

# THE INDUSTRIAL TRIBUNALS

CASE REF: 15481/20

**CLAIMANT:** Kevin Morgan

**RESPONDENT:** Northern Health & Social Care Trust

## JUDGMENT

The unanimous judgment of the tribunal is that the claimant was not unfairly dismissed and therefore his claim is dismissed.

### CONSTITUTION OF TRIBUNAL

**Employment Judge:** Employment Judge Orr

**Members:** Mr I Carroll  
Ms M J McReynolds

### APPEARANCES:

The claimant appeared and was self-representing.

The respondent was represented by Mr P Ferrity, Barrister-at-Law, instructed by the Directorate of Legal Services.

### CLAIMS

1. The claimant claims unfair dismissal. The respondent disputes the claimant was unfairly dismissed and contends that the claimant was fairly dismissed on the grounds of gross misconduct.

### ISSUES

2. The issues for the tribunal to determine were as follows:-
  - (i) Whether the claimant was unfairly dismissed for gross misconduct, whether the respondent believed that the claimant was guilty of the misconduct alleged and whether there were reasonable grounds to sustain that belief following a reasonable investigation.
  - (ii) Whether the process and penalty were within the band of reasonable responses for a reasonable employer in all the circumstances.

- (iii) Whether the decision to dismiss was fair or unfair in accordance with equity and the substantial merits of the case.

## **SOURCES OF EVIDENCE**

3. The tribunal was provided with written statements for each witness and they were cross-examined at the hearing.
4. The tribunal heard evidence from the claimant on his own behalf.
5. On behalf of the respondent the tribunal heard evidence from the following witnesses:-
  - (1) Marc Carey, Locality Manager (Investigating Officer).
  - (2) Mr Randal McHugh, Lead for Adult Safeguarding in Holywell Hospital – (Disciplinary Panel Member).
  - (3) Ms Maryna Chambers, Assistant Director of Human Resources (Appeal Panel Member).
6. On application by the respondent and with the consent of the claimant Ms Chambers was cross-examined remotely due to Covid restrictions.

## **CASE MANAGEMENT**

7. The hearing was delayed by one day because the minutes of the disciplinary and appeal hearing were not included in the tribunal bundle. Mr Ferrity, on behalf of the respondent, confirmed that these were relevant documents and were necessary for the fair disposal of the claim. They had been disclosed to the claimant by way of discovery on 20 December 2021. On the first day of hearing Mr Ferrity informed the tribunal that the respondent's representative had not included these documents in the tribunal bundle as 'nothing turned on them' and 'they were not part of the case'. The claimant was unaware that these documents were not contained within the trial bundle. On the first day of the hearing he was unable to confirm to the tribunal whether he had received these documents by way of discovery. Consequently the tribunal adjourned the hearing until day two to allow the claimant to confirm whether he had received the documents in December 2021.
8. On day two, the claimant confirmed that he had received copies of the minutes of the disciplinary and appeal hearings by email on 20 December 2021. However he had not read them. The claimant had not raised any issue in respect of the respondent's failure to include these documents in the trial bundle, prior to the hearing. However the tribunal unanimously determined that in a claim of unfair dismissal, the minutes of the disciplinary hearing and appeal hearing were relevant documents and should properly be included in the trial bundle, accordingly the respondents were ordered to provide copies to the tribunal for the purposes of the hearing.

## RELEVANT LAW

9. Mr Ferrity, on behalf of the respondent, referred to and relied on the following in his submissions:-

- (i) Part XI of the Employment Rights (Northern Ireland) Order 1996.
- (ii) Harvey on Industrial Relations and Employment Law, Division D1 - Unfair Dismissal, paragraphs [1351]-[1651].
- (iii) Harvey on Industrial Relations and Employment Law, Division D1 – Unfair Dismissal/7, paragraphs [951]-[990].

### 10. Unfair Dismissal

Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides insofar as is relevant to these proceedings;-

*“130 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

*(a) the reason (or if more than one, the principal reason) for the dismissal and*

*(b) that is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) a reason falls within this paragraph if it –*

*(b) relates to the conduct of the employee,*

*(4) where the employer has fulfilled the requirements of paragraph (1), 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.”*

11. The test to be applied in the case of an alleged misconduct dismissal is known as the “*Burchell Test*” or the “*band of reasonable responses*” test. This was confirmed by the Northern Ireland Court of Appeal in ***Rogan v South Eastern Health and Social Care Trust (2009) NICA 47*** in approving the Court of Appeal decision in ***Dobbin v Citybus Limited (2008) NICA 42***: -

“(49) The correct approach to [equivalent GB legislation] was settled in two principal cases – **British Home Stores v Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17** and explained and refined, principally in the judgements of Mummery LJ, in two further cases **Foley v Post Office** and **HSBC Bank PLC (formerly Midland Bank) v Madden reported at [2000] ICR 1283** (two appeals heard together) and **J Sainsbury v Hitt [2003] ICR 111**.

