Neutral Citation No. [2009] NICA 47

Ref: **MOR7642**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **13/10/09**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

AND IN THE MATTER OF AN APPEAL FROM THE OFFICE OF INDUSTRIAL TRIBUNALS

AND IN THE MATTER OF A CASE STATED BY AN INDUSTRIAL TRIBUNAL UNDER ARTICLE 22 OF THE INDUSTRIAL TRIBUNALS (NORTHERN IRELAND) ORDER 1996 AND IN ACCORDANCE WITH ORDER 61 OF THE RULES OF THE SUPREME COURT (NORTHERN IRELAND) 1980 ARISING FROM THE DECISION OF THE INDUSTRIAL TRIBUNAL ON A QUESTION OF LAW FOR THE OPINION OF HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

PATRICK JOSEPH ROGAN

Claimant/Respondent;

-and-

SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST

Respondent/Appellant.

Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ

[1] This appeal is by way of case stated by the South Eastern Health and Social Care Trust (the appellant) against the decision of an industrial tribunal issued on 29 August 2008 whereby the tribunal held that the appellant had unfairly dismissed Patrick Joseph Rogan (the respondent) when he was summarily dismissed by the appellant on 13 February 2007.

Background

[2] The appellant is a Health and Social Care Trust with responsibility for a residential care facility for vulnerable adults. During the period with which this appeal is concerned patients with advanced dementia and other significant health difficulties were cared for in a particular ward to which the respondent, a Registered Mental Nurse, had been tasked since 2003.

[3] By letter dated 1 August 2006 an auxiliary nurse, Isobel Tweedie, submitted a written complaint to the Night Charge Nurse on duty, Mrs Walsh, on 2/3 August describing an incident where she and the respondent attempted to assist a patient, WM, who had slipped out of bed onto the floor, back into his bed. Mrs Tweedie stated that they were having difficulty completing this manoeuvre because the patient was not co-operating. She alleged that the respondent "buried his boot" to the right side of the patient's head. When they made a further attempt to assist the patient which failed Mrs Tweedie alleged that the respondent then punched him in the stomach and kicked him a second time. The respondent filled in a report form in relation to the incident approximately 1 hour after it occurred in which he described how the patient had slipped out of bed as a result of which he had sustained a bruise behind his left ear.

[4] Mrs Walsh provided the letter of complaint to the Clinical Services Manager, who happened to be her husband, at the end of her shift. She had come onto the ward on the night of 1/2 August quite shortly after the time at which Mrs Tweedie alleged that the assault upon the patient had occurred. Mrs Walsh had assisted the respondent with the patient. She had observed nothing of note in relation to either the patient or Mrs Tweedie nor was any complaint made to her at that time.

[5] The matter was brought to the attention of the Operations Manager on 3 August 2006 and he appointed Mr Walsh, the Clinical Services Manager, as investigating officer and directed that the patient be examined by a doctor who noted no injuries other than 2 old areas of bruising on the anterior aspect of the lower legs bilaterally. The respondent was suspended at that time.

[6] On 14 August 2006 the ward manager, Mr O'Reilly, spoke to Mr Walsh advising him that three members of staff wanted to speak to Mr Walsh regarding untoward incidents that had taken place on the ward. Mr Walsh asked Mr O'Reilly to put this in writing to him and said that it would be formally investigated. He assured Mr O'Reilly that the staff would not be disadvantaged for not reporting any matter when it had happened. Mr Walsh made a note of the conversation on the date on which it had occurred.

[7] On 16 August 2006 a nursing assistant, Mr Mathew, made a statement alleging that more than six months beforehand he had witnessed the

respondent punching a patient, KG. The reason, he said, was that the patient had eaten a piece of the respondent's cake. He also alleged that about six to eight months prior to August 2006 a patient, RS, by then deceased, had been slapped in the face by the respondent. He further alleged that a patient, MR, had been grabbed by the respondent by the shirt collar with both hands and verbally threatened. On the same date a nursing assistant, Mrs Campbell, made a statement alleging that on 2 August 2006 a patient, GMcG, was possibly assaulted by the respondent although she was not a direct witness to the assault.

