taking my account of what happened to me seriously and looking at the facts independently making me feel like someone was finally listening': **pg 483.***

63. Ms O'Lone responded stating that she was 'deeply saddened' by Mr Murphy's decision to resign and offered to keep him registered with the bank as '*you are working for Susan Wicks and I also would like to thank Susan for supporting you during this time:* **pg 479.**

64. On 29 November 2021 Mr Murphy commenced new employment as an apprentice gas fitter for Greenwich Council.

65. On 30 November 2021, Mr Murphy emailed again expressing gratitude to Ms Wicks stating that he was 'happy to work from home at the minute' and not come into the respondent trust: **pg 484**

66. On 1 February 2022 Mr Murphy commenced early conciliation, on 3 February 2022 he received the early conciliation certificate. On 2 March 2022 Mr Murphy submitted his claim form.

THE LAW

Continuous Service

67. Under section 108 of the Employment Rights Act 1996 (ERA 1996), in order to claim unfair dismissal a claimant must have no less than two years' continuous employment as an employee ending with the effective date of dismissal.

68. Section 212 of the ERA 1996 (weeks counting in computing period) provides that:

> *"(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.*
>
> *…..*
>
> *(3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—*
> *(a) incapable of work in consequence of sickness or injury,*
> *(b) absent from work on account of a temporary cessation of work, or*
> *(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose,*
>
> *counts in computing the employee's period of employment."*

69. An 'employee' is defined under section 230(1) and (2) as someone who works or worked under a 'contract of employment', meaning a contract of service or apprenticeship, whether express or implied and whether oral or in writing. The common starting point for determining whether an individual is an employee is the following three factors set out in the decision of **Ready Mixed Concrete South East Ltd v Minister of Pensions** [1968] 2 QB 497L (HC):
    a) whether the individual agreed that in consideration of remuneration he will provide their own work and skill in the performance of some service for putative employer;
    b) whether the individual agreed expressly or impliedly that in the performance of that service he will be subject to the other's control in sufficient degree to make that other the employer; and
    c) the other provisions of the contract are consistent with it being a contract of service.

70. In determining employment status the tribunal should consider what is true agreement between the parties, not just the written terms of the contract, taking into account all the circumstances: **Autoclenz v Belcher** [2011] ICR 1157; **Uber BV v Aslam & Others** [2021] ICR 657; **Ter-berg v Simply Smile Manor House Ltd & Others** [2023] EAT 2.

Unfair (Constructive) Dismissal

71. Section 95(1)(c) of the ERA 1996 provides that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's

conduct (known as constructive dismissal). In order to claim constructive dismissal the employee must satisfy the tribunal that the respondent had committed a repudiatory breach of contract, that he resigned in response to that breach and did not otherwise waive or affirm the contract. It is sufficient for the repudiatory breach to be an effective cause of the dismissal it need not be the effective cause (or put another way, the most important cause): **Wright v North Ayrshire Council** [2013] UKEAT 0017/13/2706.

72. The approach to be applied to a 'final straw' case (where the last of a series of acts and omissions viewed cumulatively amount to a repudiatory breach) is set out in the Court of Appeal case of **Omilaju v Waltham Forest London Borough Council** [2005] ICR 489**,** at paragraphs 19-22**.** In particular, Dyson LJ noted that the last act need not itself be a breach of contract, it need not be unreasonable or blameworthy, nor does it need to be of the same character as the earlier acts. However it did need to add something to the breach even if what it added was relatively insignificant. An entirely innocuous act on the part of the employer cannot be a final straw.

73. An employee is not justified in leaving employment just because an employer has acted unreasonably: **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908 (CA). Further not all breaches of contract will be repudiatory, for conduct to be repudiatory it must be 'very serious': **Morrow v Safeway Stores Ltd** [2002] IRLR 9 (EAT). This same case is authority that a breach of the implied term of trust and confidence is 'inevitably' fundamental (repudiatory).

The implied term of trust and confidence

74. The following term of trust and confidence has been implied into employment contracts: that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: **Malik v Bank of Credit and Commerce International SA** [1997] IRLR 462 (HL); **Baldwin v Brighton and Hove City Council** [2007] ICR 680 (EAT). This requires tribunals to consider (1) whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and (2) whether it had reasonable and proper cause for doing so**.** The legal test requires looking at the circumstances *objectively* — i.e. from the perspective of a reasonable person in the employee's position.

