EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr K Iheka		**Elysium Healthcare Limited**

Heard at: London South Employment Tribunal **On:** 20, 21 & 22 July 2020

Before: Employment Judge Hyams-Parish

Representation:
For the Claimant: Mrs M Hodgson (Counsel)
For the Respondent: Mr P Livingston (Counsel)

JUDGMENT

1. **The claim of unfair dismissal is well founded and succeeds.**

2. **The claim of wrongful dismissal is well founded and succeeds.**

3. **There shall be a *Polkey* reduction to the compensatory award of 50%.**

REASONS

Claims

1. By a claim form presented to the Tribunal on 16 November 2018, the Claimant brings claims of unfair and wrongful dismissal against the Respondent. There had been a holiday pay claim, but this was withdrawn at the start of the hearing.

2. Judgment was given orally at the conclusion of the hearing. These written reasons are provided at the request of the Claimant.

The hearing

3. I heard evidence from the following four witnesses:

   (a) Claimant;

   (b) Ms Ina Taiwo-Quaak ("ITQ"): Lead nurse at the Respondent's Bromley Road Hospital and investigating officer;

   (c) Mr Roland Graham ("RG"): Hospital Director at the Respondent's Rosebank Hospital and dismissing officer;

   (d) Mr Malcolm Campbell ("MC"): Director at the Respondent's Farmfield Hospital, Regional Lead and appeal officer.

4. I have been referred to documents in an electronic bundle agreed by the parties. References to numbers in square brackets below are to documents in the hearing bundle.

5. Due to the COVID 19 pandemic and the restrictions on social distancing, this case was conducted using the HMCTS cloud video system called CVP. Both parties consented to this. It is due to the hearing being conducted by video that it took longer to complete than would have been the case had the hearing been conducted in person.

6. Evidence was heard over one and a half days, with legal submissions after lunch on the second day. Both representatives made oral submissions and Mr Livingston had provided written submissions in advance. These submissions were carefully considered before reaching the decision set out below. Judgement was delivered orally at the beginning of the third day.

Background findings of fact

7. The Respondent is a company that runs hospitals in the UK, offering private, mental, neurological and education healthcare services. The Company employs in the region of 5000 people nationwide.

8. The Respondent has an HR department that is run according to a business partner model. Unusually for a case like this, there does not appear to be any evidence in the bundle, of input or advice from HR, but RG confirmed that he did take advice from HR before making the decision to dismiss the Claimant.

9. The Claimant commenced employment with the Respondent on 4 September 2007. He was employed as a Healthcare Assistant. Prior to his

dismissal, the Claimant had a clean disciplinary record.

10. On 1 December 2016, the Claimant started working at the Respondent's Bromley Road Hospital. Bromley Road Hospital is a rehabilitation service for men and women with enduring mental health Issues, complex needs and complicated addiction problems. At the time of his dismissal, the Claimant worked on Olive Ward. Olive Ward is a mixed gender ward with a maximum of 17 patients.

11. At the time of the incident which led to the Claimant's dismissal, there were 15 patients on Olive Ward. One of those patients, who I shall refer throughout this judgment to "Patient X", had been diagnosed with paranoid schizophrenia and autistic spectrum disorder.

12. As part of the induction training at the commencement of employment, and annually thereafter, employees are given training in the management of violence and aggression, including the techniques they should deploy when faced with an act of aggression or violence - referred to as breakaway training. These breakaway techniques are taught to employees to enable them to secure their own health and safety, as well as that of colleagues and patients. The techniques assume that it may be necessary to use some force to secure the safety of the patients and the employee concerned but otherwise the use of unreasonable force is considered to be unacceptable and a disciplinary matter. To that end, the Respondent's disciplinary policy gives the following as an example of gross misconduct:

> ***incidents of ill-treatment/abuse of patients/residents likely to cause them unnecessary and avoidable pain and distress. Examples include failure to follow, or poor application of, MVA techniques, unreasonable physical restraint, handling the patient/resident in a rough or inappropriate manner.***

13. The Claimant received breakaway training as recently as 11 January 2018.

14. On 25 June 2018 at 13.30 there was an incident involving the Claimant and Patient X. It is not disputed that the incident began by Patient X assaulting the Claimant by punching him in the face. What then happened is the subject of dispute between the parties. The Respondent's case is that the Claimant responded to the act of aggression by going beyond what was taught to him in training, and that instead he used unreasonable or excessive force. The Claimant's case is that he was simply trying to protect himself from Patient X. Confronted with being grabbed by Patient X, the Claimant says that he grabbed Patients wrists and guided him to the floor where he was restrained.

