



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Reid

**Respondent:** Central and North West London NHS Foundation Trust

**Heard at:** London Central

**On:** 19 and 20 October 2017

**Before:** Employment Judge Wisby

## Representation

Claimant: Mr R Owen -Thomas (Counsel)

Respondent: Ms H Patterson (Counsel)

# JUDGMENT

The claimant's complaint of unfair dismissal fails and is dismissed.

The claimant's complaint of breach of contract fails and is dismissed.

# REASONS

Oral judgment and reasons were given on 20 October 2017. Upon the request of the claimant written reasons are now provided:

## Preliminary matters

### Issues

1. The agreed list of issues was as follows:

#### Unfair Dismissal

- 1.1. Was C dismissed for a potentially fair reason within section 98(2) of the Employment Rights Act 1996? *R asserts that C was dismissed by reason of gross misconduct.*
- 1.2. Was the dismissal fair in all the circumstances (including the size and administrative resources of the employer's undertaking) and did R act reasonably in treating the allegations as sufficient reason for dismissing the employee within section 98(4) of the Employment Rights Act 1996.
- 1.3. The Tribunal must have regard to whether: (i) R genuinely believed that C was guilty of the alleged misconduct; (ii) R had reasonable grounds upon which to sustain that belief; (iii) At the point when R formed that belief it had carried out as much investigation into the matter as was reasonable in all the circumstances; (iv) The sanction imposed was reasonable, and (v) The process followed was fair.
- 1.4. If the dismissal is found to be unfair, would C have been dismissed in any event had there been no unfairness?
- 1.5. If the dismissal was found to be unfair, did C contribute to his dismissal by his own blameworthy conduct? If so, to what extent?
- 1.6. To what compensation, if any, is the claimant entitled?

#### Wrongful dismissal

- 1.7. Was the claimant entitled to notice pay under his contract of employment? *R asserts that it was entitled to dismiss the summarily for committing a fundamental breach of contract.*
  - 1.8. If so, what sum is entitled to?
2. There was no issue with the fact that the claimant was an employee with the requisite service to bring an unfair dismissal claim, that he had been dismissed and that his ET1 was lodged in the relevant time frame.

#### **Evidence before the tribunal**

3. A joint bundle split into two volumes was presented to the Tribunal.
4. The claimant provided witness evidence in support of his complaint.
5. The respondent provided witness evidence from: Michael Fullertson, Ann Sheridan and Andy Mattin.
6. Relevant CCTV footage was shown to the Tribunal.

## The Law

### Unfair Dismissal

7. Under Section 94 of the Employment Rights Act 1996 (“ERA”) an employee has the right not to be unfairly dismissed by the employer. Under Section 95 ERA the circumstances in which an employee is dismissed are set out. It is agreed by the parties in this case that the employee’s contract was terminated by the respondent without notice. In these circumstances it is incumbent upon the respondent to establish a potentially fair reason for the dismissal from the exhaustive statutory list set out in Section 98 ERA. Conduct is one of the potential fair reasons listed and that is the reason relied upon by the respondent in this case.
8. If a potentially fair reason for the dismissal is established, the Tribunal goes on to consider the fairness or unfairness of the dismissal. That assessment is governed by section 98(4) ERA. The determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer), 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 (Section 98(4)(a) ERA), and shall be determined in accordance with equity and the substantial merits of the case (section 98(4)(b) ERA).
9. In considering whether the respondent acted reasonably in dismissing the claimant it is well established that the Tribunal must not put itself in the position of the employer to consider what it would have done in the circumstances, rather it must assess whether the respondent’s actions in dismissing the claimant fell within the range of reasonable responses open to an employer in that situation.
10. For conduct to amount to gross misconduct it must be an act that fundamentally undermines the employment contract.
11. Where, as here the respondent relies on suspected misconduct as the grounds for dismissal the respondent must show:
  - 11.1. He believed the claimant was guilty of misconduct;
  - 11.2. He had in mind reasonable grounds on which to sustain that belief; and
  - 11.3. At the stage when the belief on those grounds was formed as much investigation into the matter as was reasonable had been carried out.

