EMPLOYMENT TRIBUNALS

Claimant: **Miss M L Fiske**

Respondent: **Cygnet (DH) Limited**

HELD at Teesside Justice Centre **ON: 25 and 26 November 2024**

BEFORE: Employment Judge Aspden (sitting alone)

REPRESENTATION:

Claimant: **Mr Lloyd (claimant's father)**
Respondent: **Ms Ismail, Counsel**

JUDGMENT having been sent to the parties 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

1. The claimant was employed by the respondent until her dismissal. She brings a claim that her dismissal was unfair, contrary to the Employment Rights Act 1996.

Findings of fact

2. The claimant is a registered mental health nurse who qualified in 2004, and at the time of the events which led to her dismissal she had 20 years' experience in that role as a registered mental health nurse.
3. The claimant started working for the respondent in 2010. At the time of the events that led to her dismissal she worked at a facility that provides neuropsychiatric care and rehabilitation to those affected by acquired brain injuries. Some of the respondent's patients can demonstrate aggressive or otherwise challenging behaviour and the claimant had extensive personal experience of dealing with such

patients. She had been assaulted on several occasions. One assault in particular was especially violent and traumatising for the claimant. It is not disputed that the claimant was hospitalised and off work for several months suffering from Post Traumatic Stress Disorder in addition to physical injuries following an assault and she received CBT from her GP. The claimant had suffered broken bones including a broken leg in that incident. The claimant recovered physically from the assault but the memory remained with her and occasionally she suffers from recurring memories of the moment when that assault took place.

4. The respondent's staff received training on how to manage difficult situations including de-escalating violent or potentially violent situations, as well as how to safely and appropriately restrain patients where necessary. The claimant had received such training. At the time of the incident that led to the claimant's dismissal she was overdue some refresher training. There was no evidence before me that the claimant had ever indicated to her line manager or anybody else in a position of authority with the respondent that she believed her skills had atrophied or become stale or that she did not feel sufficiently skilled to deal with challenging behaviours.

5. On 23 January 2024 there was an incident involving a patient. The patient was behaving aggressively towards staff. The claimant was the senior nurse on site. The claimant became involved in the incident. The incident was captured on CCTV albeit it without sound. The claimant's case is that she instinctively raised her leg to defend herself from home. The respondent's is that she kicked out at the patient, whether or not the claimant actually made contact. When deciding whether the claimant was unfairly dismissed it is not for me to make findings of fact as to what I conclude happened. That is because my view as to what happened is not relevant to the question of whether the claimant was unfairly dismissed.

6. The claimant was shaken by the incident, both because of the way in which it had escalated and the extent of the confusion at the time and also because of the way she had reacted.

7. Immediately afterwards the claimant could not recall the exact nature of her involvement. She asked a colleague if she had actually kicked the patient or had the patient kicked her. That same day, straight after her shift ended, the claimant gave an account of what had happened to her line manager Mr Jones. In doing that she told Mr Jones that she had, in her words, 'done something really bad.' She said that in self defence she had raised her leg and it looked like she had kicked the patient. I accept the claimant's evidence that she did not herself use the word 'retaliate' on this occasion. When Mr Jones gave an account later in an email on the 25th, after he had viewed the CCTV footage, he put quote marks around words the claimant had used when reporting the matter to him. He did not put quote words around the word 'retaliated' which supports the claimant's evidence that she did not use that word herself.

8. On that same day, Mr Jones telephoned Mrs Yarker saying the claimant had told him she had retaliated in self-defence. Mr Jones also reviewed the CCTV footage as did Mrs Yarker.

9. Mr Jones also on that day then made a statutory report to the CQC. That is at page 77 of the bundle of documents. He referred to the incident and said that the patient had kicked one of the nurses and the nurse had 'retaliated by kicking in her right inner thigh.' He went on to say that the nurse (ie the claimant) had

'immediately realised what she had done and removed herself from the incident' and had reported herself to the management team. He said the claimant had been temporarily suspended until further investigation had taken place, although in fact she had not been suspended at that point.

10. Also on 23 January, Mr Jones completed a safeguarding form in which he described the incident and the claimant's actions in essentially the same terms as in the statutory report to the CQC.