(50) In **Iceland Frozen Foods**, Browne-Wilkinson J offered the following guidance:-

“Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by [equivalent GB legislation] is as follows:-

- (1) the starting point should always be the words of [equivalent GB legislation] themselves;
- (2) in applying the section an industrial tribunal must consider the reasonableness of the employer’s conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;
- (3) in judging the reasonableness of the employer’s conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
- (4) in many, though not all, cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view, and another quite reasonably take another;
- (5) the function of an industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair. ”

(51) To that may be added the remarks of Arnold J in **British Home Stores** where in the context of a misconduct case he stated:-

“What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question ..... entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is

*in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old fashioned term such as to put the matter beyond reasonable doubt. The test, and the test all the way through is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."*

12. The Court of Appeal in ***Graham v Secretary of State for Working Pensions (Job Centre Plus)*** [2012] IRLR 759 summarised the law on fairness in misconduct cases as follows:-

*"35. ...once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.*

*36. If the answer to each of those questions is "yes" the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the*

*employee fell within the band of reasonable responses which “a reasonable employer might have adopted”. An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice.”*

13. The Northern Ireland Court of Appeal in **Connolly v Western Health and Social Care Trust [2017]** NICA stated the following in relation to dismissals for gross misconduct for a first offence:

*“[22] The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind ‘equity and the substantial merits of the case’. I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer’s decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal i.e. some lesser sanction such as a final written warning.*

*[23] The authority for the Tribunal’s statement given in Harvey, Industrial Relations at paragraph [975] is the decision of the Court of Appeal in England in British Leyland UK Limited v Swift [1981] IRLR 91. Lord Denning MR said the following at p. 93:*

*“The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said:*

*‘... A reasonable employer would in our opinion, have considered that a lesser penalty was appropriate’.*

*I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.”*

*Ackner LJ and Griffiths LJ, as they then were, gave concurring ex tempore judgments. None of those say that a lesser penalty was not a consideration that was relevant for the Tribunal to take into account. They were stating that the overall test was. I think it important to bear this in mind. Harvey also cites in support Gair v Bevan Harris Limited [1983] IRLR 368. The judgment of the Lord Justice Clerk does indeed*

*cite and follow the decision in British Leyland but it does not exclude consideration of a lesser sanction as a relevant consideration”.*

14. In ***Mbubaegbu v Homerton University Hospital UKEAT/0218/17*** the EAT held as follows (as per Choudhury J):-

*“32. ... There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely upon a series of acts, none of which would, by themselves, justified summary dismissal. As stated in **Neary**, conduct amounting to gross misconduct is conduct such as to undermine the trust and confidence inherent in the relationship of employment. Such conduct could comprise a single act or several acts over a period of time.”*

## **RELEVANT FINDINGS OF FACT**

15. The tribunal considered all the evidence presented to it both oral and documentary together with the written and oral statements of the parties and the oral submissions of the parties in reaching its conclusions. The tribunal found the following facts proved on the balance of probabilities.

### **Background**

16. The claimant was employed by the respondent as a Catering Assistant in Millbrook Resource Centre from 29 February 2016 until his dismissal on 20 January 2020 on the grounds of gross misconduct.
17. Millbrook Resource Centre is an adult day care facility within the Northern Health and Social Care Trust, located in Ballymoney.
18. A disciplinary investigation was instigated by the respondent in relation to allegations of misconduct arising from the claimant’s behaviour. The investigation commenced on 11 May 2017. The initial incident occurred in April 2017 and related to an allegation of threatening and aggressive behaviour by the claimant towards a Service User who was a vulnerable adult. The investigation was expanded on 26 July 2017 to include breaches of the respondent’s smoking policy and allegation that the claimant was behaving in a threatening and inappropriate manner towards staff who sought to enforce the smoking policy (4 May 2017). The investigation was further expanded on 2 January 2018 to consider allegations in respect of the claimant’s behaviour and attitude during a period of redeployment from August 2017 until December 2017, specifically his language and use of swear words and failure to follow line management procedures regarding requesting annual leave.
19. As the initial investigation related to a Service User, restrictions were placed on the claimant in relation to the areas within which he could carry out his duties in Millbrook Resource Centre. On 4 August 2017, the claimant was transferred to the Portering Team in Causeway Hospital X-Ray Department pending the outcome of the disciplinary investigation. It was during the claimant’s redeployment in Causeway Hospital that further incidents of misconduct occurred and resulted in the investigation being further expanded.