75. Suspending an employee from work (and other disciplinary related action) could destroy or seriously damage trust and confidence if done without reasonable and proper cause: **Gogay v Hertfordshire County Council [2000] IRLR 703 (CA)**; **Crawford v Suffolk Mental Health Partnership NHS Trust** [2012] EWCA Civ 138 (comments of Elias LJ in footnote at paragraphs 71-73). The case of **GoGay** concerned suspension of a residential care worker accused of sexual abuse in circumstances where the evidence against the worker was slim. The Court of Appeal held that the respondent employer did not have 'reasonable cause' to suspend the claimant.

Wrongful (Constructive) Dismissal

76. A wrongful dismissal is a dismissal without notice or with insufficient notice contrary to the express or implied terms of the employment contract. This cause of action includes where the dismissal was a constructive dismissal.

Health and Safety Detriment

77. Section 44 of the ERA 1996 provides that:

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

……

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

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

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

78. The wording of section 44(1A)(b) is identical to section 100(1)(e) for unfair dismissal, so those cases are informative when interpreting section 44. The equivalent unfair dismissal provision was considered recently by the EAT in **Accattatis v Fortuna Group (London) Ltd** [2024] EAT 25. This stated that:
   (a) The first question is whether there were circumstances of danger which the employee reasonably believed was a serious and imminent danger (to him).
   (b) The tribunal will then need to decide whether the steps on which the employee relied to protect himself from danger were appropriate. This is an objective question to be decided by the tribunal having regard to all the circumstances of the case including the employee’s knowledge, and the facilities and the advice available to him at the time he took the steps in question. The weight to be given to any of the relevant circumstances in reaching a decision about appropriateness is a matter for the tribunal.

79. Detriment has been defined as some disadvantage, seen from viewpoint of employee. It need not be physical or economic disadvantage but must be objectively reasonable: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 (HL). An unjustified sense of grievance cannot

amount to a detriment: **Jesudason v Alder Hay Children's NHS Foundation Trust** [2020] EWCA Civ 73 (CA).

80. Section 48 (complaints to employment tribunals) provides that:
'*(1XA) A worker may present a complaint to an employment tribunal that the worker has been subjected to a detriment in contravention of section 44(1A).*
….

(2) On a complaint under subsection … (1XA), ….. it is for the employer to show the ground on which any act, or deliberate failure to act, was done.'

81. This is different from the test of causation for health and safety unfair dismissal claims under section 100(1)(e), since it is for employer 'to show' the ground for its treatment. Therefore the burden of proof is on the respondent, once the claimant has established the primary facts. Mr Boyd accepted that the correct causation test for a detriment case was whether the claimant's action/s 'materially influenced (in the sense of being more than a trivial influence) the employer's treatment: **Fecitt v NHS Manchester** [2012] ICR 372 (CA) (a protected disclosure detriment case applied by analogy).

Unlawful Deduction of Wages

82. Section 13(1) of the ERA 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is 'authorised' by statute, a written term of the contract or by agreement.

83. An employee is only entitled to claim unlawful deduction in relation to what is 'properly payable'. This has been interpreted as that which a worker is legally entitled to under their contract or otherwise: **New Century Cleaning Co v Church** [2000] IRLR 27.

84. A worker has a right to complain to an employment tribunal of an unauthorised deduction from wages under section 23 of the ERA 1996.

DISCUSSION AND CONCLUSIONS

CONSTRUCTIVE UNFAIR DISMISSAL

85. Mr Murphy gave heartfelt evidence of the impact of the physical attack on him. He still remembers the security guard's hands round his neck, his vision going blurry, that he could not breathe and felt in fear of his life. It was a traumatic experience and one that continues to affect him. Whilst he had our sympathy, we explained that his claim had to be considered in accordance with the legal tests to be applied.

86. We decided to consider the issue of constructive dismissal before considering jurisdiction (continuous service and employment status). This was because the constructive dismissal complaint was based on the same acts and omissions

as the health and safety detriment complaint which would need to be considered in any event. Therefore consideration of the substantive issues seemed the most appropriate use of the tribunal's deliberation time.