These principles were set out in the case of *British Home Stores Limited v Burchell* [1978] IRLR 379 and have been applied on many subsequent occasions. The burden is on the respondent to establish the first element but not the second or third.

12. In *A v B* [2003] IRLR 405 it was pointed out that:

*"Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."*

13. Case law has made it clear that the range of reasonable responses test applies not only when considering the appropriateness of the sanction but also when considering the reasonableness or otherwise of the scope of the investigations carried out by the employer (*Sainsburys Supermarkets Limited v Hitt* [2003] IRLR 23)

### **Breach of Contract**

14. Section 3 of The Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that a complaint may be brought before an Employment Tribunal by an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries), if amongst other matters, the claim arises or is outstanding on the termination of the employee's employment.
15. Where a claim of wrongful dismissal is brought (dismissal in breach of contract) fairness is not an issue, the question is instead whether there has been a repudiatory breach of contract. In assessing this, evidence discovered after the dismissal may be relied upon. This is different from the position with a complaint of unfair dismissal where the question is whether the dismissal is fair based on what the employer knew at the time.
16. The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal but the concept of repudiatory breach of an employment contract can be expressed as the conduct that "so undermine[s] the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment" (*Neary and anor v Dean of Westminster* [1999] IRLR 288, approved by the Court of Appeal in *Briscoe v Lubrizol Ltd* [2002] IRLR 607). The employee will have a claim in damages if the employer, in dismissing them breached the contract thereby causing loss. The purpose of damages is to put the employee in the position they would have been if the contract had not been breached.

### **Findings of Fact**

17. The claimant worked as a healthcare assistant for the respondent from the 16 February 2004 to 21 October 2016, when he was summarily dismissed.

18. The claimant worked on the Nile Ward, which is a psychiatric intensive care unit at Saint Charles hospital. It provides mental health care and treatment for people whose acute distress, absconding risk, suicidal or challenging behaviour requires a secure environment, beyond that which can normally be provided on an open psychiatric ward. It is accepted that the patients on this ward can be volatile and violent and therefore require specialist care.
19. The claimant gave evidence that a patient referred to as CC can be very aggressive and violent, that he was on antipsychotic medication to treat a drug induced psychosis and schizophrenia and that he had previously racially abused the claimant and threatened him with physical violence. The Tribunal accepts this evidence.
20. On 18 August 2015 an incident took place between a patient on Nile Ward, patient CC and the claimant. Patient CC ended up being physically restrained and medicated. The incident was captured on CCTV.
21. The CCTV footage (which has no sound) first shows the garden courtyard. The claimant is in the garden courtyard with patients and another healthcare assistant, Mark Ndangana. Patient CC comes across to the claimant and taps on his head. The claimant moves forward towards patient CC and makes physical contact with him. The claimant is seen swinging his keys around on a chain. He then follows patient CC around in the garden area.
22. The claimant's evidence is that he raised his arm in self-defence and stepped forward to "take a stance" in order to show that the patient's behaviour was not acceptable. The respondent's position is that in that situation the claimant should have moved back away from patient CC. There was no physical obstruction behind the claimant preventing a movement away from the patient. The claimant accepts that his training was up-to-date. The claimant's position is that he had been trained to step back and de-escalate situations where possible but where that is not appropriate to take a stance and move forward to take control of the situation. The Tribunal finds that in the garden moving back away from patient CC, in accordance with the de-escalation training that the Tribunal accepts was best practice, would have been possible for the claimant.
23. An alarm is then raised and other members of staff enter the garden. Mark Ndangana, in a statement given to the respondent, said that he told the claimant to step back from the situation, as the claimant was agitated from being tapped on the head. In his opinion had the claimant left the garden area the incident that subsequently took place in the ward would not have occurred. The claimant denies that anyone asked him to leave the garden area and stated that he felt that he had to stay for his colleague's sake.
24. The second sequence of CCTV footage from the ward area, shows the area where patient CC is heading to receive oral medication. Patient CC can be seen lunging across a corridor space to attack the claimant. Another staff member intervenes to pull patient CC off the claimant. A further flurry of activity then

ensues culminating in patient CC being restrained face down on the floor by several members of staff, he then receives medication by injection.