20. The claimant's redeployment in Causeway Hospital ended on 18 December 2017 by reason of the conduct/behavioural issues. The claimant was, at that point, suspended with effect from 5 January 2018 and remained on suspension until his dismissal on 20 January 2020.
21. It is the claimant's case that he did not commit any acts of misconduct at all, never mind gross misconduct. It is the claimant's case that the Investigation Officer was biased as he was 'friends' on Facebook with a witness (the Manager of the Centre - Mrs Dealey) and that the Investigating Officer breached confidentiality by sharing witness statements with Mrs Dealey during the disciplinary investigation. The claimant claims that when he raised his concerns in respect of the Investigating Officer these were ignored by the respondent's Human Resources Department.

### **The Investigation**

22. Mr Carey was appointed as Investigation Officer. Mr Carey is a qualified Social Worker and at the time of the investigation he was the Manager of Hawthorne Adult Centre in Carrickfergus. The tribunal finds that in his professional capacity as a qualified Social Worker he had considerable training and experience of conducting investigations. He had been employed by the respondent for over 30 years and he received Investigation Officer training on 6 June 2017.
23. The tribunal was provided with Mr Carey's investigation report. This extended to over 240 pages and included 42 appendices. It contained witness statements, copies of the respondent's policies on Smoking, Core Values, Standards of Conduct and Adult Safeguarding, together with email correspondence and letters.
24. The claimant was informed of the outcome of the investigation on 12 August 2019 and advised that he would be required to attend a disciplinary hearing in due course.
25. The tribunal carefully considered the investigation report and its appendices and accepts the findings of the Investigation Officer in respect of the three incidents as set out below.

### **Incident 1 – Service User (Vulnerable Adult)**

26. The Service User incident on 26 April 2017 related to alleged aggressive and threatening behaviour towards a Service User who was a vulnerable adult with learning difficulties, in the car park of Millbrook Resource Centre.
27. Mr Walker, a Support Worker reported to the Senior Day Care Worker in Millbrook Resources Centre that the claimant had verbally confronted a Service User who was a vulnerable adult. Mr Walker gave the following account to the Investigation Officer:-

*"I was assisting a wheelchair user to be clamped onto the bus. The client involved and another client were on the bus as this time (sic). They had asked me who was going to be guide on the bus that afternoon the client in question said "Oh no. Not Old Granny" (this was a fun name that some members would have called the lady who would have been doing bus guide). Mr Morgan had been passing the bus and misheard. He thought that the*



*client has called him "Old Grumpy". Mr Morgan began to shout at the client saying "come out here (out of the bus) and say that to my face." Mr Morgan continued to shout at the client at which point the client made a middle finger gesture to Mr Morgan. This made Mr Morgan even more irate and he shouted more and began moving towards to the bus to confront the client. At this point I told the clients to lock the door of the bus to stop Mr Morgan getting on.*

...

*He was threatening the client and very aggressive. It made me very concerned for the client's safety at the time. That's why I got the clients to lock the door. For their own safety." (sic).*

28. There was no dispute that an incident took place between the claimant and the Service User. However the claimant disputed that his behaviour was inappropriate in any way. His statement to the Investigating Officer was as follows:-

*"Kevin stated that the Service User was jumping up and down on the bus tail lift and as he was walking past, the Service User started to shout abuse at him. Kevin advised that he did this on a daily basis. Kevin stated this particular Service User would call him "all the B's under the sun and make rude hand gestures towards him". Kevin advised that [the Service User's speech is unclear] and that he would sometimes struggle to understand what he says. Kevin stated that as he got level with the bus, he went to the side door of the bus as it was open and asked [the Service User] again what he had said. The side door of the bus then closed. Kevin stated "That was it". I went to get into my car to go home and at no point did Barry Walker stop me."*

29. He also stated the following to the Investigation Officer:-

*"Kevin advised that this Service User would often call him names. On one occasion, Kevin asked Gary Hayes (another member of staff) to take [the Service User] out of the canteen and Gary replied "It's the (Service User). He does what he likes." Kevin stated there are often other witnesses about when this happens and that this Service User has a history of violence and abuse."*

30. The Investigating Officer's conclusion on this incident was as follows:-

*"There is no disputing the fact that a conversation did occur between Mr Morgan and the Service User. Additional evidence is that the Service User himself described the incident to his family and was observed after by staff to have become more unsure and afraid of Mr Morgan. He was tearful and angry. There are indications that for a period of time he experienced an upsurge in Epileptic activity, which may or may not have been as a result of the incident. All four care staff (including the Manager, Senior Day Care Worker and Service User's Keyworker) noted changes in how the Service User presented following this incident.*

...