Did the respondent do the acts / omissions complained of?

87. It was not disputed that the respondent did the following:
    - 87.1 suspend the claimant (issue 2.1.1.1);
    - 87.2 fail to give the claimant time to recover from the attack; in particular by calling him to a meeting the following day to ask him about what happened (issue 2.1.1.2); albeit it was submitted that Mr Outhwaite was acting for CIS Security, a third party, not the respondent;
    - 87.3 not record the claimant as off sick (issue 2.1.1.3);
    - 87.4 fail to report the incident to the police (issue 2.1.1.4);
    - 87.5 fail to report the incident in accordance with the respondent's reporting of violence policy (issue 2.1.1.5);
    - 87.6 fail to contact the claimant during his suspension to check on his welfare (issue 2.1.1.6); in so far that the respondent did not dispute that Mr Thompson only contacted Mr Murphy on two occasions although it was argued that this was not the only support offered to Mr Murphy.
    - 87.7 pursue disciplinary proceedings against the claimant (issue 2.1.1.7); and
    - 87.8 issue the claimant with a first written warning (issue 2.1.1.8).

Did those acts singularly or cumulatively breach the implied term of trust and confidence?

88. We noted that the words that define the implied term of trust and confidence are strong words. The fact that the respondent did something wrong e.g. breached a policy or procedure, or could have done things better, is not enough. The respondent must behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between Mr Murphy and his employer without reasonable and proper cause for doing so**.** We also noted that it is an objective test to be considered based on the information before the respondent decision-makers at the time.

The decision to suspend the claimant;

89. As Elias LJ in **Crawford** recognised, suspension can cause considerable distress to those who are suspended, it is an isolating experience, carries a potential stigma and assumption of guilt and can be psychologically damaging. Like the claimant in **Gogay** Mr Murphy was facing a serious allegation. Further in Mr Murphy's case not only did suspending him have a psychological impact it also had a financial impact since he lost pay, due to the manner in which enhancements were calculated and being prevented from doing bank work (which he did to top up his salary). We accept that in many situations suspension may be appropriate and reasonable; the issue in this case is whether on the facts before him Mr Briggs had reasonable and proper cause for suspending Mr Murphy.

90. We do not consider that Mr Briggs had reasonable and proper cause to suspend Mr Murphy for his own safety. If Mr Briggs was concerned for Mr Murphy's safety there were other actions that could have been taken, such as to permit him to work from home. Although Mr Murphy worked on A&E reception he had already been moved to a non-clinical role by Ms O'Lone, and arrangements were made to enable Mr Murphy to work from home following the conclusion of the disciplinary process. Mr Briggs accepted that the reason this was not an option was due to the seriousness of the allegation. Therefore we find that concern for Mr Murphy's security was not in fact the real reason for the suspension. This finding is supported by the suspension letter which only referred to 'the serious nature of this incident', and did not mention of any other reason for the suspension.

91. Nor do we consider Mr Briggs had reasonable and proper cause to suspend Mr Murphy because he could pose a risk to others, colleagues and patients. As he himself accepted in evidence, there was no evidence that Mr Murphy had previously posed a risk to patients.

92. We find that the only reason that Mr Murphy was suspended was due to the fact that a 'physical altercation' had occurred and the seriousness of the allegation. In relation to that reason we do not consider that the mere fact that such an altercation had occurred, or that it was serious, was sufficient. We considered that it was a highly relevant factor that Mr Murphy was acting in self defence and that should have been taken into account when making the decision to suspend. Mr Briggs in evidence placed great weight on the comment of the police officer to Ms Casserly that he would have arrested both persons. However he made no reference to this in the 'initial assessment form', therefore we do not accept that at the time that he made the decision it was as significant a factor as he now suggests. Further, and in any event, we considered that this was weak evidence against Mr Murphy. No statement had been obtained from the police officer and Mr Briggs did not know what the police officer had seen or on what basis he had made the comment. In reaching his decision Mr Briggs ignored the contrary evidence provided by Mr Murphy at the meeting on the 19 July 2021 that he was acting in self defence supported by the statements of Ms Pintea and at least partially by Mr Orr and Mr Owori and the comments made to Ms Casserly. As Mr Briggs himself noted at the time in his email of 19 July 2021 'Bens story is quite strong' and was likely to be supported by Ms Casserly. Given that Mr Briggs knew at the point of suspension that Mr Murphy had a strong case that he was acting in self defence, we conclude that Mr Briggs did not have reasonable and proper cause to suspend him. Had Mr Briggs properly taken into account the 'strong' evidence of self defence then there were alternative options open to him including permitting Mr Murphy to work from home during the investigation.