[8] On 17 August 2006 a nursing assistant, Mrs Bell, made a statement in relation to an incident on 29 May 2006. She alleged that a patient, BM, had been verbally and physically aggressive earlier that day. At 5 p.m. she said that she had been preparing food and was in the kitchen washing her hands when she heard a commotion in the day room. She looked through the glass and saw a nursing assistant, Nigel Fitzpatrick, escorting BM to his chair. She alleged that the respondent came from the other side of the trolley and punched BM three times in the stomach. The patient became verbally and physically aggressive and a struggle took place as a result of which he ended up on the floor and had to be restrained. The patient received a cut above his eye. Mr Fitzpatrick was interviewed on 17 August by Mr Walsh and said that he remembered the incident but did not see the respondent strike the patient. Mr Fitzpatrick said that he had never witnessed any untoward incidents of verbal or physical abuse of patients.

[9] On 17 August 2006 a staff nurse, Mrs Kerr, made a statement saying that she had noticed a dressing on the left forehand of a patient, JT, on 8 June 2006. She spoke to the respondent who informed her that he had had a scuffle with JT as a result of which the patient's left forehand was skinned. The following day the patient had bruising to the left elbow and was complaining of pain in the ribs. The respondent filled in an accident report form in which he said that the patient had become increasingly agitated and struck him with a stick. When the respondent attempted to remove the stick the patient staggered back, striking a trolley. Although Mrs Kerr was unhappy with the explanation she had no evidential basis for taking further action.

The Disciplinary Hearing

[10] On 27 October 2006 the appellant was asked to attend a disciplinary hearing dealing with a charge that he had behaved inappropriately towards patients under his care in breach of his contract of employment and the NMC Code of Professional Conduct: standards for conduct, performance and ethics. He was advised of his right to be represented at the hearing by his trade union or a professional association and was provided with a copy of the preliminary investigation report which essentially consisted of the statements made by his colleagues. The disciplinary hearing was initially fixed for 9

November 2006 but did not proceed because on the previous day the respondent issued proceedings seeking an injunction to restrain the hearing inter alia because he had been refused legal representation. That application was refused and a subsequent appeal to the High Court was also unsuccessful. Although this point was not pursued before the tribunal it was referred to in the course of the argument in this appeal. It is not, however, a question that we are asked to determine in the case stated.

[11] The disciplinary hearing eventually proceeded on 29 January and 1 and 5 February 2007. It was chaired by Mrs Maura Devlin, acting Director of Primary Care together with Mr Billy Bateman, Human Resources Manager. The disciplinary panel members arranged a visit to the ward on 8 February 2007 to examine sight lines and the general layout of the ward. The respondent was represented by his trade union official, Mr Mulholland. Each of the witnesses was available to be cross-examined both by the respondent and his representative and by the time of the hearing all witness statements and relevant medical evidence were available to the respondent.

[12] The panel considered seven incidents which were put forward as evidence of inappropriate behaviour. By letter dated 13 February 2007 and by a telephone call of the same date the panel communicated its decision that the respondent should be summarily dismissed. In relation to the seven incidents the panel said:

> "The Panel has considered information relating to seven incidents of abuse of patients under your control as reported by four witnesses. One incident was not directly observed and the Panel has discounted this in arriving at its decision. The Panel believes that the other six incidents happened and that these were directly observed by three of your colleagues. Given the number of incidents reported the Panel finds that the allegation against you is proven."

[13] On 26 February 2007 the panel published a written report of the hearing. That report considered each of the incidents in turn.

> "**Incident 1: Patient Mr WM**
>
> Witness Isobel Tweedie who is a Nursing Assistant has 6 years 7 months experience on ward 32:
>
> **Facts**
>
> 1. The incident happened in bay2 of ward 32.

2. The incident was reported by S/N Rogan as an accident. The patient had slipped from his bed onto the floor on the evening of 1 August 2006. This happened at approximately 11.00 pm.