11. The next day Mrs Yarker made a report to the police as the respondent was required to do. Mrs Yarker also sent an email that day to two individuals at the CQC. In that report she said 'a patient assaulted numerous members of staff and a registered nurse retaliated and kicked the patient on the thigh.' She said that the nurse (ie the claimant) was to be suspended whilst an investigation was completed. There was also a reference in this email to two bank workers who 'took hold of the patient' Mrs Yarker said those bank workers were also under investigation and a decision had been taken that they were not to be permitted to pick up shifts pending that investigation.

12. On 25 January Mrs Yarker met with the claimant and told the claimant she was being suspended. During that meeting the claimant told Mrs Yarker 'I stretched my leg out towards her [the patient]'. Mrs Yarker asked 'a kick?' and whether the claimant had made contact and the claimant said she may have done. Mrs Yarker told the claimant she would be supported and kept informed of the progress of the investigation and that a Ms Hemblade would be the claimant's point of conduct.

13. At or after that meeting Mrs Yarker provided the claimant with a letter confirming her suspension. She said 'I confirm you are suspended until further notice pending an investigation into serious misconduct in relation to the allegation'. The letter went on to describe the allegation as follows: 'Allegation of inappropriate or aggressive behaviour towards an individual in our care and serious breach of trust and confidence. Alleged on Tuesday 23 January 2024 at approx 8am you physically assaulted a patient by way of kicking them.'

14. On 25 January Mr Jones also sent an email to Mrs Yarker (page 492 of the bundle) in which Mr Jones referred to the claimant having retaliated in self-defence.

15. On 30 January Mrs Yarker completed a timeline, a '72 hour report', in which she set out an account of her understanding at that stage of the investigation. She had seen the CCTV footage by then and said 'MF was seen on CCTV to kick the patient... It is unknown if the kick made contact with the patient, however the patient was seen to recoil following the kick'. In that document Mrs Yarker also said the claimant 'is then seen extending her leg toward patient. Unsure if contact made. However patient is seen to recoil. The patient is placed in hold by two staff members and drops to the floor and the staff let go.'

16. Mr Skelton was asked to conduct an investigation. He is no longer employed by the respondent. He was on annual leave until 30 January. That meant he could not start his investigation before then.

17. By 12 February the claimant had heard nothing further about the investigation so she sent Ms Hemblade a message by text to ask if there is any progress. Ms Hemblade replied 'Hi I haven't heard anything' and then sent another message shortly afterwards saying 'I honestly don't know anything I've been kept out of the investigation.' Nobody else contacted the claimant to update her as to progress.

18. As part of his investigation Mr Skelton looked at the CCTV footage. He also interviewed the claimant and a number of other people. The first of the interviews took place on 27 February, which is more than a month after the claimant had been suspended. The reason Mr Skelton did not interview anyone until 27 February was that some of the staff who had witnessed or been involved in the incident were bank staff and Mr Skelton waited until they were scheduled to work a shift before speaking with them.

19. Three individuals were interviewed on 27 February. The next day, the claimant was contacted by telephone and asked to attend a fact finding meeting on the 29th and she did so on that date. Mr Skelton also had a fact finding meeting with two other members of staff on that date.

20. In the claimant's meeting the claimant was shown the CCTV footage. She was asked to give her account and she said, talking about the patient, 'she went towards me aggressively so I tried to stop her coming further towards me and I kicked her to stop her advancing.' The claimant was asked if it was the first time she had reacted in that way and she said it was. Mr Skelton asked her what she thought made her react in that way and she said she was not sure. She referred to the incident in 2011 when she was violently assaulted by a patient and sustained broken bones. Mr Skelton asked her why she had not retreated into the office on this occasion and the claimant said her way had been blocked by others. The claimant referred to the fact that other staff attempting to deal with the situation before she became involved were inexperienced and suggested that if they had not been matters would not have got quite so out of hand. There was also a discussion about the training the claimant had had.

21. The claimant asked if she could see the minutes of the meeting (there was somebody there taking minutes). They were typed up after the meeting and the claimant was given 10 minutes to review them in a busy reception area. She made some handwritten notes and gave them back.

22. On 5 April the claimant received a telephone call from a hospital receptionist who told the claimant that the fact finding meeting had to be repeated, giving the reasons that the right questions had not been asked, and the claimant was asked to attend another meeting on 9 April. The claimant asked for copies of all the witness statements from the first set of meetings but was told they were irrelevant and would be destroyed. The claimant asked why and convinced the receptionist to send her all of those statements or interview records and the claimant did receive them when her disciplinary hearing was arranged.