25. The claimant reported that he sustained injuries when patient CC attacked him and on 17 September 2015 he asked to view the CCTV footage. Paul Hill (site support manager) watched the footage with the claimant. After watching the footage Paul Hill raised concerns about the claimant's behaviour both prior to and during the restraint with the matron on Nile Ward, who then contacted Stephen Parker (inpatient service manager).
26. On 21 September 2015 Stephen Parker viewed the CCTV footage. After taking internal advice Stephen Parker took the decision to suspend the claimant pending the outcome of a disciplinary investigation.
27. The claimant's suspension was confirmed by letter dated 7 October 2015. The allegations set out in that letter were, that on the 18 August 2015:
  - 27.1. *"You are alleged to have used excessive force on patient CC*
  - 27.2. *You are alleged to have struck patient CC whilst patient CC was being restrained*
  - 27.3. *That in your interactions with patient CC during this incident you did not consider the needs of the patient and that your behaviour did not meet the expectations set out in the Trust values"*
28. The incident was reported to the police and the subject of a police investigation. The police asked the respondent to put its disciplinary investigation on hold whilst their investigation took place.
29. The claimant appeared in court on 5 February 2016 and the criminal case was adjourned to 1 June 2016.
30. In March 2016 the police told the respondent they could proceed with their internal disciplinary investigation. Accordingly on 16 March 2016 the claimant was sent a letter, informing him that the internal investigation would now start and that Michael Fullerton (Older People and Healthy Ageing Manager) had been appointed investigator. Michael Fullerton was assisted by HR.
31. Investigation interviews with the staff present at time of the incident took place between 5 and 13 April 2016. The claimant was invited by letter dated 13 April 2015 to a formal disciplinary investigation meeting on 20 April 2016. The Claimant responded and said that he would be unable to provide the statement requested or attend the investigation, referring to a medical certificate that expired on 30 April 2016. He also explained that he was having a medical procedure and raised concerns that the internal investigation should not be continued until after the relevant court hearing had taken place.
32. On 11 May 2016 the claimant supplied a medical certificate signing him off as unfit until 31 May 2016. He once again raised concerns about the internal investigation continuing before the police investigation had concluded. He

explained he was therefore unable to attend the rescheduled meeting on 19 May 2016.

33. The claimant was referred by the respondent for an occupational health assessment report, which stated the claimant was to have a minor eye operation and that he would like the investigation meeting to be booked three weeks after that operation. Accordingly the respondent contacted the claimant and arranged for a rescheduled investigation meeting to take place on 13 July 2016.
34. On 1 June 2016 the police informed the respondent that the charges against the claimant had been dropped.
35. On 13 July 2016 the claimant was interviewed by the respondent.
36. Michael Fullerton's investigation culminated in a report attaching the statements taken from: Kevin Moore; Elmira Charles; Larry Olanrewaju; the claimant; Shelley Wilson; and, Mark Ndangana, together with relevant correspondence and policies. Patient CC did not make a complaint at the time of the incident. He was not interviewed by the respondent as his therapeutic needs needed to be taken into consideration, there was CCTV footage of the incident and his witness evidence would not be conclusive.
37. The investigation report describes the exchange between patient CC and the claimant that began in the garden area and continued on the ward. The investigation report sets out the statement of case in relation to each allegation. The conclusion in summary for each allegation were:
  - 37.1. In relation to allegation one, that "deciding if excessive force was used by [the claimant] is difficult to measure". "It was clear from the CCTV footage and all the witness statements and interviews that force was used in respect of the physical restraint carried out. It was also clear that some of the actions and techniques were not approved or recognised techniques for de-escalation or physical restraint". It was concluded that considering all the evidence it was clear that force was used in the restraint and in using unapproved techniques the claimant can be viewed to have compromised the safety of the physical intervention carried out.
  - 37.2. In respect of allegation two, that the evidence was weighed towards the fact that the claimant did twice throw punches that appear to make contact with patient CC and that the evidence given by the claimant was not consistent with the visual evidence of the CCTV footage.
  - 37.3. In relation to allegations three, it is highlighted that a relevant policy states "wherever possible do not compromise the patient's sense of personal space" and "ensure that your non-verbal communication is non threatening - avoiding sudden movements and maintain an open and relaxed posture". That relevant training advises that backing away and keeping a safe distance are part of the de-escalation process and that Mark Ndangana states that he asked the claimant to leave, as he felt it was aggravating the