Fail to give the claimant time to recover from the attack; in particular by calling him to a meeting the following day to ask him about what happened

93. Neither Mr Murphy nor Mr P Murphy objected to the meeting with Mr Outhwaite at the time, and both accepted in evidence that they were happy for the meeting to go ahead. Therefore we do not find that this was a breach of the implied term of trust and confidence. Consequently we have not gone on to consider whether Mr Outhwaite was acting as an agent for the respondent.

Not record the claimant as off sick

94. We do not consider that failing to record Mr Murphy as being off sick following the incident, was likely to seriously damage trust and confidence. Mr Murphy continued to be paid and no action was taken against him for his absence. We could find no disadvantage to Mr Murphy for not being recorded as off sick during this period.

Fail to report the incident to the police

95. We do not consider that failing to report the incident to the police, was likely to seriously damage trust and confidence. There was no suggestion that Mr Murphy had asked the respondent to refer the matter to the police. Nor was the respondent acting in breach of its own policies and procedures. The Guide on Reporting Incidents at Work merely refers to an incident being reported to the police 'if necessary'. This is guidance and does not require the respondent to refer an incident to the police. Even if it did require such a reference, Mr Murphy has identified no disadvantage to himself from this failure.

Fail to report the incident in accordance with respondent's reporting of violence policy

96. We do not consider that failing to report the incident in accordance with the respondent reporting of violence policy, was likely to seriously damage trust and confidence. Mr Murphy in evidence accepted that Ms Casserly had completed an incident report. His complaint was that one had not been completed by the security service. Mr Murphy has not identified any requirement on the security service to make a report where one had already been completed by the respondent. Further Mr Murphy has not identified any disadvantage to him by the failure to complete the report.

Fail to contact the claimant during his suspension to check on his welfare

97. The respondent's case was that Mr Murphy had been informed on 6 separate occasions of the Employee Assistance Service (which provides assistance and counselling) and that Mr Thompson was his pastoral support. It was not disputed that Mr Thompson had only made contact on two occasions but it was argued that there was also a responsibility on Mr Murphy to initiate contact with Mr Thompson and that he could have contacted the Employee Assistance Service.

98. We do not agree. We consider that the limited support that Mr Murphy received from Mr Thompson was wholly inadequate. The two texts followed by a short phone conversation at the commencement of the suspension was contrary to the expectation that contact be made at least once pw and that the contact be initiated by the person providing the pastoral support not the person who had

been suspended. Ms O'Lone explained that when someone is suspended it is often difficult for those affected to proactively contact someone to ask for support. Further Mr Thompson had informed Mr Murphy that he would keep him updated and make contact.

99. Ms Chambers, the respondent's witness and HR advisor, agreed with Mr Murphy's case that she would have expected the level of support to be more than that provided by Mr Thompson, with a phone call at least once pw initiated by the person providing the support. She agreed that it was an awful thing for an employee to be suspended and that if support was not provided they would feel quite isolated and maybe confused about what happened. This was especially so if this was the first time they have been suspended and therefore it was a process they were not familiar with.

100. We consider that the respondent was under a clear obligation, having suspended Mr Murphy, to ensure that he received adequate support, particularly when the suspension continued over an extended period of four months. Anyone who has been subject to a disciplinary suspension is likely to need support but in Mr Murphy's case he was not just facing the loss of employment but as the respondent was aware had undergone a horrific attack which had left him traumatised. His evidence, which we accept, was that this was a very difficult time for him.

101. We also consider that the support provided by Ms Caldwell in her capacity as workplace colleague and the informal support provided by Ms O'Lone was no substitute for the formal role and duty of care on the respondent over the suspension period.