3. With his report S/N Rogan noted a mark behind the patients left ear.

4. Mrs Tweedie's statement confirmed that she observed Mr Rogan kick the patient to the right hand side.

5. The patient hoist was stored approx 10 m away from the bay of ward 32 in the hallway.

6. This is a well lighted ward.

Other Information

Relationships between S/N Rogan and Mrs Tweedie up until this point were good and reflected a personal friendship. Mr Rogan acknowledged this point.

Mrs Tweedie's allegation:

- She observed Mr Rogan kick patient WM twice to the right hand side. Mrs Tweedie demonstrated that S/N Rogan kicked the patient in the side, punched the patient in the stomach and then landed a further kick to the side.

- She confirmed that she had direct line of sight

- She also confirmed that there were no other witnesses to the incident

- It was after reflecting on the incident which distressed her that she raised the matter firstly with her husband then with two colleagues. S/N Jennifer Rooney wrote the statement which Mrs Tweedie read and signed.

Incident 2 - Patient JT-6 June 06

Witness Mrs Tweedie who is a Nursing Assistant has 6 years 7 months experience.

Facts

1. This incident involved patient JT and S/N Rogan.
2. The incident was reported by S/N Rogan on 8th June 06. An injury had occurred to the patient's elbow and he had complained of pain to R/H side ribs.
3. The patient struck S/N Rogan with stick and in the altercation the patient JT was injured
4. The patient was examined by Dr Begg on the 9 June who confirmed there were no apparent injuries except a small bruise on his elbow.
5. The trolley height is 3.5 feet high.
6. Patient JT is a large patient 6 foot plus.

Other information:

S/N Rogan advised that patient JT fell back against the Trolley and hit his side against the trolley.

Allegation:

The witness alleges that S/N Rogan punched patient JT 3 times in the stomach.
She said that the patient remained on his feet.
There were no other witnesses to this incident.

Incident 3 - Patient BM

Witnesses:

Shelagh Bell who is a Nursing Assistant has 5 years experience ward 34 and ward 32 since April 06

Nigel Fitzpatrick who is a Nursing Assistant

Facts:

1. Incident occurred in Day room ward 32

2. Day Room has Fireplace

3. S/N Rogan confirmed that there was an incident involving patient BM who had become physically aggressive toward Nursing Assistant Nigel Fitzpatrick.

4. Nigel Fitzpatrick confirms physical aggression and advised that S/N Rogan intervened to re-establish care and administer drug.

5. A sink is located immediately inside the kitchen door and offers a view of the Day Area at the fireplace through a small glazed strip approx 6 inches wide.

6. Patient BM was agitated and during an incident received a cut above his eye. There is no indication how this cut occurred.

7. This incident was reported by S/N Rogan on 29 May 06.

8. Dr Baig examined patient BM confirmed a 1cm out above eye. No other problems identified.

Other information:

- o This incident was not reported by the witness SB.

- o She felt she had not protected the patients and said felt “down” and asked for a transfer to night shift

- o Outside of Nigel Fitzpatrick there were no other witnesses involved.

Allegation:

- o Shelagh Bell alleges that while washing hands she observed a struggle. between Nigel Fitzpatrick and patient BM. S/N Rogan intervened and she observed him punch BM 3 times to the stomach. BM was agitated and during the struggle BM slid to the floor.
- o S/N Rogan’s arm was then placed at BM’s face whilst the struggle continued on the floor.

- o Nigel Fitzpatrick was an innocent party in this incident.

Nigel Fitzpatrick

Nigel Fitzpatrick confirmed that patient BM was verbally aggressive. He ended up on the floor and at one stage tried to stab Nigel Fitzpatrick with a fork on the leg. S/N Rogan lent assistance and gave him an injection. NF confirmed that he did not notice any thing untoward with S/N Rogan's intervention. It was however a 'bad circumstance'.

Incident 4 — G McG

Witness:
Anne-Marie Campbell

This incident happened behind a locked toilet door. Patient G McG and S/N Rogan were in the toilet area. There was a commotion. The incident was not observed.

Witness Ann-Marie Campbell heard the commotion and ran to the toilet area and found the door blocked. There is no visual account of the incident.

The panel ruled this allegation out in arriving at its decision in this case.