15. At 4pm on 25 June 2018, the Claimant completed what is referred to as an IRIS report of the incident. Note that this is slightly paraphrased and I have used appropriate references to those involved [152]:

> ***I was in nursing office with the following staff: BA, LM and OA. Patient X came inside the Nursing office and launched an unprovoked attack. Then he was restrained KI, LM and OA and he was taken to his room. Clinical charge Nurse EY was informed and he went to patient room to ask patient what happened, and patient said that he was influenced by command auditory hallucinations. Then clinical charge nurse EY gave him medication.***

16. The next day on 26 June 2018 at 10.11, ITQ reviewed the above IRIS entry. She referred the IRIS form back to the Claimant for amendment because she noted that the report mentioned that Patient X had been restrained, but there was no information as to which holds were used to restrain the patient. ITQ said in evidence that this type of information should always be included in an IRIS report.

17. On 26 June 2018 at 17:05, an Assistant Psychologist and Social Inclusion Worker who I shall refer to as LM, who was present during the incident, sent an email to his supervisor with his account of what had happened [140A]:

> ***Statement - excessive force***
> ***Incident date: 25/06/2018***
> ***Location: Olive nursing office at 13:40***
> ***Present - LM, KI, BA and OA***
>
> ***Staff LM - preparing to stand up to place the money folder away in Olive nursing office, when he observed Patient X standing next to staff KI. Staff KI spoke to staff LM "are you taking him (Patient X) shopping". Staff LM replied to the effect of "no I have an appointment at 14:00". At this point staff KI partially started to stand up (to let staff LM out of the office) and Patient X was observed to punch staff KI in the face. I stated the patients name and "stop" and staff KI stated unclear words and moved towards Patient X with closed fist and he appeared to be striking Patient X on the shoulder, he was backing out of the office with his right arm raised defensively. NiC shouted stop several times. Staff LM turned to place several documents and money down and staff KI and Patient X were observed to be in the doorway and staff KI was observed to pull/push Patient X into the office. Patient X was observed to fall onto the nursing office floor, Staff LM helped Patient X to his feet, standing behind Patient X holding both hands (Patient X was not resisting), staff LM then changed positions into approved arm hold (right side) and walked Patient X to his room with the assistance of staff KI. Patient X was released from holds and he positioned himself on the bed. In a raised voice he stated "I'm alright" . Staff LM and staff KI disengaged and returned to the nursing office. Staff LM left the unit shortly after"***

18. It is notable that LM said in his email that OA was present, whereas the Claimant was criticised, and indeed disciplined, for referring to OA being present and part of the restraint in his IRIS report. RG referred to this as the falsification of the IRIS report.

19. LM's supervisor sent that email to ITQ at 17:21 on 26 June 2018 with a covering email which said:

> ***Please see statement below as the account of events that happened yesterday. It is highly concerning and worrying that the patient was punched and had fallen to the floor. The incident report does not reflect this and neither did we hear this in this morning's handover.***