situation and finally that the CCTV showed the claimant's non-verbal communication and body language to be "combative and threatening" and certainly not what would be acceptable under the Trust's Expected Standard of behaviour work.

38. It was therefore recommended that the case be heard by disciplinary panel and that as part of any formal proceedings Mark Ndangana, healthcare assistant and Shelley Wilson, the Therapeutic Management of Violence and Aggression Clinical Trainer (TAMVA), should be called as witnesses.
39. On 8 September 2016 the claimant was invited to a disciplinary hearing. The hearing was chaired by Ann Sheridan (Borough Director, Kensington and Chelsea Mental Health Services) and assisted by Josie Potts, Head of Employee Relations. The disciplinary invite letter sets out that Mark Ndangana and Shelley Wilson will be called by the respondent as witnesses. It also asks for the names of any individuals that the claimant intends to call as witnesses. The letter notes that it is the claimant's responsibility to make arrangements for the attendance of any witnesses he wishes to call.
40. The disciplinary hearing took place on 6 October 2016. The claimant, who did not call any witnesses but was accompanied by his union representative, submitted a written statement, which was considered by the panel.
41. As part of the evidence heard at the disciplinary hearing, Shelley Wilson explained that the claimant's lunge in the garden area towards patient CC was not appropriate and that ideally the claimant would have removed himself from the situation. It was also explained by her, as an expert in the management of violence and aggression, that when a patient touches a member of staff the member of staff should step back from the "fighting arc" but instead the claimant had moved forward into the patient's personal space, that the hand action shown on the CCTV looked like a punch and was aggressive. Mark Ndangana explained to the panel that he had asked the claimant to step aside because he felt that it would diffuse the situation in the garden, that he felt the restraint was carried out properly but the claimant should have stepped away from the situation. The claimant was asked whether he would do anything in hindsight differently. In response he said would do the restraint the same and did not know if he would do anything differently in the garden or ward. It is accepted that the claimant's position regarding this lack of insight was a significant concern to Ann Sheridan; her genuine concern being that should a similar set of circumstances arise, there was a real risk that the claimant would behave in the same way, due to a lack of insight into his actions. The disciplinary hearing ran from 9:30 am to 4 pm. It is accepted that both sides had a full opportunity to put forward their cases, that the allegations were fully understood by the claimant and that both parties provided relevant evidence.
42. At the conclusion of the disciplinary hearing the claimant was informed that the panel would like to consider their position, review the training material around de-escalation, check on the police action regarding the patient and review the CCTV footage without the running commentary before reaching a decision.