Incident 5- KG

Witness:
Aby Matthews is a Staff Nurse who was appointed to ward 32 in October 2004

Facts:

1. Bay 4 is close to the Nursing Station but does not directly overlook it.
2. Nursing station is glazed on 2 sides has a door and a push/close communication window.

Other Information:

- o This incident was not reported at the time of happening.

- o It is not unusual for the door into the Nursing station to be left open.
- o Ward 32 is well lighted.
- o Patient noise is not significant.

Allegation:

- o Witness A Matthews alleges seeing S/N Rogan punch a patient in the back. The incident occurred in the nurse's station as Mr Matthew was walking from bay 4 to the nursing station. He had direct line of sight and saw the punch being thrown and heard its impact.
- o Mr Matthews failed to demonstrate the force of the punch but said he heard it and would never forget it

Incident 6 – Patient RS

Facts:

1. Happened 6-8 months prior to incident.

Other Information Nil

Allegation:

- o Witness Aby Matthews alleges that S/N Rogan was feeding fluids to Patient RS.
- o Patient RS struck out at S/N Rogan who slapped him in the face.
- o This incident happened 15 meters away.
- o He did not report it at the time and there were no other witnesses.
- o He confirmed examining patient RS about half an hour later but there was no red mark on the patients face.

Incident 7- Patient MR.

Witness

Aby Matthews this incident was not reported at the time and there were no records at the time.

Aby Mathews alleges that S/N Rogan grabbed patient MR aggressively by the collar and verbally threatened him. This incident was unprovoked.

Additional Information:

S/N Rogan and Mr Matthews confirmed that there had been a difficult relationship between the two. Mr Matthews said that he had been bullied by S/N Rogan and this had been reported to the Orientation Nurse and then to Mr O'Reilly who had raised concerns with S/N Rogan. S/N Rogan said that he had offered his hand to Aby Matthews and as far as he was concerned the matter was over. "

[14] The panel recorded that it had requested additional evidence from Mr O'Reilly and Mr Fitzpatrick and that the respondent called Mr and Mrs Walsh together with a number of character witnesses as well as introducing a number of character references. The panel then set out various matters which were considered by it in assessing the evidence.

"The panel considered the following:

1. Six (6) incidents were observed and subsequently reported by 3 separate witnesses.

2. 5 incidents were not reported at the time because of fear or misplaced loyalty to a colleague S/N Rogan.

3. Panel considered Mr Matthews statements which happened 6-8 months prior to 1 August. The Panel were concerned by the delay in reporting same however there was clear recall of patient names and S/N Rogan's behaviour by this witness. There was a difficult relationship between S/N Rogan and Mr Matthews which was acknowledged by both parties. The panel believed Mr Matthews to be telling the truth about the incidents.

4. Was there any management interference with witnesses to come forward? Under questioning by Mr Mulholland, Mr Walsh the investigating

officer was very clear that all the witnesses had come forward voluntarily. Mr Walsh's letter confirming that no action would be taken by the Trust against any witness in this case was issued after the witnesses had volunteered to give statements.

5. There is conflict between Nigel Fiizpatrick's statement and that of Shelagh Bell - why? If Mr. Fitzpatrick is telling the truth then is Shelagh Bell telling lies? But why? She was new to the ward and following the incident she requested a transfer. Are both statements true? We must believe that the witness did not see anything as he was other wise engaged in the struggle with the patient. Likewise however we must consider that Shellagh Bell's statement is also accurate. She clearly recalls the incident. She was clear that punches were thrown by S/N Rogan to the stomach. She had clear line of sight. Why would she tell lies?

6. Why would Isobel Tweedie tell lies? She had clear line of sight she was clear in her evidence. There seemed to have been a good working relationship confirmed by S/N Rogan with Mrs Tweedie. We believe Mrs Tweedie's evidence.

7. Was there any corroboration of witness statements to any of the incidents? NO. However the number of independent incidents and the number of independent witnesses confirms to the panel that at times something was wrong with S/N Rogan's care of patents. The witness accounts are not of fending off blows but are deliberate acts of striking, kicking and man-handling different patients. One account tells of striking the patient while standing, two others while sitting and the back.