20. ITQ subsequently spoke to LM and produced a note of that conversation headed "LM clarified the following details":

> ***LM advised that Patient X had hit the Claimant at the side of his face. LM said that the moment he said stop to Patient X, he backed off. LM said that Patient X was backing away towards the door and stepping backwards. KI then hit Patient X with a closed fist on the shoulder of his right side. [] continued to back out of the office. KI followed him towards the door and struck him with an open hand several times around the same area. KI then hit out at PG for a final time causing him to lose balance and fell forward flat on to the floor in prone position. LM said that during the incident KI was talking in a normal tone however did not understand what he was saying. LM advised that he was shocked at this and immediately put the items that he was holding in his hands on the chair, he then called out for staff to pull the alarm and moved towards Patient X asking him if he was ok. LM said that Patient X advised that he was ok. LM was asked if the NIC was present when this incident occurred and he said that NIC BA was in the office and that she had shouted to KI to stop when he struck PG. LM said that he supported PG to stand and immediately changed into a secure hold. KI took over the free hand and PG was escorted to his bedroom. Once inside LM asked PG was ok. And he said in a raised voice "I'm Alright". Once LM had returned to the office, he asked KI "are you ok?" however KI did not respond.***
>
> ***LM was asked why he did not report this to senior staff immediately following the incident. LM advised that he was in shock following the incident and he continued with his duties escorting another patient to the community. LM said that he was under the impression that the NIC BA was dealing with the incident. He realised that this was not the case when he read the incident form on the 26/06/2018 that a factual account of events had not been recorded.***

21. The above account was signed by LM.

22. There are differences in the accounts provided by LM on 25 and 26 June 2018. Firstly, in the 25 June account, LM said that "Patient X *punched* the Claimant in the face" whereas in his second account LM said that "Patient X *hit* the Claimant *at the side of his face*". In his first account LM said the "Claimant moved towards Patient X with a *closed fist and he appeared to be striking Patient X on the shoulder*, he was backing out of the office with his right arm raised defensively". In his second account he said "KI then hit Patient X with a closed fist on the shoulder of his right side. Patient X continued to back out of the office. KI followed him towards the door and struck him with *an open hand* several times around the same area. KI then hit out at Patient X for a final time causing him to lose balance and fell forward flat on to the floor In prone position".

23. Shortly after the incident, Patient X was visited by nurse EY who administered medication to him. He was also visited by OA shortly after the incident. Patient X said that OA visited him to find out how he was.

24. On 27 June 2018 at 11:00, Patient X was interviewed by ward manager MMD and nurse EY. He accepted that he punched the Claimant in the face; he also said that the Claimant punched him in the face several times. The interview specifically notes that Patient X's left hand was slightly swollen and bruised but when asked whether he had any pain in the face, Patient X said that his face was ok. No injuries to the face were observed by those interviewing Patient X. When asked how he would like staff to help him, he said that he would like the Claimant sacked. He also admitted to having hit the Claimant before.

25. On 27 June 2018 at 18:10, Patient X attended hospital and was seen by a Dr Judy Chen [141]. Patient X was examined and apart from his hand, no other injury or bruising was seen. This report was available to the Respondent but was not considered by ITQ or provided to those conducting the disciplinary and appeal hearings, or importantly, the Claimant.

26. On 27 June 2018, Nurse BA provided a statement of her account of what happened. She said:

> ***At midday I was in the office looking for an item in the cupboard. I heard LM saying 'P... stop it" and some shuffle, when I turned around I saw KI held Patient X's hand and pulled him to the ground. I pulled the alarm and radio for assistance. LM and KI took Patient X to his room. When LM came back to the office, I asked him what happened he said that Patient X asked him if he is taking him out and he said no and PG hit KI. EY came to the office and he was told what happened. EY went to see PG in his room and he was given Lorazepam. The Ward manager was informed about the incident.***

27. The Claimant was suspended on 27 June 2018.

28. On 29 June 2018, Patient X was interviewed by the police about the incident but no further action was taken.

29. On 3 July 2018, BA was interviewed by ITQ [145A]. These notes were not disclosed to the Claimant or provided to the disciplinary or appeal panels. ITQ took the view not to use it on the basis, in her opinion, that it added nothing to BA's statement provided on 27 June 2018. Looking at it, BA adds and clarifies assertions made in her first statement. Importantly BA suggested in the interview with ITQ that when the Claimant took hold of Patient X's hands, he lost balance.

30. On 10 July 2018, ITQ interviewed the Claimant. He said that he had been punched a number of times by Patient X. He insisted that he restrained Patient X and denied punching Patient X as alleged.