23. The second meeting between Mr Skelton and the claimant took place on 9 April. Mr Skelton referred to incident reports from earlier incidents, referred to as 'pink notes.' He asked why the claimant had not responded in a similar manner on those occasions and the claimant explained that the patients had not been as violent and were better known to her and because of that she had a clear understanding of how to de-escalate their behaviour. The claimant was asked again why she had responded in the way she had on the 23rd and she said: there was a lot going on; staff had been assaulted; she felt that the patient had 'fixed her gaze' on her; other staff members were not listening to her directions to take hold; and she felt she was in danger. Mr Skelton asked what was it about this incident which elicited the response to kick the patient and the claimant responded that she had had flashbacks of her leg being broken and felt she was at serious risk of injury. She referred to having had therapy for her injury and said it was a 'flight or fight reaction'.

24. On 9 April Mr Skelton also spoke again to some of the other individuals he had previously interviewed.

25. The respondent has given inconsistent explanations for the decision that Mr Skelton should reinterview some people including the claimant. It has been suggested this was done because further information came to light. That does not explain why it was necessary to interview others, and the questions asked of them both before and after in the first and the second interview do not support that proffered reason. The respondent also suggested that some individuals were asked 'closed questions' in the first instance and that this was inappropriate. I do not accept that as an explanation having read what was said in the first and second interviews.

26. I find it more likely than not that the reason Mr Skelton reinterviewed the claimant and others is that, the first time around, he simply did not ask the questions he later believed he should have done. That is the reason the claimant was given when she was told there was need for further interviews. I find that the questions that were asked the second time around could have been asked the first time people were interviewed. Had that happened, and had Mr Skelton started the interviews sooner, he could have completed his report much sooner than he did.

27. On 12 April Mr Skelton completed an investigation report. In it he described the point at which the claimant kicked out or raised her leg. He said there were staff members on each arm with a number of staff in front of the patient, behind her and in the doorway. He said 'at this stage the patient is kicked by the claimant.' The claimant takes issue with that description. She says it is not an accurate reflection of what the CCTV showed. She says in her witness statement the patient was plainly not being restrained, although in cross-examination she accepted the CCTV footage appeared to show staff had the hold of the patient's right arm. I find as a fact that the decision to dismiss was not taken by Mr Skelton, it was taken by Mrs Yarker who formed her own view on what had happened.

28. On 17 April the respondent sent the claimant a letter requiring her to attend a disciplinary hearing on 26 April. The allegation she was required to answer to was an allegation that the claimant 'attempted to assault a patient by kicking them.' The claimant was provided with the investigation report by Mr Skelton and the interview notes and various other documents.

29. On 26 April the disciplinary meeting took place. It took an hour and 15 minutes with a break. Notes were taken. I do not need to recount in detail what was said at that meeting as the notes record it. During the meeting the claimant accepted she may have kicked the claimant. She explained her conduct was a response to feeling frightened that she was going to be kicked in the leg by the patient. She was asked to explain how she would respond in future. The claimant's response is as set out in the notes, including the response she gave after a short break.

30. Following that meeting Mrs Yarker decided to dismiss the claimant.

31. There has been a suggestion in these proceedings that the decision to dismiss was pre-determined ie made before the hearing. I note that Mrs Yarker had been involved at an early stage and had said in a document ahead of the meeting that the claimant had 'retaliated'. However, having heard evidence from Mrs Yarker and considered what was discussed at that disciplinary hearing I am satisfied that she went into this meeting with a sufficiently open mind, recognising that there had been further developments since she had made that reference to retaliation and

that she listened to what the claimant had to say. I find that it is more likely than not that Mrs Yarker did not pre-determine the outcome of the disciplinary meeting.

32. After the meeting Mrs Yarker decided to dismiss the claimant.

33. On 1 May the claimant was sent a letter saying she was summarily dismissed. The reasons given for dismissal were set out as follows:

> *'On 23rd January 2024, whilst on duty …you admitted attempting assault on a service user. During our meeting you acknowledged that you assaulted a service user on 23rd January and that you made contact with the service user via a kick.*
>
> *During our meeting you stated that you had been assaulted in Cygnet Victoria House in 2011 where you sustained a significant injury to your knee. You stated this was a mitigating circumstance to the reason why you had attempted to assault the service user. However, during our meeting you also confirmed, following the incident in 2011, you had experienced being assaulted on numerous times …Despite receiving injuries [on those occasions] you had not retaliated. During our meeting, whilst I acknowledge your remorse at the incident, I felt you did not provide sufficient explanation regarding steps you would take to prevent a similar situation occurring again.'*