...

*Therefore my opinion, from the information that I have collected I believe that Mr Morgan did indeed speak to the Service User in a manner and tone that would not be in keeping with what I would expect from any NHSCT staff member. And clearly the longer impact that this has had on the Service User was very real and potentially caused an increase in anxiety and physical health. I also believe that Mr Morgan was well aware that this man was a vulnerable adult who deserved care and compassion, regardless of his behaviour towards Mr Morgan. I believe in this instance he received neither of these from Mr Morgan.”*

31. It was the claimant’s position throughout the disciplinary process and of the tribunal that his behaviour was not aggressive and that he only asked the Service User a question twice which he believed was entirely appropriate.

### **Incident 2 – Smoking Policy and Aggressive Behaviour**

32. Incident 2 relates to allegations that the claimant was in breach of the respondent’s Smoking Policy by reason of the frequency of his smoke breaks, despite verbal and written reminders from management in respect of same. There was also a related allegation that the claimant was aggressive, abusive and intimidating towards his Line Manager (Mrs Linda Dealey) when she attempted to address this with him.

33. The claimant stated the following to the Investigating Officer in respect of this allegation:-

*“Kevin advised that Linda Dealey was under the ‘illusion’ he was out smoking when he wasn’t; Kevin further advised he was out to ‘cool down’ as he has high blood pressure and it gets very hot in the kitchen and Health and Safety and Unison rep permitted him to do this.”*

34. The conclusion of the investigation into this incident was as follows:-

*“Mr Morgan was observed on many occasions taking excessive smoke/vape breaks. The agreement set aside in Mr Morgan’s induction made the level of breaks he was entitled to two ten minute breaks per day. Despite reminders on a written and verbal basis from both the Unit Manager and the Senior Day Worker, Mr Morgan continued to take the breaks he wished and seemed to disregard the efforts of management to try to curtail these breaks to the agreed timeframes.*

...

*Therefore, it is my belief that Mr Morgan did indeed fail to comply with the NHSCT Policy on Smoking in the Workplace. I also believe that the evidence would suggest that despite many efforts to help Mr Morgan follow the policy and comply with same, he failed on several occasions to act on the instructions given to him. These breaches of policy had disregard for advice/policy given to him from managers bear witness to this in my opinion.*

...

*Both these extremely experienced members of staff reported that Mr Morgan showed total disregard for their advice with regard to his smoking/vaping breaks. Mrs Dealey, in particular spoke of her feelings of anxiety and concern due to Mr Morgan shouting at her, disregarding and disrespecting her authority as a manager and positioning himself physically in areas that could be viewed or perceived as intimidating and threatening. Mrs Dealey states that as result of some of the interactions with Mr Morgan, she felt so unnerved by the situation that she had cause to make an appointment to speak to Occupational Health.”*

35. The claimant disputed that he had ever been spoken to regarding smoke breaks or that he had responded aggressively to Ms Black or Mrs Dealey when reminded of his entitlement to smoke breaks.

### **Incident 3 – Conduct during Redeployment In Causeway Hospital**

36. Incident 3 relates to the claimant’s conduct during the period of time he was redeployed to the Portering Department in Causeway Hospital. His Line Manager in Causeway Hospital was Mr Chris Platt.
37. In the investigation report the Investigating Officer summarised these issues as follows:-

*“Mr Morgan refused to book his annual leave/report absences via Mr Platt, stating that he had been told to address such matters through Jane Black in Millbrook.*

*- Mr Morgan was challenging, had a poor attitude to his colleagues and Line Managers (past and present).*

*- Mr Morgan used foul language whilst at work, despite requests to desist.”*

38. The tribunal finds that because of the above conduct the claimant’s redeployment to the Portering Department was brought to an end and he was suspended on full pay until his dismissal in January 2020.
39. The claimant’s response to the Investigating Officer was that these allegations were “lies” and that Mr Platt told him he was not his line manager and that he wanted nothing to do with his leave or providing him with a uniform. He also stated to the Investigating Officer that Mr Platt had never spoken to him about his language, that he did not have an attitude and that Mr Platt was angry and abusive to him.
40. The Investigating Officer’s conclusions in respect of this incident were as follows:-