43. On 21 October 2016 Ann Sheridan wrote to the claimant to confirm the decision reached was to dismiss the claimant for gross misconduct with immediate effect. The letter initially dealt with the chronology in relation to the claimant's illness and police investigation, it also dealt with the issue of the claimant requesting his own copy of the CCTV footage, that the footage had been provided with pixelated images of patients on 27 July 2016, then when the claimant experienced difficulties viewing the footage, the respondent had offered opportunities to the claimant to assist in accessing the footage. The Tribunal accepts that the claimant saw the CCTV footage several times before the disciplinary hearing and reasonable assistance was offered to provide access to the footage. The disciplinary outcome letter then set out a mixture of bullet points with the panel's findings and bullet points setting out the claimant's defence to the allegations. Ann Sheridan accepted in evidence that the outcome letter could have been written more clearly to conveying a clear understanding of how the decision to dismiss had been reached. The letter also explains that Amanda Jack (Safe Practice Lead) was contacted, as the claimant had indicated she would not support the expert evidence presented by Shelley Wilson. It is accepted Amanda Jack however, did support that evidence.
44. On 3 November 2016 the claimant appealed the decision to dismiss on the grounds that the sanction, in summary, was disproportionately harsh. The claimant in his appeal letter sets out various comments on the bullet points set out in the disciplinary outcome letter. The claimant's conclusion is that allegations one and two should be dismissed as he did not punch the patient and there was no evidence from Mark Ndangana and Shelley Wilson to support that. Allegation three, the claimant stated was enlarged upon and inflated and did not warrant dismissal due to gross misconduct, bearing in mind the fact that it was acknowledged that restraining techniques and training needed to be reviewed. The claimant also stated consideration should be given to the fact that he had been the victim in the episode, having sustained injuries from patient CC, which seemingly had been overlooked and disregarded by management. He stated that disciplinary action was only considered after he made clear that he intended to prosecute patient CC for his violent behaviour towards him, in line with the Trust's zero tolerance policy.
45. As part of the appeal process Ann Sheridan and Josie Potts, prepared the management response statement of case, which was provided to the claimant ahead of the appeal hearing. In that document the basis on which the decision to dismiss had been taken was appropriately set out, including that the swinging of keys in the garden area by the claimant was considered as threatening and unhelpful and that it was found that the claimant did use excessive force on patient CC in the following manner:
- 45.1. In the garden area following patient CC tapping the claimant on the head the claimant struck the patient with his left hand. It was concluded that the claimant did not raise his hand to protect himself but reacted by striking the patient under his right armpit. It was held that those actions were not in line

with the training provided to staff for managing difficult situations involving patients who are particular challenging.

- 45.2. On the ward that the claimant struck patient CC at 5:56 minutes on the CCTV footage, as the patient was being restrained to the ground whilst in a restrained hold, and the claimant struck patient CC at 6 minutes on the CCTV footage as the patient was being restrained on the ground.
46. It was acknowledged in the management response statement of case that other staff involved in the restraint did not state they saw the claimant strike the patient, however, Mark Ndangana did state he saw the claimant move his arm up and down during the restraint. It was set out that the panel concluded that the claimant did strike the patient on two occasions. The claimant's explanation that the reason his arm was raised at 5:56 on the CCTV footage was due to him trying to hold the patient's shoulder was not accepted. It was concluded instead that the claimant appears to make a manoeuvre that shows him striking the patient as the patient is falling to the ground. At 6 minutes on the CCTV footage, the claimant's explanation for his arm going rapidly back and then forwards, making contact with the patient, was as a result of trying to gain momentum to push his arm underneath the patient to release patient CC's hand. The panel concluded that the claimant's arm did not appear to be going underneath patient CC and that his explanation for this act was not accepted. In evidence to the Tribunal the claimant stated that it had been his left hand that had been trying to release patient CC's hand from underneath him and that his right hand (the one that is seen going back and forward) is being used to aid his balance. This explanation is not accepted by the Tribunal. In relation to allegation three, the panel concluded that as patient CC viewed the claimant as a target, had he retreated it was probable that the incident on the ward may not have occurred. It was concluded that the claimant's interactions with patient CC both in the garden and ward area did not meet the Trust's values.
47. The conclusions in the management response statement of case, set out that based on the evidence heard the claimant did strike the patient on two occasions and that he did use excessive force both in the garden area and during the restraint. Ann Sheridan therefore stood by the decision to summarily dismiss. It is accepted by the Tribunal that the decision was not taken lightly. It was stated in the management response statement of case that given the claimant's position and role that his actions during the restraint did not support the therapeutic management of patient CC, in that it is never appropriate to strike a patient, therefore there was not enough trust and confidence left in relation to the claimant to allow him to continue in his role and dismissal was the only option.
48. The appeal hearing took place on 8 December 2016. The appeal was chaired by Andy Mattin (Executive Director of Nursing and Quality) supported by Stephen Cook, Director of Nursing for Jameson division and Jane McVey, Director of People and Organisational Development. The claimant was accompanied by his representative. The CCTV footage was reviewed as part of the appeal process.