34. That letter was somewhat ambiguous as to whether Mrs Yarker believed that the claimant had actually assaulted the patient or believed that the claimant had just attempted to assault the patient, which is what the claimant had been told the allegation was. In evidence Mrs Yarker said the reason she dismissed the claimant was that she believed the claimant had attempted to kick the patient. Having heard evidence from Mrs Yarker and having considered that letter, I find that Mrs Yarker believed the following had happened: the claimant had not merely raised her leg to block an approach or attack by the patient but rather had aimed a kick at the patient and, whether or not the claimant's foot had made contact with the patient, the claimant had tried to assault the patient by trying to kick her. It is that belief that was Mrs Yarker's reason for dismissing the claimant.

35. I find that, in reaching that conclusion and in assessing the claimant's culpability, Mrs Yarker considered what the claimant had to say about the circumstances and acting in self defence. Mrs Yarker formed a view (based mainly on the CCTV footage that she viewed many times) that the claimant was not being attacked at the moment she kicked out. Mrs Yarker considered whether the claimant had, nevertheless, been acting to defend herself, being fearful of attack. She came to the conclusion that, even if she had, the claimant's actions still amounted to gross misconduct because, Mrs Yarker believed, there were other ways she could have protected herself; in particular Mrs Yarker did not accept that the claimant could not have retreated.

36. In deciding that dismissal was the appropriate sanction, Mrs Yarker took into account the claimant's record of good service and the fact that this had not happened before. She believed the claimant had not done enough to satisfy her that an incident like this would not happen again if the claimant was faced with similar circumstances.

37. Two bank staff were investigated following the incident, facing allegations that they had restrained the patient inappropriately. Neither of the bank staff was as experienced as the claimant and neither was in a similar position of seniority. One

of the bank staff was in a probation period. The respondent decided not to keep that individual on beyond their probation. The other member of bank staff was retained with further training.

38. The claimant appealed on 8 May alleging that there had been a failure to follow a disciplinary procedure in a fair and transparent manner and that the penalty was unduly severe.

39. An appeal meeting was arranged for 24 May. It was conducted by Ms Bergin the operations director, from whom I did not hear evidence. The claimant prepared and submitted a six page document setting out her grounds of appeal. It included assertions that her dismissal was unfair for a number of reasons including that there had been no actual assault and that it was an inconsistent decision compared with how others had been treated who were guilty of misconduct. In respect of this latter point the claimant referred to staff she alleged had fallen asleep on duty or used their phones. She also mentioned a bank worker inappropriately restraining a patient. The claimant also referred to the fact that there had been no previous misconduct on her part and she criticised the investigation, suggesting Mr Skelton was inexperienced. She referred to the length of the investigation and the lack of contact.

40. Ms Bergin dismissed the appeal, essentially agreeing with the decision to dismiss made by Mrs Yarker. I accept that, before deciding to dismiss the appeal, Ms Bergin considered what the claimant said in her appeal letter and appeal meeting. I say that because Ms Bergin's letter of 6 June setting out the outcome addressed those matters.

Legal framework

41. An employee has the right under section 94 of the Employment Rights Act 1996 not to be unfairly dismissed.

42. When a complaint of unfair dismissal is made, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held: ERA section 98(1).

43. The reference to the reason, in section 98(1)(a), is not a reference to the category within section 98(2) into which the reason might fall. It is a reference to the set of facts known to the employer, or beliefs held by the employer, which cause it to dismiss the employee: Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. In Abernethy the Court of Appeal noted that: 'If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason'.

44. Having identified the reason (or, if more than one, the principal reason) for the dismissal, it is then necessary to determine whether that reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. In this case the respondent contends that the reason for the claimant's dismissal was a reason relating to the conduct of the claimant, which is a potentially fair reason for dismissal within section 98(2)(b).

45. Where an employer alleges that its reason for dismissing the claimant was related to his conduct the employer most show:
    45.1. that, at the time of dismissal, it genuinely believed the claimant had committed the conduct in question; and
    45.2. that this was the reason (or, if there was more than one reason, the principal reason) for dismissing the claimant.

46. The test is not whether the Tribunal believes the claimant committed the conduct in question but whether the employer believed the employee had done so.