102. Whilst we do not consider that the respondent's failure was sufficiently serious on its own to breach the implied term of trust and confidence, when considered cumulatively with the decision to suspend we find that it amounted to a breach of the implied term of trust and confidence.

<u>Pursue disciplinary proceedings against the claimant</u>

103. We consider that it was reasonable for Mr Briggs to initiate a disciplinary investigation. This was in order to gather the facts and not to apportion blame. The issue of culpability and Mr Murphy's defence of self-defence was a matter for the decision maker at the disciplinary hearing. Having received the investigatory report that explicitly stated that it had not considered self defence or the apportionment of blame it was reasonable for Mr Briggs to refer the matter to a disciplinary hearing to determine. We do not find that this was a breach of trust and confidence and consider that Mr Murphy has misunderstood the process that he was involved in.

<u>Issue the claimant with a first written warning</u>

104. According to the respondent's disciplinary policy a first written warning is for 'minor conduct'. We have found that the reason that Mr Murphy was issued with a first written warning was due to his banter and conduct in the lead up to the physical altercation. We consider that Ms Wicks had reasonable and proper

cause to issue him with this warning. Further we consider that Mr Murphy understood at the time the reason for the first written warning.

105. Nor do we consider the first written warning to be a last straw. It was a good outcome for Mr Murphy which appropriately recognised his culpability and was based on what he himself accepted was inappropriate behaviour. We took into account that Mr Murphy did not appeal this decision and in his resignation letter did not object to the receipt of a first written warning but rather thanked Ms Wicks for listening to his case, treating him with the upmost respect, taking his account of what happened seriously and looking at the facts independently.

Did the claimant resign in response to the breach?

106. In considering this question we noted that a claimant may have mixed motives or reasons for resigning. The issue is whether the breach was an effective cause (it need not be the only cause).

107. The breach that we have found was the decision to suspend Mr Murphy either on its own or in combination with the lack of support during his suspension. We carefully considered Mr Murphy's resignation letter. We noted that in this letter he gave a number of reasons for his resignation, some of which were not pleaded as a breach of his contract (e.g. his fear at returning to work after the incident, the lack of support by Ms Fuller (his line manager) and the further incident with Mr Orr). We do not consider any of these reasons to be fatal to his claim for constructive dismissal and accept that part of his reason was that he had been suspended and how he had felt during that suspension due to the lack of official support provided.

108. We also took into account Mr Murphy's stated intention that he had applied and successfully obtained an apprenticeship as a gas fitter, and therefore considered whether he would have resigned in any event even if he had not been suspended. We noted his intention to ask for reduced hours or work as a bank worker alongside the apprenticeship role. We also took into account that according to his resignation letter he had been in active discussion with Ms Wicks and Ms O'Lone regarding his return to work. We consider it unlikely that he would have entered into such detailed discussions if he had always intended to resign.

109. We considered whether Mr Murphy's case that he resigned in response to the respondent's breach the implied term of trust and confidence was inconsistent with him thanking Ms Wicks and Ms O'Lone for their support and wanting to continue the relationship with the respondent to do bank work. We did not consider that this was inconsistent. In part because bank work is different from wishing to continue to be permanently employed but also because different persons were involved. It was the actions of Mr Briggs in suspending him along with the lack of support during that suspension period that we have found to be a fundamental breach of contact not the actions of Ms O'Lone who supported him throughout and Ms Wicks who listened to him and only gave him a first written warning.

110. Therefore we conclude on balance that part of the reason why Mr Murphy resigned was the fact that he had been suspended and not received adequate support during that period.

Did the claimant affirm the contract before resigning?

111. If an employee waits too long after the employer's breach of contract before resigning, he may be taken to have affirmed the contract. This is not merely a matter of time but of conduct.

112. We were prepared to accept that the breach of the implied term caused by the decision to suspend him and the failure to provide support continued up to the date of the disciplinary hearing outcome when the suspension was lifted. We noted that a two week period after this date was a relatively short period of time.