*“Mr Platt’s statement gives accounts of conversations between the two men where he discusses these issues with Mr Morgan, yet Mr Morgan continued to dictate that he would be reporting his annual leave via Jane Black in Millbrook.*

*Not only did Mr Platt address this issue with Mr Morgan. Prior to starting his*

*placement in Causeway Hospital it was made very clear to Mr Morgan in a meeting with Mrs Isabel Kidd, Mr Platt, Mr Morgan and his TU rep, that all annual leave requests should be made through Mr Platt or his colleague Mrs Moore. This was also reaffirmed in a letter from the HR Department dated 06/10/17. Following a leave request made to Jane Black on 27/10/17, Mr Morgan was again reminded that he needed to book his leave with Mr Platt or Mrs Moore. There was a further request made to Jane Black on 08/11/17. Mrs Black contacted Mr Platt to get him to remind Mr Morgan that leave requests need to go through his office and not Millbrook as they are no longer line managing Mr Morgan.*

*These were repeated reminders that Mr Morgan refused to comply with. I do not believe that Mr Morgan felt that he had to book his annual leave through Mrs Black. It is inconceivable that he would have thought it was unnecessary to book leave through the Department that he was currently working for. For me there is no doubt that Mr Morgan, for some reason was unprepared to give Mr Platt his place and approach him about his annual leave/absences. Mr Morgan maintains that he was working under guidance that he had been given to report to Jane Black and that initially Mr Platt told him that he wanted nothing to do with his annual leave. I can't see why Mr Platt would have said anything like that as it would have been impossible to navigate and organise staff rotas and ensure adequate cover without proper notification of absence. Despite all of this Mr Morgan still maintains that he had no need to inform Mr Platt about his leave and only did so "out of courtesy".*

*In conclusion I believe Mr Morgan was acting uncooperately and without reasonableness. I believe that he should have reported to Mr Platt and indeed knew that this was the case, but refused to do so.*

...

41. The Investigating Officer also concluded:-

*"As in the two previous areas of the investigation a theme continues to develop. That is that Mr Morgan seems to have issues with colleagues in each incident. He appears to have a very different assessment of situations and their impact, than to those who he is working with. On each occasion Mr Morgan is adamant that he has done nothing wrong. I believe that his behaviour, attitude, lack of acknowledgement, insight or any wrongdoing is not in keeping with NHSCT "Working Well Together" policy, nor does it portray the commitments with the CORE values that NHSCT requires all its staff members to strive to achieve. It is my opinion that this is not acceptable behaviour in the workplace." (sic)*

### **The Disciplinary Hearing – 19 November 2019**

42. By letter dated 5 November 2019 the claimant was requested to attend a disciplinary hearing. The disciplinary panel consisted of Mr Randal McHugh, Principal Practitioner Adult Safeguarding and Ms Leanne McKay, Senior Human Resource's Manager. The investigation outcome letter dated 12 August 2019 stated as follows:-

*“It has been determined that such action constitutes gross misconduct. The allegations if proven may lead to your dismissal from the Trust.”*

43. The disciplinary hearing took place on 19 November 2019 and considered the following allegations (as set out in the letter to the claimant dated 12 August 2019):-
- “1. On 26 April 2017 you breached the Adult Safeguarding Operational Procedures/Adults at Risk of Harm and in Need for Protection for acting in an inappropriate and verbally aggressive manner towards a Service User;*
  - 2. On 4 May 2017 you failed to comply with the Standard of Conduct for the catering department within Millbrook Resource Centre with reference to NHSCT’s Smoke Free Policy in that you were observed taking an unofficial smoke break despite having received verbal and written guidance and direction from management;*
  - 3. On 4 May 2017 you acted in a threatening and aggressive manner towards the Manager of Millbrook Resource Centre, Linda Dealey;*
  - 4. Whilst on alternative duties, from Millbrook Resource Centre in the Portering Department, Causeway Hospital, you regularly used inappropriate and foul language;*
  - 5. Again whilst on alternative duties in the Portering Department, Causeway Hospital you failed to follow procedure regarding booking of annual leave despite having been previously advised of the procedure.”*
44. Mr Mark Carey, the Investigating Officer was in attendance at the disciplinary hearing and Mrs Dealey, Ms J Black and Mr B Walker also attended as witnesses and gave evidence.
45. The claimant attended the disciplinary hearing, accompanied by his Trade Union representative, Ms Campbell.
46. The claimant makes no criticism of the disciplinary hearing or the disciplinary panel nor does he allege any unfairness in the conduct of the disciplinary hearing. It is common case that at the disciplinary hearing, the claimant did not dispute that there had been an altercation between him and a Service User.
47. At the hearing the claimant raised the issue of the discrepancies in respect of the dates that had been recorded for the Service User incident. It is common case that there were discrepancies in the various witness statements and reports as to the date of the Service User incident. For example Mr Walker’s handwritten statement refers to the incident as occurring on 25 April 2017, the Datix incident report form refers to the incident occurring on 24 April 2017 and being reported on 27 April 2017; and the Adult Protection Procedures referral form was completed on 27 April 2017 and recorded the incident as having occurred on 25 April 2017. The tribunal accepts the respondent’s case that these discrepancies did not in any way call into question or detract from the fact that an incident had occurred between the claimant and a Service User. The tribunal finds that the disciplinary panel was fully aware of