47. If the respondent shows that it dismissed the claimant for a potentially fair reason the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) of the Employment Rights Act 1996.

48. Section 98(4) of ERA 1996 provides that:

> '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (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 it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.'

49. In assessing reasonableness, the Tribunal must not substitute its view for that of the employer: the test is an objective one and the Tribunal must not fall into the substitution mindset warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563.

50. The objective approach requires the Tribunal to decide whether the employer's actions fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439). This 'range of reasonable responses' test applies just as much to the procedure by which the decision to dismiss is reached as it does to the decision itself (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).

51. The Employment Appeal Tribunal (EAT) set out guidelines as to how the reasonableness test should be applied to cases of alleged misconduct in the case of British Home Stores Ltd v Burchell [1980] ICR 303. The EAT stated there that what the Tribunal should decide is whether the employer had reasonable grounds for believing the claimant had committed the misconduct alleged and had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

52. In that case the EAT also made clear that, in deciding whether an employer had reasonable grounds for believing that the employee had committed the misconduct alleged, the test is not whether the material on which the employer based its belief was such that, objectively considered, it could lead to the employer being 'sure' of the employee's guilt. What is needed is a reasonable suspicion amounting to a belief and that the employer had in his or her mind reasonable grounds upon which

to sustain that belief. If the employer's decision was reached his or her conclusion of guilt on the balance of probabilities that will be reasonable.

53. The concept of a reasonable investigation can encompass a number of aspects, including: making proper enquiries to determine the facts; informing the employee of the basis of the problem; giving the employee an opportunity to make representations on allegations made against them and put their case in response; and allowing a right of appeal.

54. The Tribunal must take into account relevant provisions of the In ACAS Code of Practice on Disciplinary and Grievance Procedures when assessing the reasonableness of a dismissal on the grounds of conduct. Trade Union and Labour Relations Consolidation Act. 1992 s207 and 207A. This requirement applies to the Code of Practice itself, not the guidance that accompanies it.

55. The Code says in its introduction:

> 'Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.
>
> That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:
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> - Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
> - Employers and employees should act consistently.
> - Employers should carry out any necessary investigations, to establish the facts of the case.
> - Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
> - Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
> - Employers should allow an employee to appeal against any formal decision made.
>
> It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.
>
> In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.'

56. Even if procedural safeguards are not strictly observed, the dismissal may be fair. This will be the case where the specific procedural defect is not intrinsically unfair and the procedures overall are fair (Fuller v Lloyd's Bank [1991] IRLR 336, EAT).

57. Furthermore, defects in the initial disciplinary hearing may be remedied on appeal if, in all the circumstances, the later stages of a procedure are sufficient to cure any

earlier unfairness (Taylor v OCS Group Ltd [2006] IRLR 613). The Court of Appeal noted that the Tribunal must 'determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.'

58. In applying section 98(4) the Tribunal must also ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances ie one falling within the range of reasonable responses open to a reasonable employer. As noted above, it is not for the Tribunal to substitute its view for that of the employer.

59. Inconsistency of punishment for misconduct may give rise to a finding of unfair dismissal: Post Office v Fennell 1981 IRLR 221, CA. However, in the EAT has held that inconsistency of treatment will only be relevant in limited circumstances, including where decisions made by an employer in truly similar circumstances indicate that it was not reasonable for the employer to dismiss. That approach was endorsed by the Court of Appeal in Securicor Ltd v Smith 1989 IRLR 356, CA.

60. If a claim of unfair dismissal is well founded, the Tribunal will consider whether to order reinstatement or reengagement.

61. If an Order for reinstatement or reengagement is not made, the claimant may be awarded compensation under section 112(4) of the Employment Rights Act 1996. Such compensation comprises a basic award and a compensatory award, calculated in accordance with sections 119 to 126 of the Act.

62. Section 123(1) ERA provides that, subject to certain other provisions, the compensatory award shall be such amount as is just and equitable having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

63. The compensatory award may be reduced or limited to reflect the chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed: Polkey v AE Dayton Services Ltd [1987] ICR 142.

64. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (section 123(6) of the 1996 Act).

65. Similarly, where the Tribunal considers that any conduct of the claimant prior to dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, it must reduce the amount accordingly (section 122(2) of the 1996 Act). The contributory conduct must be in some way 'culpable or blameworthy': Bell v The Governing Body of Grampian Primary School UKEAT/0142/07.