113. Therefore the focus of our consideration was whether the breach had been affirmed by Mr Murphy's conduct. We took into account that:

113.1 at the point that Mr Murphy resigned the breach was not continuing;

113.2 Mr Murphy had not complained about being suspended at any point over the four month period. His only complaint at the time was in relation to payment of enhancements;

113.3 that Mr Murphy had not complained about the lack of support being provided by Mr Thompson during his suspension. Whilst Ms Caldwell raised that Mr Thompson was on holiday at the investigation meeting in August 2021 she did not raise that he had failed to provide the necessary support or request an alternative, other than to cover the interim period;

113.4 Mr Murphy's suspension ended at the disciplinary hearing as did his reason for being aggrieved, since at this point Ms Wicks did listen to him and accepted that he had acted in self-defence. He expressed his gratitude to Ms Wicks for listening to him and in his resignation letter identified all the ways that his return to work could be supported for which he was grateful. This included providing him with work which he could do at home;

113.5 Ms O'Lone also continued to be supportive and recommended a phased return to work and referral to occupational health; and

113.6 Mr Murphy was actively engaged in discussions about his return to work, and from the documentation felt positive about this. We considered that this did contradict his claim that he had not accepted the respondent's repudiatory breach of contract.

This is not a case where a subsequent act by the respondent (lack of care by Ms Fuller or further incident with Mr Orr), even if proven, could be said to have revived the right to resign. They were not pleaded as breaches of the implied term of trust and confidence or even as a final straw. Therefore on the basis of the claim before us we have concluded that following the lifting of his suspension and the imposition of the first written warning Mr Murphy affirmed the breach by his conduct, accepting the sanction as fair and the support that was to be offered to him to enable his return to work.

If the claimant was dismissed, was the claimant unfairly dismissed?

114. Since we have found that Mr Murphy was not dismissed it was not necessary for us to consider whether that dismissal was unfair.

Jurisdiction – Continuous service

115. Mr Murphy is only entitled to claim unfair dismissal if he has more than 2 years' continuous service.

116. During his employment with the respondent there was a two-week period (17 March 2020 to 31 March 2020) when Mr Murphy was employed as a bank worker doing the same work and covering the same shifts. The respondent's case is that this broke his continuous service since he was not an employee over that period.

117. Since we have found that Mr Murphy was not unfairly (constructively) dismissed it is not necessary for us to reach a conclusion on this issue.

WRONGFUL (CONTRUCTIVE) DISMISSAL

118. Since we have found that Mr Murphy was not dismissed his claim for wrongful dismissal does not succeed

HEALTH AND SAFETY DETRIMENT

Were there circumstances of danger which the claimant reasonably believed to be serious and imminent, the claimant took appropriate steps to protect himself from the danger?

119. This is an objective test for the tribunal to consider on the basis of evidence. On the facts we have found that:
    - 119.1 Mr Murphy was physically and violently assaulted by the security guard. We conclude that being subjected to an unanticipated attack causing personal injury was capable of being 'a circumstance of danger';
    - 119.2 that he was nearly strangled and had his head repeatedly banged against the wall. He was struggling to breathe and thought he was going to die. We conclude from this that Mr Murphy reasonably believed that the danger was 'serious and imminent'; and
    - 119.3 that he acted in self defence in other words he was attempting to mitigate the danger by defending himself. We consider that this was an appropriate step in the circumstances. At the point of the attack, Mr Murphy did not have the option of taking alternative steps of walking away or seeking help and it took time for the other security guards to notice and intervene.

Did the following occur and were they detriments?

120. We accept that the acts occurred since they were largely not disputed (see paragraph 87). The main issues was whether any of the acts / omissions complained of constituted a detriment.

The decision to suspend the claimant

121. A suspension can have both a emotional and economic impact on the person who is suspended. Whether it is a detriment depends on the circumstances. Factors to consider include the seriousness of the allegation, its impact on reputational damage and the strength of the evidence (**Gogay**) along with in appropriate cases an assessment of risk of repetition (**Crawford**). It should not be a knee-jerk reaction.

122. In his closing submissions the respondent sought to distinguish **Gogay** on the basis that a significant factor was that the suspension was for Mr Murphy's own protection. However we did not find that Mr Murphy was in fact suspended for this reason (see above). Nor did we find that he was suspended because he posed a risk to others.