   The issue of force of punch and kick was considered by the panel. Force was not the issue but the act of striking a patient was the important concern in this case.

8. Was there a conspiracy between witnesses? NO. We believe the witness accounts of the incidents which they repeatedly confirm they observed.

9. In S/N Rogan's response to allegation 1 he confirmed to the panel that he had repeatedly used swear words which were directly pointed at Isobel Tweedie. He considered her reaction and statement a direct response to his using foul language against her. The panel had serious concerns about S/N Rogan's action throughout this incident.

10. The panel noted S/N Rogan's response to S/N Matthews statement which he thought was as a direct result of a history of a poor relationship between the two. He indicated that this relationship had deteriorated.

11. The panel also noted S/N Mr Rogan's comments about the remaining witnesses who may have had an issue with him as a result of his attempts to initiate practice developments throughout the ward. This level of change was not welcomed by the staff and may have resulted in staff trying to undermine him. The panel had no concerns that there was any conspiracy by staff.

12. S/N Rogan said that he did not recall patient NR being on new ward 32. On visiting ward 32 the panel confirmed that patient NR had been a patient on new ward 32 from opening until the latter part of 06. "

It concluded that there had been no conspiracy against the respondent by colleagues but rather that the incidents as witnessed had occurred. In light of the number of independent allegations and independent witnesses the panel considered that the respondent had been behaving inappropriately towards patients under his care and having concluded that they believed the accounts from witnesses indicating that the respondent had been guilty of abusing patients he was summarily dismissed. The respondent pursued an appeal and that hearing duly took place on 17 May 2007. No separate issue arises in respect of the appeal and there is no need to consider it further.

The Applicable Law

[15] On 8 May 2007 the respondent launched his application with the industrial tribunal claiming unfair dismissal. The parties had helpfully agreed a statement of issues requiring the determination of the tribunal.

> "(1) *Was the dismissal of the* [respondent] *by the* [appellant] *fair in all the circumstances? In determining this primary issue the Tribunal should consider the following:*
>
> *(a) Has the Trust shown that the reason relied upon by it in its decision to dismiss the* [respondent] *related to the* [respondent's] *conduct?*
>
> *(b) Had the Trust a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time of its decision?*
>
> (i) *Had the Trust reasonable grounds at the time of its decision on which to sustain, its belief in the misconduct of the* [respondent]?
>
> *(ii) At the stage the Trust took the decision to dismiss, had the Trust carried out as much of an investigation/enquiry into the matter as was reasonable in all the circumstances?*
>
> *(c) Was the dismissal a fair sanction in the circumstances?*
>
> *(d) Was the [respondent] afforded an effective right of appeal in the circumstances?"*

It was not in dispute that the respondent had been dismissed and that the statutory provisions governing the determination of the fairness of the dismissal were found in article 130 of the Employment Rights (Northern Ireland) Order 1996.

> "**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 it 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."

Those provisions make it plain that the burden of proof is on the employer to establish the reason for the dismissal and in this case to demonstrate that it was a reason relating to the conduct of the employee. If the employer successfully does so the tribunal then applies its judgment to whether the employer acted reasonably in treating the conduct as a sufficient reason for dismissal.

[16] The manner in which the tribunal should approach that task has been considered by this court in Dobbin v Citybus Ltd [2008] NICA 42. Since there was no dispute between the parties in relation to the relevant law I consider that it is only necessary to set out the relevant passage from the judgment of Higgins LJ.

> "[48]…The equivalent provision in England and Wales to Article 130 is Section 98 of the Employment Rights Act 1996 which followed equivalent provisions

contained in Section 57 of the Employment Protection (Consolidation) Act 1978.

[49] The correct approach to section 57 (and the later provisions) was settled in two principal cases - *British Homes Stores v Burchell* [1980] ICR 303 and *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 – and explained and refined principally in the judgments of Mummery LJ in two further cases - *Foley v Post Office* and *HSBC Bank Plc (formerly Midland Bank Plc) 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 section 57(3) of the [Employment Protection Consolidation) Act 1978] is as follows:
>
> (1) the starting point should always be the words of section 57(3) 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, another quite reasonably take another;

(5) the function of the 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 Homes 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 (usually, though not necessarily, dishonest conduct) 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, there 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'."