31. On 17 July 2018, RG wrote to the Claimant requesting that he attend a disciplinary hearing on 20 July 2018 [172]. There is one allegation in the letter, namely *using unreasonable force towards Patient X*.

32. Due to the Claimant's representative not being available on 20th July, the hearing was postponed to 27 July 2018. In fact he was not represented at that hearing either because his companion's car had broken down but on this occasion the Claimant agreed to proceed in her absence.

33. Before the disciplinary hearing took place, RG interviewed LM and Patient X. He wanted to hear from them in person and make his own assessment of their credibility and whether what they were saying was true. He said that he did not take a note of his interviews with them as he did not consider there were any differences between what they said to him and what they had said previously. He made a point of saying during this hearing, on several occasions, that they were not interviews and he did not consider what they said to him to be part of the hearing.

34. During cross examination, when asked whether he had seen, or asked to see, anyone else, it became clear that RG had actually asked to see anyone involved in the incident. However, at the time that RG was there, only LM and Patient X were available. RG did not arrange a time to return to speak to others. RG did not inform the Claimant that he had seen Patient X and LM prior to the disciplinary hearing.

35. The hearing was relatively short, commencing at 13.15 and ending at 13.42. Anne Wafula, the hospital director, was present as note taker.

36. Following the disciplinary hearing, RG decided to dismiss the Claimant. During cross examination, RG was pressed about what he had concluded had happened, given the conflicting version of events. He concluded that the Claimant had struck Patient X and used unreasonable force.

37. He was pressed about his reasons for dismissing the Claimant and he gave two reasons: firstly, using unreasonable force against a patient; secondly, falsifying the IRIS report by saying that OA was present during the incident and had assisted with the restraint. These reasons for dismissal are consistent with the dismissal letter.

38. The Claimant was dismissed with immediate effect on 30 July 2018.

39. The Claimant appealed against his dismissal by letter dated 3 August 2018, listing 17 grounds of appeal.

40. The appeal hearing took place on 20 August 2018 and was chaired by MC.

41. On 23 August 2018, MC wrote to the Claimant informing him that his appeal

would not be upheld.

Legal principles

(A) unfair dismissal

42. The law relating to the right not to be unfairly dismissed is set out in s.98 Employment Rights Act 1996 ("ERA"). Section 98(1) says as follows:

> ***(1) In determining….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 it is either a reason falling within subsection (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 subsection if it—***
>
> ***(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***
>
> ***(b) relates to the conduct of the employee,***
>
> ***(c) is that the employee was redundant, or***
>
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***
>
> ***(4) Where the employer has fulfilled the requirements of subsection (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.***

43. What is clear is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the Respondent acted fairly in treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

44. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually

did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness.

45. In a conduct case, it was established in the well-known case of **British Home Stores v Burchell** that a dismissal for misconduct will only be fair if, at the time of dismissal: (1) the employer believed the employee to be guilty of misconduct; (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

46. In another case called **Iceland Frozen Foods Ltd v Jones**, it was said that the function of the Employment Tribunal in an unfair dismissal case is to decide whether in the particular circumstances 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.

47. In **Sainsburys Supermarket Ltd v Hitt** it was said that the band of reasonable responses applies to both the procedures adopted by the employer, as well as the dismissal.

48. Finally, in **London Ambulance NHS Trust v Small** the court warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. It is therefore irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

49. In a gross misconduct case, a Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. Here, the employer's rules and policies are important because a particular rule which makes clear that a certain type of behaviour is likely to be categorised as gross misconduct, may make it reasonable for the employer to dismiss for such behaviour.

(B) Wrongful dismissal

50. In wrongful dismissal cases, employers typically rely on serious or gross misconduct by the employee to justify summary dismissal. But it is important to remember that the underlying legal test to be applied by a Tribunal is whether there has been a fundamental or repudiatory breach of contract by the employee entitling the employer to treat the contract as at an end.