Conclusions

66. I have found that find that Mrs Yarker believed the following had happened: the claimant had not merely raised her leg to block an approach or attack by the patient

but rather had aimed a kick at the patient and, whether or not the claimant's foot had made contact with the patient, the claimant had tried to assault the patient by trying to kick her. That is the reason the respondent dismissed the claimant.

67. That is a reason related to the claimant's conduct which is a potentially a fair reason for dismissal falling within Section 98(2). Therefore, the question of whether the claimant's dismissal was fair or unfair turns on the test in Section 98(4).

68. I have considered whether the respondent carried out as much investigation into the matter as was reasonable in all the circumstances of the case. In this regard I note the following:

    68.1. Both Mr Skelton, in his investigation, and Mrs Yarker (before deciding to dismiss the claimant) viewed the CCTV footage, and in the case of Mrs Yarker did so numerous times.

    68.2. Mr Skelton interviewed the claimant twice and interviewed others. It has not been suggested there were other people who should have been interviewed but were not.

    68.3. Before making her decision, Mrs Yarker considered what had been said in those interviews. She also spoke with the claimant herself and got her version of the events at the disciplinary hearing.

    68.4. The claimant had the statements produced by others at the time of the disciplinary hearing. I am satisfied that the claimant had a chance to state her case and give her version of events.

69. It has been suggested by the claimant that it was unreasonable that she was not provided with the 'pink notes' or the email of 25th from Mr Jones. I do not accept that the claimant's ability to defend herself against the allegation she faced was adversely affected by her not having access to those documents. Not providing the claimant with those documents did not fall outside the range of reasonable approaches by an employer in any event.

70. It has also been suggested that Mrs Yarker predetermined the outcome of the disciplinary investigation. I have found as a fact that was not the case and that Mrs Yarker was sufficiently independent and undertook the disciplinary hearing with an open mind.

71. I accept that Mrs Yarker recognised in reaching her conclusions that it was important to consider what the claimant said about the reason she acted as she did. She investigated that matter and took account of what the claimant said about her reasons for acting as she did, albeit that she did not accept those reasons.

72. I have concluded the respondent did carry out as much investigation into the matter as was reasonable in the circumstances of the case.

73. I have also considered whether Mrs Yarker had reasonable grounds for believing the claimant had committed the misconduct alleged by the employer. The question is not whether Mrs Yarker could be sure of the claimant's guilt. Nor is it for me to substitute my view of the evidence and what it shows.

74. Based on the CCTV footage and what the claimant said during the disciplinary process I find that Mrs Yarker's conclusion as to what the claimant had done and the blameworthiness of it was well within the range of reasonable conclusions open to a reasonable employer. It is possible that some other employers faced with the same facts might well have reached a different conclusion; but that is not the test.

Mrs Yarker's interpretation of what the CCTV footage showed was an interpretation that a reasonable employer could reasonably put on that CCTV footage. Her conclusion that the claimant was not trying to block an attack or approach by the patient was one that was open to her on the evidence, particularly the CCTV footage. She reached the conclusion that the claimant was not acting in reasonable self-defence. That was a conclusion that was open to a reasonable employer and open to Mrs Yarker. As was her conclusion that she was not satisfied the claimant would not react the same way presented with a similar situation in the future.

75. I have considered whether the decision to dismiss the claimant was one that a reasonable employer acting reasonably could have reached ie whether the decision was within the range of reasonable responses. In this regard I note the following:

    75.1. The conduct in question was very serious. It was, in Mrs Yarker's belief, an attempted assault on a patient.

    75.2. Mrs Yarker considered the claimant's mitigation and reached a reasonable conclusion in the circumstances that the claimant's previous experiences did not excuse her behaviour.

    75.3. The claimant was in a senior position. She was experienced and she was trained. The fact that the claimant was overdue some refresher training does not fatally undermine the respondent's conclusion that the claimant knew it was not appropriate to kick out. The claimant herself has accepted that what she did amounted to misconduct of some description.

    75.4. The claimant could experience this type of behaviour again in the future. I accept the respondent needed to be confident they could trust the claimant to react appropriately.

    75.5. Mrs Yarker did not take the decision lightly. In fact it would be surprising if she had because the consequence was that they lost an experienced nurse.