these discrepancies and took them into consideration as part of their deliberations. The tribunal finds that there was no dispute between the claimant and the respondent that the incident took place and that the discrepancies in the date made no material difference as the disciplinary panel and appeal panel both found that the claimant was aggressive and threatening towards a Service User which constituted gross misconduct. The central issue for the disciplinary panel was that the claimant refused to accept that his interaction with the Service User was completely inappropriate or that it had a significant detrimental impact on a vulnerable individual's mental health and wellbeing. The tribunal accepts Mr McHugh's evidence that the claimant showed no remorse at the disciplinary hearing and in fact blamed the vulnerable adult. The tribunal finds from Mr McHugh's evidence that the claimant was unable to recognise or take responsibility for what was clearly threatening and abusive language towards a vulnerable Service User and that this was a significant factor in the disciplinary panel's decision.

48. At the disciplinary hearing the claimant alleged collusion and bias on the part of Mr Carey, the Investigation Officer and he further alleged that he breached confidentiality by emailing draft witness statements to Mrs Dealey. In this regard he relied on the contents of email exchanges during the course of the investigation between the Investigating Officer and Mrs Dealey. The tribunal finds as a fact that these emails were carefully considered by the disciplinary panel and they were satisfied that they contained no evidence of collusion or bias on the part of Mr Carey in his investigation.
49. The tribunal considered the emails in the tribunal bundle. One email postpones an arranged meeting, another email forwards copies of draft witness statements to Mrs Dealey requesting that she provide them to the witness to allow them to consider their content and if necessary amend. Another email includes attachments of letters inviting witnesses to investigatory meetings. The tribunal finds that at all times these email exchanges were for the purposes of conducting the investigation and that they do not contain evidence of bias or collusion between the Investigating Officer and the Manager of Millbrook Resource Centre, Mrs Dealey. The tribunal rejects the claimant's case that the investigation was flawed because draft witness statements had been forwarded to Mrs Dealey for the purposes of conducting the investigation. The tribunal finds that the Investigating Officer and the witnesses were located 50 miles apart and that the purpose emailing the statements was to allow the witnesses to consider the evidence they had given to the investigation officer and if necessary to amend. The tribunal unanimously rejects the claimant's argument that the emails contain any evidence of bias or collusion.
50. The claimant also alleged that the Investigating Officer in forwarding witness statements to Mrs Dealey during the investigation was a breaching confidentiality. The tribunal finds that this was not a breach of confidentiality, as Mrs Dealey the Manager was also bound by confidentiality and there was no evidence, that the statements had been disseminated other than for their intended purpose, ie, forwarded to the witnesses for their approval. The tribunal finds as a fact that Mr Carey sent the witness statements to the Manager to enable her to provide them to the witnesses to approve as a means of speeding up the investigation process as Mr Carey was located 50 miles away from Millbrook Resource Centre. The tribunal finds that this was for the purposes of saving time avoiding unnecessary travel.

51. At the hearing the claimant specifically criticised an email between the Investigating Officer and Mrs Dealey dated 27 November 2017 as it contained a smiley face after the following sentence:-

*“Am hoping to meet KM within the next two weeks, so want to have my stuff all sorted and well prepared. Can’t wait.”*