51. The Tribunal's function when considering a claim of wrongful dismissal is

very different to that of an unfair dismissal claim. In a wrongful dismissal case, the Tribunal does not look at the employer's actions and decide whether it was reasonable for the employer to treat the Claimant's conduct as a repudiatory breach of contract. The Tribunal itself has to be satisfied that the Claimant did, on the balance of probabilities, commit a repudiatory breach of contract.

(C) Adjustments

52. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by means of a basic and compensatory award.

53. Section 123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer. This is commonly termed a Polkey reduction, taken from the well known case **Polkey v A E Dayton Services Limited**.

54. I was referred to the case of **Software 2000 Ltd v Andrews and ors [2007] ICR 825** during Mr Livingston's submissions in which Elias J (at paragraph 53) helpfully explains the role of the Tribunal when considering making a Polkey reduction:

> ***The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.***

55. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

> ***Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.***

56. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

> ***Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding***

57. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2)**. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Analysis and conclusions

(A) Unfair dismissal

58. Firstly, has the Respondent discharged the burden of proving the reason for dismissal, being misconduct? To this question I had little difficulty concluding that the Respondent had proved that misconduct was the reason for dismissal. No other credible alternative reason for dismissal was put forward by the Claimant.

59. Turning then to whether the Respondent acted fairly in treating conduct as the reason for dismissal, I find that the process was defective and inadequate in a number of respects.

60. I find that the investigation lacked the necessary rigour and care that a reasonable employer would have adopted in these circumstances, given that the Claimant had 10 years' service with the Respondent and the effect on his future prospects of being dismissed for this reason.

61. I do not consider the Respondent approached this case in as even handed way as they should have done, but rather in a way which resulted in the focus being on the guilt of the Claimant - with the result that their approach was to find and use evidence to support that theory - rather than looking at evidence or pursuing routes of enquiry that may have supported the Claimant's case.

62. They appeared to excuse, or give reasons for, discrepancies in accounts given by their witnesses, but they did not give that same benefit to the Claimant where, for example, there were discrepancies between his first account and what he later told the Respondent or what later became apparent. They accused the Claimant of embellishing his account but did not at the same time consider whether Patient X had embellished his account, given the lack of visible injury consistent with being punched in the face.

63. I should add here that I do not believe that the Respondent acted out of

malice or that, as the Claimant alleged, "*management wanted to get rid of him*". I accept that the Claimant was dismissed because the Respondent had a zero tolerance of the type of behaviour alleged against the Claimant. However, in doing so, it appears not to have had its eye on the fairness of the process adopted and the decision to dismiss and I consider that what they did fell significantly outside what a reasonable employer would have done in the same situation. With regards the decision to dismiss, I am concerned that the Respondent appears to have acted on the mistaken view that it must dismiss (i.e. there is no choice) where someone is found to have committed an act of gross misconduct. Of course, dismissal may well follow in most instances of gross misconduct, but that does not have to be the case. I was concerned, for example, that neither MC or RG took a step back, prior to dismissing, in order to consider mitigating circumstances, the Claimant's service history, or whether there were alternative sanctions that could have been imposed. MC explicitly repeated this approach in his evidence to the Tribunal and in his appeal letter. I find as fact that RG also adopted this approach.

64. Turning to the specific examples of unfairness, the starkest failings are set out below.

65. Employers must keep an open mind when carrying out an investigation; their task is to look for evidence that supports, as well as weakens the employee's case. The ACAS Guide to discipline and grievances at work emphasises that the more serious the allegations against the employee, the more thorough the investigation conducted by the employer ought to be. The EAT has also made clear that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation.

66. The Respondent failed to consider whether interviewing OA or EY may have assisted the Claimant. It is reasonable to assume that EY or OA would have asked Patient X what happened; looked at another way, it is inconceivable that immediately after the event that Patient X would not have had something to say about being punched in the face. It would have been an additional opportunity to take comments in relation to any redness or bruising or Patient X's account of what happened. In a case where the Respondent did not have consistency between its own witnesses, and which was disputed by the Claimant, what EY and OA had to say may have assisted the Claimant. I am mindful that a Respondent does not have to follow every line of enquiry in an investigation, but I do not believe a reasonable employer would have ignored the potential evidence provided by OA and EY in these circumstances.