76. In all the circumstances, the respondent's conclusion that there was gross misconduct by the claimant was reasonable ie it was a conclusion that fell within the band of reasonable responses open to a reasonable employer. It is possible that some other employers may have taken a more lenient or sympathetic view of the claimant's behaviour but that does not take this decision outside the range of reasonable responses.

77. The claimant raised the issue of inconsistent treatment. I don't accept that the claimant was treated inconsistently with anybody whose circumstances were truly similar. The examples given by the claimant in her appeal were not on all fours with the situation that the claimant was in: they did not include findings of attempted assault by an experienced, senior nurse.

78. I have considered whether the respondent otherwise acted reasonably and, in particular, whether the respondent acted in accordance with the ACAS Code.

79. This was a case in which there was a reasonable investigation; proper enquiries were made to determine the facts; the claimant was informed of the basis of the problem; she was given an opportunity to make representations on the allegations made against her and put her case in response; and she was allowed a right of

appeal. In all of those respects the respondent acted reasonably and in accordance with the ACAS Code.

80. However, the ACAS Code is not confined to those matters. In this case there was a significant delay in investigating this matter and bringing it to a conclusion to a disciplinary hearing. I bear in mind that the claimant was suspended at this time. The ACAS Code not only exhorts employers to deal promptly with disciplinary investigations, but also to keep suspensions as brief as they can be.

81. The investigating officer's holiday explains the delay before 30 January; I accept it was not unreasonable not to start the investigation before then. The respondent has not, however, adequately explained the further delay that occurred after the investigation started. It was said that one cause of delay was the availability of witnesses other than the claimant, especially bank staff. The respondent was waiting to interview bank staff until it needed the staff to work a shift. I accept that bank staff could not be expected to attend an investigation meeting in time they were not being paid for. What has not been explained, however, is why the respondent could not pay the bank staff for their time attending an investigation. I have concluded that the respondent's approach was not one that a reasonable employer would take.

82. I am also told that a cause of delay was the decision to reinterview people. I have found that the reason Mr Skelton reinterviewed the claimant and others is that, the first time around, he simply did not ask the questions he later believed he should have done. The questions that were asked the second time around could have been asked the first time people were interviewed. Had that happened, and had Mr Skelton started the interviews sooner, he could have completed his report much sooner than he did.

83. Looking at the circumstances in the round, including the employer's size and administrative resources and including the ACAS Code, and taking into account equity and the substantial merits of the case, I am not satisfied that in terms of the time the investigation took the respondent acted within the range of reasonable responses open to a reasonable employer. It did not investigate promptly. It could have done so. No reasonable employer would have taken as long as the respondent did to investigate what was a fairly straightforward issue especially given the existence of CCTV footage. The unreasonableness of the delay is compounded by the fact that the claimant was suspended at the time. It is even more important to deal with an investigation promptly when an employee is out of the workplace on suspension. The unreasonableness was further compounded by the lack of communication and openness with the claimant about the reasons for delay.

84. This unreasonableness was not remedied on appeal.

85. As set out below, I have found that the delay did not make a difference to the outcome: had matters been dealt with promptly the outcome would inevitably have been the same. However, as the case of Polkey makes clear, that fact does not mean I can disregard that unfairness and unreasonableness in the process.

86. I must decide whether the procedure was fair overall, bearing in mind that other aspects of the process were fair. In my conclusion, taking into account all the circumstances, the failure to deal with the investigation promptly was such a significant failing that that it is sufficient to render the dismissal unfair. The claim of unfair dismissal is well founded for that reason.

Remedy

87. There was not time to deal with remedy in its entirety at this hearing, not least because the claimant was seeking reinstatement or reengagement. However, I was able to deal with one aspect, namely the effect of the case of Polkey.

88. It is my conclusion that, if the respondent had acted reasonably by dealing with the disciplinary investigation and hearing promptly, the outcome would inevitably have been the same. That is because Mrs Yarker's conclusions were based primarily on the CCTV footage, which was unaffected by the delay. Her interpretation of that evidence would have been unchanged if she had viewed it sooner. The claimant would inevitably have been dismissed, but her dismissal would have occurred sooner than it did by a few weeks.

89. I am bound to conclude, therefore, that the claimant suffered no loss that was attributable to the actions of the respondent in unfairly dismissing her. That being the case, there will be no compensatory award in this case.

90. The hearing was adjourned to consider all other matters relating to remedy at a later date, unless the parties were able to reach agreement in the meantime.

Approved by Employment Judge Aspden

Date: 14 March 2025