52. The tribunal accepts the evidence of Mr Carey that the inclusion of a smiley face emoji at the end of the above sentence was a sarcastic and ironic gesture. The tribunal accepts Mr Carey’s evidence that he regularly used smiley faces in a number of his emails. The tribunal rejects the claimant’s assertion that the use of an emoji was evidence of the Investigating Officer laughing at him. The tribunal finds as a fact that Mr Carey had a considerable workload and that being tasked with this investigation added to his workload therefore the reference to ‘can’t wait’ with a smiley face emoji was, in this context sarcasm. The tribunal unanimously rejects the claimant’s case that the content and tone of the emails to Mrs Dealey is evidence that the investigation was biased or flawed in any way.
53. The tribunal considered the entirety of the investigation report and unanimously concludes that there is no evidence of bias or collusion between the Investigating Officer and Mrs Dealey or any other witness.
54. The claimant also alleged that witnesses ‘lied’ in their witness statements to the Investigating Officer. The claimant specifically alleged that the evidence of Mr Walker, Mrs Dealey and Mrs Black’s to the investigation officer was that the Service User had missed time away from the centre. The claimant relied on the attendance records of the Service User from April to December 2017 as evidence to show that the Service User had not missed any days from the centre. The tribunal rejects the claimant’s argument that the witnesses were being untruthful. The tribunal finds that the claimant has completely misinterpreted the witness statements of these witnesses. The tribunal finds that the witness statements clearly state that the claimant missed time away from the centre and not that the claimant ‘missed days’. The tribunal finds as a fact that the absence records do not record the specific times spent at the centre and simply indicate that a Service User had been in attendance, be that for one hour, half a day or a complete day. The tribunal accepts Mr Carey’s evidence that at all times he understood the Service User had late attendances and reduced time at Millbrook Resource Centre and not that he had missed days. The tribunal finds that the Investigation Report was not based on witness evidence that was untruthful.
55. In his claim the claimant alleged that the Investigating Officer was not qualified to undertake an investigation. The tribunal rejects the claimant’s argument and finds that Mr Carey was a qualified Social Worker who was trained and experienced in conducting investigations. Furthermore the tribunal accepts that he had specific investigation training on 6 June 2017. The tribunal further finds that throughout the investigation process, the Investigating Officer had an appointed HR Liaison contact within the respondent’s HR Department to provide assistance on any aspect of the Disciplinary Procedure. It is the unanimous finding of this tribunal that Mr Carey’s investigation was extensive, comprehensive and entirely reasonable in all circumstances of the specific allegations and that he reached a reasonable conclusion that the matter should proceed to a disciplinary hearing.

56. The outcome of the disciplinary hearing was forwarded to the claimant on 20 January 2020. The claimant was dismissed with effect on 20 January 2020 and received pay in lieu of notice the outcome stated as follows:-

*“Taking account of all the information, it is the panel’s decision that all the allegations are proven and therefore, the decision of the Disciplinary Authority is that your actions as noted in the allegations are totally unacceptable and in totality constitute gross misconduct. The decision of the panel is that you should be dismissed with pay in lieu of notice.*

*It is the panel’s view that allegations 2, 3, 4 and 5 are misconduct and you demonstrated a repeated disregard for management instruction as well as policies and procedures. You maintain the view that you are right and all others are wrong, and this is very concerning for the panel. The events surrounding allegation 1 (Service User) are considered to be gross misconduct.*

*It is the panel’s view that you acted inappropriately and aggressively towards a Service User, and in doing so you did not demonstrate the Trust’s values in your actions. You however see no wrong in the actions you took in April 2017 and therefore have offered no mitigation. The panel did take into account that you do not have any disciplinary sanctions but the panel also considered that you have only been employed by the Trust since 29 November 2016.*

*In summary, in coming to this decision the panel have taken into account the gravity of allegation 1 along with your repeated disregard for management instruction as well as policies and procedures. We have also taken account of the fact that you have accepted no responsibility in any of the events that have taken place, and more importantly you have shown no remorse especially in light of the impact your behaviour and actions have had on a vulnerable adult.”*

57. The claimant was given the right of appeal. The claimant submitted an appeal by handwritten letter on 30 January 2020 citing the following grounds of appeal:-

- (1) That he disagreed with the disciplinary panel’s findings.
- (2) That the Investigating Officer had treated him unfairly due to his friendship with Mrs Dealey.
- (3) That he was never verbally aggressive to a Service User.
- (4) That he was fully aware of the Smoking Policy but only ever took two allocated smoke breaks. That he spoke to his Line Manager Mrs Dealey in the same tone as she spoke to him.
- (5) That he never used inappropriate or foul language whilst in the Causeway Hospital and never had complaints from any member of staff.
- (6) That he followed the procedure when booking holidays as he rang Jane Black, his allocated Manager.