67. Secondly, withholding the interview with BA was not something that a reasonable employer would have done and therefore fell outside the band of reasonable responses. It has clearly been an issue in these proceedings whether the Claimant pushed Patient X. Yet BA's interview - not her first

account - raises the possibility that Patient X lost his balance.

68. The failure to investigate the medical examination of Patient X by looking at the hospital report - in circumstances where the Claimant denied punching him, again is something that is significant and fell outside the band of reasonable responses open to an employer in this situation.

69. Turning then to RG's interview of LM and Patient X, I found the evidence of RG quite surprising on this point - given his seniority and experience in such matters - that he believed he could reasonably interview witnesses - take a view on relevance to the proceedings and tell the Claimant nothing about the interviews or what was said. Indeed, the suggestion that these were not interviews - simply because they were not recorded, and in any event, RG did not then take them into account - was surprising. The reality is that he had material before him which the Claimant knew nothing about. That is something that no reasonable employer would have done in these circumstances.

70. Furthermore, RG said that he attended Bromley Road before the time of the disciplinary hearing to speak to anyone involved in the incident. Having decided that it was important to speak to those involved, it was somewhat surprising that he did not in fact speak to everyone concerned because they were not available at that time.

71. The Claimant was eventually dismissed for something that he did not know was being considered as a specific allegation and ground for dismissal. He was not told that he was to be disciplined for allegedly falsifying the IRIS record - it was not even put to him during the disciplinary hearing - yet he was dismissed for it. It meant that the first time the Claimant knew that he was being disciplined for falsifying the IRIS record is when he was informed in the dismissal letter that this was one of the reasons for his dismissal.

72. The above failings were not corrected on appeal.

73. For all the above reasons, the claim of unfair dismissal is well founded and succeeds.

(B) Wrongful dismissal

74. I am not satisfied, on the evidence before me, that the Claimant used unreasonable or excessive force when responding to the attack on him from Patient X. None of the three Respondent witnesses who gave evidence during this hearing were present during the incident and therefore could not give direct evidence of what happened. There are no witness statements from those who witnessed the incident apart from the Claimant. It is clear that there are significant differences between those who were present as to what happened, particularly as the incident occurred within a very short space of time. The Respondent relies on this incident as supporting its view

that there was a breach of trust and confidence. As I cannot be satisfied that the incident occurred as it is alleged by the Respondent, I cannot conclude that the Claimant breached his contract of employment.

75. With regards the IRIS report, I do not accept that the Claimant deliberately completed the IRIS report with the intention of misleading the Respondent, by including reference to OA being present. I am not satisfied that the Respondent's assertion that OA was not there is correct, particularly when this may be a matter of interpretation. I say this in the context that in LM's email referred to at paragraph 17 above, he mentions OA as present. If OA was not there, then LM is also mistaken; the point here is that it is easy to mistake who may or may not be present at a particular time. I am not satisfied that such a mistake, amounts to a fundamental breach of contract.

76. For the above reasons the claim of wrongful dismissal is well founded and succeeds.

(C) Adjustments

77. In deciding whether to make a Polkey reduction, I have to consider what the outcome might have been had the Respondent conducted the investigation in a more even handed way, the above witnesses were interviewed, the Claimant was supplied with all the missing evidence identified above, that other defects or failings were rectified, including consideration of mitigating circumstances and alternatives to dismissal. I consider that there must be a chance, absent the above defects and failings, that the Claimant would still have been dismissed. I cannot ignore that there was evidence before the Respondent that the Claimant did strike Patient X and that he did use unreasonable force. I conclude that there is a 50% chance that the Claimant would still have been dismissed absent the above failures and unfairness.

78. For the same reasons that I am unable to find that the Claimant was wrongfully dismissed, I am unable to make findings of fact, based on the evidence before me, to support a reduction for contributory fault. Therefore, I do not make any reduction.

79. A remedy hearing has been listed for 18 September 2020.

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Employment Judge Hyams-Parish
28 July 2020