[17] It was accepted that the civil standard was the appropriate standard of proof for the disciplinary panel but the respondent placed emphasis on the passage in the opinion of Lord Nicholls in Re H (minors) [1996] AC 563 referring to the need for more cogent evidence to overcome the unlikelihood of what is alleged if a serious allegation is made. That passage has been considered again by the House of Lords in Re D [2008] UKHL 33 and the proper approach is helpfully set out in paragraphs 27 and 28 of the opinion of Lord Carswell.

> "27. Richards LJ expressed the proposition neatly in *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, 497-8, para 62, where he said:
>
> > 'Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the

> allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'

In my opinion this paragraph effectively states in concise terms the proper state of the law on this topic. I would add one small qualification, which may be no more than an explanation of what Richards LJ meant about the seriousness of the consequences. That factor is relevant to the likelihood or unlikelihood of the allegation being unfounded, as I explain below.

28. It is recognised by these statements that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less

> likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."

The Management of the Hearing

[18] The hearing commenced promptly on 21 January 2008. The respondent's counsel submitted that all witnesses who gave evidence to the disciplinary panel should give evidence at the hearing before the tribunal and be cross-examined. In light of that submission the appellant's counsel decided to call many of those who had been involved in the disciplinary hearing. It is not clear to what extent if at all the tribunal was involved in managing the witness list and establishing the issues to which these witnesses were relevant but the next 9 1/2 days were taken up with evidence from 9 witnesses who had either been called before the disciplinary panel or presented the appellant's case to the disciplinary panel. It was only at that stage that the only member of the disciplinary panel to be called, Mrs Devlin, gave evidence and that took a further five days. In its decision issued on 29 August 2008 the tribunal indicated that towards the conclusion of the hearing the respective representatives indicated that an agreed schedule of loss had not been prepared and requested that the tribunal determine only the issues put before it which it referred to as matters of liability. At the hearing before this Court the appellant contended that matters of contributory fault remain outstanding as well as matters of remedy.

[19] The effect of these arrangements was that the tribunal heard evidence on 21 to 25 January inclusive, 19, 20, 27, 28 and 31 March and 1, 7, 8, 11, 17, 28 and 29 April 2008. The issue as to what if any conduct constituted the reason for dismissal was clearly a matter on which the belief of the disciplinary panel was the critical issue and the agreed and correct legal position of the parties was that having established the belief of the disciplinary panel the tribunal should not rehear the allegations but should consider whether the employer acted reasonably having regard to the material available to it and the investigation carried out by it. The respondent did not advance any argument in this court to sustain the submission that it was necessary to call the first 9 witnesses and the appellant, who called the witnesses, submitted that their evidence was irrelevant and potentially led the tribunal into serious error in the determination of this application. The net position, therefore, is that for the first 9 1/2 days of the hearing the tribunal heard evidence from 9 witnesses who apparently had no relevant evidence whatsoever to give in

relation to the issue which the tribunal was being asked to determine. We have considerable sympathy with the position in which this tribunal found itself having regard to the agreed position taken up by the parties but this case is a classic example of the need for active case management by the tribunal.

[20] It is the function of industrial tribunals to provide a fair, practical and effective forum for the resolution of applications such as those pursued by the respondent. In order to achieve this aim the tribunal is given a high degree of flexibility as to the procedure that it should adopt in the cases before it and that flexibility must be used to ensure that hearings are both fair and proportionate in time and cost. In some cases it may be appropriate to determine a timescale within which a witness's evidence must be completed and where the timescale provided is reasonable there is no question of such a course being considered unfair. The fact that large tracts of time were taken up with the introduction at length of irrelevant evidence in this case emphasises the need for tribunals to focus the parties on the issues by effective case management. The result in this case was a hearing which was disjointed, taking place over a period in excess of 3 months. Such a hearing over a prolonged period inevitably makes the task of the tribunal considerably more difficult. The time from the opening of the case until the promulgation of the decision was in excess of 7 months. That is no reflection on the industry of the tribunal but rather demonstrates the undesirable outcome where hearings become unduly prolonged and disjointed. The manner in which Tribunals should approach their task was addressed by Girvan LJ in Peifer v Castlederg High School and Western Education and Library Board [2008] NICA 49.