49. The appeal outcome was sent to the claimant on 20 December 2016. The claimant disputed that he had struck patient CC and stated that his actions were in response to aggression from the patient, that the police charges had been dropped and therefore the Trust should dismiss the charges, which he considered were based on lies. The claimant's position was that evidence had been accepted from a trainer, which was theoretical and did not take account of the challenges of managing violent patients in the ward environment.
50. The appeal panel was satisfied both from the evidence presented by management and from their own viewing of the CCTV footage that the claimant did strike the patient with excessive force and that this was not acceptable behaviour in any circumstances.
51. The appeal panel considered whether the sanction of dismissal was proportionate and reasonable in all the circumstances and found that the claimant's actions breached the trust and confidence in him as an employee. In addition it was found that the claimant showed no insight into his behaviour and the effect of his actions.
52. In relation to timescales the appeal panel acknowledged the time lapse due to police proceedings and the claimant's sick leave but took the view that it did not invalidate the decision to proceed with the case and the disciplinary panel had been able to examine detailed evidence through CCTV and witness statements.
53. The appeal panel after considering all the evidence presented agreed that the decision to dismiss was fair and reasonable in all the circumstances and therefore upheld the decision to dismiss.
54. A section of the CCTV footage at 6:46 minutes was highlighted to the Tribunal during the respondent's evidence that had been not been identified or relied on at the disciplinary stage, showing the claimant's knee moving back and then rapidly moving forward towards the Claimant's head.

### **Submissions**

55. Both parties made oral submissions. In their submissions Counsel set out the law that applies in this case.
56. On behalf of the claimant in relation to the issue of liability, the claimant's representative, in summary, submitted that the key issue in this case was whether there were reasonable grounds on which the respondent could sustain their belief in the misconduct. The claimant's representative put forward the position that reasonable grounds did not exist, due to the lack of witness evidence supporting the allegation from those present at the time, the claimant's explanation of his movements and it was submitted that the CCTV footage did not clearly show the claimant striking patient CC.
57. The respondent representative also focused on the reasonable grounds test, setting out that in their view there was cogent evidence to support the allegations,

not least the CCTV footage, which in their submission clearly showed the claimant striking patient CC.

58. The Tribunal considered the parties' submissions and legal arguments.

## **Conclusions**

### Unfair Dismissal

59. There is no dispute between the parties that the claimant was dismissed by reason of conduct and that is a potentially fair reason for dismissal.

60. It was accepted by the claimant that the respondent genuinely believed that the claimant was guilty of the misconduct complained of. The Tribunal finds in any event that this was the case.

61. The Tribunal needs to consider did the respondent have reasonable grounds for the belief in the misconduct and at the stage when the belief on those grounds was formed had as much investigation into the matter as was reasonable been carried out.