123. Both **Gogay** and **Crawford** on the facts concerned serious allegations, and therefore we do not consider that this alone made it reasonable to suspend Mr Murphy. In Mr Murphy's case we considered that a highly relevant factor was the strength of the evidence before Mr Briggs (the decision-maker): in particular that there was strong evidence in favour of Mr Murphy's defence of self-defence which Mr Briggs ignored (for the reasons explained above). Further there was an emotional impact on him in that he struggled with the fact he was 'suspended for defending himself' and not seen as a victim of a violent attack (see resignation letter). Further there was a financial impact on him of being suspended. We therefore conclude that suspending Mr Murphy put him at a disadvantage and was a detriment.

Fail to give the claimant time to recover from the attack; in particular by calling him to a meeting the following day to ask him about what happened

124. We do not consider that this was a detriment. On Mr Murphy's own evidence he was happy to attend this meeting. Further this conduct was by CIS agency and not the respondent.

Not record the claimant as off sick

125. We do not consider that this was a detriment. There was no evidence that Mr Murphy was put at any disadvantage by this failure: he was paid for this period and there was no suggestion that his non-attendance at work in the period prior to his suspension was without permission or carried any stigma.

Fail to report the incident to the police

126. We do not consider this was a detriment. There was no evidence that Mr Murphy was put at any disadvantage by this failure for the reasons set out above.

<u>Fail to report the incident in accordance with respondent's reporting of violence policy</u>

127. We do not consider that this was a detriment. There was no evidence that Mr Murphy was put at any disadvantage by this failure, since a report had already been filed by Ms Casserly. Mr Murphy failed to explain in evidence why he considered that this put him at a disadvantage, other than that he considered that it was a breach of an unspecified policy.

<u>Fail to contact the claimant during his suspension to check on his welfare</u>

128. For the reasons set out above in paragraph 97-102 we consider that the limited support that Mr Murphy received from the respondent during his suspension was wholly inadequate, and that the respondent were under an obligation to provide him with welfare support during his suspension. Whilst we do not consider that this failure was sufficiently serious on its own to breach the implied term of trust and confidence but we do consider it was a breach of the duty of care towards him and sufficiently serious to constitute a detriment. Mr Murphy was clearly 'struggling' and he did not receive the support he should have received over the period of his suspension.

<u>Pursue disciplinary proceedings against the claimant;</u>

129. We do not consider that it was reasonable for Mr Murphy to view this as a detriment. Whilst we appreciate his frustration that the matter had not been dismissed following investigation, it was reasonable for Mr Briggs to refer the matter for a disciplinary hearing to consider the issue of culpability and whether Mr Murphy was acting in self-defence.

<u>Issue the claimant with a first written warning.</u>

130. Although a first written warning could be considered to be a detriment, on the facts of this case we do not consider that it was since we have found that it was only done to reflect Mr Murphy's conduct prior to the altercation. Further it was not reasonable for Mr Murphy to view it as a detriment (if indeed he did). This is because he accepted at the time that this was in relation to his part in the banter and was an implicit acceptance of his position that he acted in self-defence.

<u>Were the detriments (found proven) done on one or more of the pleaded grounds?</u>

<u>Suspend the claimant</u>

131. Mr Biggs suspended Mr Murphy because of his part in the physical altercation and because he failed to take into account that Mr Murphy was acting in self defence. We therefore find that the suspension was 'materially influenced' by the action that Mr Murphy took in circumstances of danger.

132. Having found that there were circumstances of danger and that Mr Murphy was subjected to a detriment because of his actions in that circumstance of danger, the claims succeeds.

<u>Fail to contact the claimant during his suspension to check on his welfare;</u>

133. We do not know why Mr Thompson failed to contact Mr Murphy since he was not called as a witness. His failure is difficult to understand in the light of Ms O'Lone's evidence that she informed him that he should contact Mr Murphy since he was struggling. However there is no evidence from which it could be inferred that the failure by Mr Thompson was 'materially influenced' by either the fact that Mr Murphy was involved in a physical altercation or that he took steps to defend himself (acting in self defence). In the absence of any evidence we consider that the reason for the lack of contact was incompetence on Mr Thompson's part and lack of care. Therefore we do not conclude that the failure to contact Mr Murphy was 'materially influenced' by him acting in self defence in circumstances of danger.