> "[2] Industrial tribunals were originally intended to provide an expeditious and relatively informal and cheap means of resolving disputes arising in the workplace. Proceedings were intended to dispense with the formality of court proceedings and to avoid the legalism and formalism that marked ordinary litigation, features which contributed to the perception of unnecessary cost and delay in ordinary litigation. With the increasing complexity of modern legislation in the field of employment and discrimination law the industrial tribunal has itself become increasingly costly and litigation in the tribunals is characterised by increasing length of proceedings, delays and lengthy breaks in the course of hearings. This court has on occasions had to warn against the readiness of tribunals to determine apparently preliminary points in such proceedings which turn out at the end of the day not to be

shortcuts to a resolution of a dispute but in fact add to delay and increase the length of the proceedings. The problems caused by delay and unnecessary length of proceedings in the tribunals are self evident. Unnecessary length substantially increases the overall costs of proceedings; ties up tribunal chairman and members unduly; delays other cases coming on for hearing; and often requires the attendance of witnesses for undue length of time thus affecting their capacity to do their own jobs or run their own businesses.

[3] Regulation 3 of the Industrial Tribunals (Constitutional Rules of Procedure) Regulations (Northern Ireland) 2005 ("the Rules of Procedure")is based on the provisions of Order 1 Rule 1A of the Rules of the Supreme Court. The provisions of Order 1 Rule 1A and Regulation 3 were intended to be exactly what they are described as being, namely *overriding* objectives. The full implications of those rules identifying the overriding objectives have not been fully appreciated by courts, tribunals or practitioners. These overriding objectives should inform the court and the tribunals in the proper conduct of proceedings. Dealing with cases justly involves dealing with cases in ways which are proportionate to the complexity and importance of the issues ensuring that the case is dealt with expeditiously and fairly and the saving of expense. Parties and practitioners are bound to conduct themselves in a way which furthers those overriding objectives. Having regard to the imperative nature of the overriding objectives tribunals should strive to avoid time wasting and repetition. Parties should be required to concentrate on relevant issues and the pursuit of irrelevant issues and questions should be strongly discouraged. Our system of justice properly regards cross examination as a valuable tool in the pursuit of justice but that tool must not be abused. Tribunals must ensure proper focus on the relevant issues and ensure that time taken in cross examination is usefully spent. The overriding objectives, which are, of course, always intended to ensure that justice is done, impel a tribunal to exercise its control over the litigation before it robustly but fairly. Tribunals can expect the appellate and

supervisory courts to give proper and due weight to the tribunals' decisions made in the fulfilment of their duty to ensure the overriding objectives. Tribunals should not be discouraged from exercising proper control of proceedings to secure those objectives through fear of being criticised by a higher court which must itself give proper respect to the tribunal's margin of appreciation in the exercise of its powers in relation to the proper management of the proceedings to ensure justice, expedition and the saving of cost. Tribunals should be encouraged to use their increased costs powers set out in Regulations 38 et seq of the Rules of Procedure to penalise time wasting or the pursuit of cases in a way which unduly and unfairly increases the costs falling on opponents. Tribunals should feel encouraged to set time limits and time tables to keep the proceedings within a sensible time frame.

[4] When parties before the tribunal appear in person without the benefit of legal representation the lack of legal experience on the part of the unrepresented party may lead to the pursuit of irrelevancies and unnecessary length of proceedings. While tribunals must give some latitude to personal litigants who may be struggling in a complex field they must also be aware that the other parties will suffer from delay, incur increased costs and be exposed to unstructured and at times irrelevant cross examination. While one must have sympathy for a tribunal faced with such a situation the tribunal remains under the same duty to ensure that the overriding objectives in Regulation 3 are pursued."