- (7) That he has never received warnings, verbal or written, there is no paper trail for anything that he has been accused of and indeed no history of any problems with his work during his employment.
- (8) That he has emails proving the Investigating Officer was biased towards him, as he shared all information with Linda Dealey, ie, witness statements, he coached witnesses and breached confidentiality on many occasions.
- (9) That witnesses lied to the Investigation Officer as the Service User had not taken any time off from Millbrook Resources Centre.

### **Appeal Hearing - 21 August 2020**

58. The appeal hearing took place on 21 August 2020. It was chaired by Ms Chambers and the panel was Mrs Rosie Elliott, Head of Service, Adult Learning Disability and Mrs Maryna Chambers (Assistant Director of Human Resources). The claimant makes no criticism of the appeal panel or the appeal hearing.
59. Mr Carey attended the appeal Hearing and Mrs Dealey attended and gave evidence. The claimant attended, accompanied by his Trade Union representative, Mrs Buick.
60. The appeal panel found four of the allegations against the claimant to have been proven and the Service User allegation to be partially proven. The appeal panel concluded that the claimant was guilty of gross misconduct and upheld his dismissal.
61. In respect of incident 1 the appeal panel found the Service User's conduct to be inappropriate and held that he was verbally aggressive towards a Service User. The appeal panel found this allegation to be partially proven by reason of the discrepancy in the dates. The tribunal accepted the evidence of Mrs Chambers that the panel were fully aware of the ambiguity with regards to the dates of the incident ranging from the 24-27 April, however the real issue was that an incident had taken place with the Service User. The appeal panel upheld the other allegations of misconduct.
62. The appeal outcome letter stated as follows:-

*"You displayed a disregard for the panel throughout the hearing and I, as chair, had to remind you what was deemed acceptable behaviour on a number of occasions during the hearing.*

*You breached the social distancing requirement by not wearing a mask when in close proximity to your Trade Union representative and again you had to be reminded of this requirement.*

*I, as chair, had to remind you to lower your voice as you were coming across as aggressive at the hearing. This happened on a couple of occasions during the hearing.*

*The panel noted a series of unnecessary comments made by you throughout*

*the hearing to include the following:-*

- *When the Presenting Officer asked the witness Mrs Dealey could be released, you stated that sure she is being paid to sit there.*
- *When I suggested a comfort break you remarked good I can go for a smoke break.*
- *When the panel checked with all the parties if they could continue after 5.00 pm to conclude this hearing, you stated you had no choice but could stay until 10.00 pm as you had brought your sleeping bag with you.”*

63. The tribunal accepts the evidence of Ms Chambers that the respondent put in place additional security in the building during the appeal hearing as witnesses had refused to attend by reason of being fearful of the claimant’s behaviour. The tribunal also finds as a fact that the claimant’s behaviour during the appeal hearing was inappropriate, aggressive and insubordinate.

## **CONCLUSION**

64. The tribunal concludes that the reason for the dismissal was the claimant’s conduct. Pursuant to Article 140 of the Employment Rights Order 1996 this is potentially fair reason for dismissal. The tribunal finds that the respondent had a genuine belief that the claimant was guilty of gross misconduct in respect of the Service User incident had reasonable grounds for this belief after a full and comprehensive investigation. The tribunal finds that the investigation, disciplinary and appeal processes were within the band of reasonable responses for a reasonable employer and find no breaches of the relevant procedures. The claimant was given every opportunity to respond to the allegations at each hearing and was represented by his union at both the disciplinary and appeal hearing.

65. The tribunal finds that the respondent’s decision to dismiss was within the band of reasonable responses. The tribunal finds that the penalty of dismissal in respect of the Service User incident was within the band of reasonable responses as the disciplinary and appeal panel reasonably held the view that the claimant was guilty of the allegation and this allegation fell within the scope of gross misconduct. The tribunal finds this to be an extremely serious allegation in breach of the respondent’s adult safeguarding procedures and codes of conduct – specifically the treatment of a vulnerable adult and therefore justify dismissal for a first offence as per ***Connolly v Western Health and Social Care Trust [2017]*** NICA.

66. The tribunal finds that the respondent took into consideration the claimant’s clear disciplinary record, the claimant’s continued failure to accept responsibility for his actions and the claimant’s continued approach of blaming others, including a vulnerable adult who was a Service User. The tribunal finds this to be entirely reasonable in all the circumstances of this case. Having considered all of the evidence presented the tribunal finds the dismissal was an appropriate sanction in accordance with equity and the substantial merits of the case.

67. The claimant's claim of unfair dismissal is therefore dismissed.

**Employment Judge:**

**Date and place of hearing: 11, 12 and 13 January 2022, Belfast.**

**This judgment was entered in the register and issued to the parties on:**