UNAUTHORISED DEDUCTIONS

134. It was not disputed that Mr Murphy was entitled to enhancements during his suspension and that he received this payment. This claim is solely in relation to the calculation of that payment. Ms Chambers' evidence on behalf of the respondent was that the usual method of calculation was to take the average of 3 months' pay prior to the relevant date. Whilst there was no express contractual clause to this effect, that had always been her understanding and the practice applied. Mr Murphy disputed this calculation since his pay was increased on 10 May 2021 when his hours were increased; however he has not pointed to any express or implied term of his contract to suggest an alternative method of for calculating his loss of pay. Therefore we do not conclude that a higher sum was payable under the terms of his contract such as to give rise to a claim for unlawful deduction of wages.

CONCLUSION

135. We conclude that:
    - 135.1 Mr Murphy was not constructively dismissed because he had affirmed the contract prior to resigning. Therefore his claims for unfair constructive dismissal and wrongful constructive dismissal do not succeed and are dismissed.
    - 135.2 Mr Murphy's claim for health and detriment succeeds but only in relation to the decision to suspend him. His other claims for health and safety detriment do not succeed and are dismissed.
    - 135.3 Mr Murphy's claim for unlawful deduction of wages does not succeed and is dismissed.

136. A remedy hearing to determine compensation for the health and safety detriment decision to suspend the claims is listed for 14 October 2024.

____

Employment Judge Hart
Date: 19 August 2024

Sent to the parties on
Date: 19 September 2024

Public access to employment tribunal decisions
Judgment and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Appendix A: Complaints and Liability Issues agreed at the Preliminary Hearing on 26 January 2023

The Complaints

51. The claimant is making the following complaints:
    51.1 Constructive unfair dismissal;
    51.2 Wrongful dismissal;
    51.3 Detriments under s.44 of the Employment Rights Act 1996;
    51.4 Unauthorised deduction from wages.

The Issues

52. The issues the Tribunal will decide are set out below.

1. Qualifying service for unfair dismissal

1.1 Does the claimant have two years' continuous employment prior to the effective date of termination? In particular, was his continuity of employment broken during the period 17-31 March 2020?

2. Unfair dismissal

2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:

2.1.1.1 Suspend the claimant;

2.1.1.2 Fail to give the claimant time to recover from the attack; in particular by calling him to a meeting the following day to ask him about what happened;

2.1.1.3 Not record the claimant as off sick;

2.1.1.4 Fail to report the incident to the police;

2.1.1.5 Fail to report the incident in accordance with respondent's reporting of violence policy;

2.1.1.6 Fail to contact the claimant during his suspension to check on his welfare;

2.1.1.7 Pursue disciplinary proceedings against the claimant;

2.1.1.8 Issue the claimant with a first written warning.

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.1.2.2 whether it had reasonable and proper cause for doing so.

2.1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal, i.e. what was the reason for the breach of contract?

2.3 Was it a potentially fair reason?

2.4 Did the respondent act reasonably in all the circumstances?

5. Detriment (Employment Rights Act 1996 section 48)

5.1 Did the respondent do the following things:
- 5.1.1 Suspend the claimant;
- 5.1.2 Fail to give the claimant time to recover from the attack; in particular by calling him to a meeting the following day to ask him about what happened;
- 5.1.3 Not record the claimant as off sick;
- 5.1.4 Fail to report the incident to the police;
- 5.1.5 Fail to report the incident in accordance with respondent's reporting of violence policy;
- 5.1.6 Fail to contact the claimant during his suspension to check on his welfare;
- 5.1.7 Pursue disciplinary proceedings against the claimant;
- 5.1.8 Issue the claimant with a first written warning.

5.2 By doing so, did it subject the claimant to detriment?

5.3 If so, was it done on the ground that, in circumstances of danger which the claimant reasonably believed to be serious and imminent, the claimant took appropriate steps to protect himself from the danger?

7. Unauthorised deductions

7.1 Did the respondent make unauthorised deductions from the claimant's wages during his period of suspension and if so how much was deducted?