62. The Tribunal finds that the respondent, based on the CCTV footage, expert evidence and Mark Ndangana's statement did have reasonable grounds for their belief in the misconduct. A detailed investigation was undertaken by Michael Fullerton. There was no suggestion that a relevant person, other than the patient, had not been interviewed. It is accepted that it was reasonable not to interview the patient as his therapeutic needs needed to be taken into consideration and CCTV footage was available. It is accepted CCTV is used on the ward for the very reason that witness evidence of such events tends to be unreliable due to the rapid nature of the incidents, the heightened emotions and in the case of patients, the potentially effects of medication. CCTV footage of the incidents was carefully examined on several occasions. Evidence was taken from an expert in the management of violence and aggressive behaviour, as to what was witnessed on the CCTV footage and what would be the appropriate actions for staff to take based on the training provided; that evidence was that the claimant's actions were not recognised and authorised techniques and that the claimant had instead deliberately struck the patient. It is accepted by the Tribunal that the attack on the claimant by patient CC was sudden and that the focus of other people present was on the patient. The Tribunal finds that because CCTV footage was available, the fact colleagues did not report seeing the claimant strike the patient did not undermine the decision taken. Accordingly the Tribunal finds at the point when the respondent's belief was formed that it had carried out as much investigation into the matter as was reasonable in all the circumstances.

63. Moving on to whether in the circumstances the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant, the Tribunal finds that the respondent did act reasonably in treating the misconduct as a sufficient reason for dismissing the claimant. It is accepted by the Tribunal that any differentiation in relation to the treatment of the claimant

compared to others involved in the incident was due to the fact that other members of staff were not recorded on the CCTV footage as appearing to deliberately strike the patient. There was no dispute that where an employee deliberately strikes a patient in a restrained situation that would be totally unacceptable behaviour. The Tribunal is satisfied that Ann Sheridan fully considered the explanation given by the claimant for his actions, to try to understand alternatives for the movements that appeared to show the claimant deliberately striking patient CC in the CCTV footage but that once she had assessed the available evidence the claimant's explanation was not accepted by her. It is accepted that Ann Sheridan was cognisant of the seriousness of the sanction of dismissal. Ann Sheridan was genuinely concerned about the lack of insight from the claimant into his actions. She genuinely considered there was not enough trust and confidence to allow the claimant to continue in his role, in light of the vulnerability of the patients requiring his care, the volatility of those patients and the fact that aggression and potential assaults to staff are unfortunately part of the role; those situations therefore need to be handled in accordance with the respondent's best practice and de-escalated wherever possible. The Tribunal accepts the respondent's reasoning was genuine, that evidence to exculpate or at least point towards the innocence of the claimant had been thoroughly considered and that the respondent's actions in dismissing the claimant fell within the range of reasonable responses open to an employer in that situation.

64. The Tribunal finds that the disciplinary process followed did not undermine the fairness of the decision. The claimant was fully aware of the allegations, the incident they related to and the seriousness of the concerns. A thorough investigation was undertaken and although the process was delayed in the circumstances of the police investigation, the claimant's ill health and the claimant's desire for the process not to continue during the police and court process, the Tribunal
65. does not find that the delays in the process undermined the fairness of the decision to dismiss.
66. The Tribunal therefore finds that the complaint of unfair dismissal is not well founded and that the dismissal was fair.

#### Wrongful dismissal

67. The question here is whether there was a repudiatory breach of contract. In assessing this, evidence discovered after the dismissal may be relied upon. This is different from a complaint of unfair dismissal where the question is whether the dismissal was fair based on what the employer knew at the time. With a complaint of wrongful dismissal the Tribunal must decide on the balance of probabilities whether there was a breach of contract. The Tribunal finds, on the basis of the CCTV footage viewed and the fact that the Tribunal did not accept the claimant's explanation for his movements that the claimant did deliberately strike patient CC whilst the patient was being restrained by several members of staff. The Tribunal finds that action by the claimant was not an approved action as part of the restraint process. The Tribunal finds that the action of striking the patient, bearing in mind the claimant's role working with vulnerable psychiatric

patients, did so undermine the trust and confidence which is inherent in the contract of employment that the respondent was no longer required to retain the claimant in their employment. The respondent was entitled to summarily dismiss the claimant in the circumstances.

Employment Judge Wisby on 13 November 2017