That is the approach which should now be followed.

Consideration

[21] The test for whether the dismissal was fair or unfair is set out in article 130 of the Employment Rights (Northern Ireland) Order 1996 but in misconduct cases it is generally helpful to follow the remarks of Arnold J in British Home Stores. It is for the employer to establish the belief in the particular misconduct. The tribunal must then consider whether the employer had reasonable grounds upon which to sustain the belief and thirdly whether the employer had carried out as much investigation into the matter as was reasonable in all circumstances. The tribunal must also, of

course, consider whether the misconduct in question was a sufficient reason for dismissing the employee. Although the tribunal did not approach the matter in this sequential way it is possible to determine the tribunal's consideration of each of these matters.

[22] In considering the belief of the Disciplinary Panel as to misconduct the starting point was the written decision in which the panel indicated that the incidents as witnessed had occurred. The tribunal paid particular attention to the first incident in which Mrs Tweedie alleged in her written statement that the respondent had "buried his boot" in the right-hand side of the victim's head and kicked him on the right side on a second occasion. It was common case that there was no evidence of injury to the right side of the patient and indeed this was put to Mrs Tweedie in the course of the hearing before the Disciplinary Panel. It was further recognised by the panel in its discussion that there was no corroboration of the incident in question. The panel considered the issue of the force of any kick and concluded that the issue of striking the patient was the important concern. Although the written report of the Disciplinary Panel did not specifically record its findings in relation to each incident, the tribunal properly inferred that the written report suggested that the Panel had concluded that a kick to the head had been delivered by the respondent. In light of the absence of any medical evidence Mrs Devlin was pressed on this issue in the course of her five days before the tribunal. The tribunal found her evidence at times evasive and inconsistent. During her evidence she indicated at one point that the Disciplinary Panel did not believe that the patient was kicked in the head or that the foot connected with the head. The tribunal concluded that the misconduct in relation to this incident actually found by the Disciplinary Panel did not include any kick which had struck the patient but reflected a finding that on two occasions the respondent had made a kicking motion towards the patient but not actually connected. Those events occurred in the context of a punch being delivered between the two motions. This appears to have been the only incident in which the belief of the Disciplinary Panel was at issue. It was clearly unsatisfactory that the written report should suggest that the Panel accepted a version of events as described by a witness when in fact the Panel had concluded that the circumstances of the incident were more favourable to the respondent. This emphasises the need for Disciplinary Panels in these circumstances to be specific about the findings that they are actually making.

[23] It is convenient next to look at the tribunal's examination of whether the conclusion reached by the Panel was based on reasonable grounds. The tribunal noted the graphic description by Mrs Tweedie in her statement that the respondent had buried his boot in the side of the patient's head. The absence of any medical evidence cast doubt upon this description. There is no doubt that this was recognised by the Panel firstly because they specifically record that there was no corroboration for the individual incidents and secondly because the Panel itself concluded that it could not be satisfied that

the kicks had landed. The absence of medical evidence was raised at the hearing before the Disciplinary Panel with the witness.

[24] The second feature of the report of this incident that troubled the tribunal was the demeanour of Mrs Tweedie as reported by Mrs Walsh soon after the incident. Although the tribunal expressed its concern that there was no active pursuit with Mrs Walsh in the course of the hearing it is clear from its written consideration that the Panel was alert to this point. It is also apparent from the written notes of the Panel members that the Panel hearing explored the circumstances leading to the report from Mrs Tweedie. She indicated at the Panel hearing that initially she was concerned about reporting such a serious allegation in respect of a colleague and sought the advice of her husband and other colleagues and friends after the end of her shift. This evidence was clearly important in assessing the significance to be placed on the failure to report and the absence of any sign of concern. Although in the case stated the tribunal suggest that the Disciplinary Panel did not really seem to have followed up this question of the demeanour of Mrs Tweedie immediately after the incident it is surprising to say the least that the tribunal has not recorded either in its decision or in the case stated anything about the evidence given at the Disciplinary Panel hearing relating to the concern Mrs Tweedie had about pursuing this matter further. If the tribunal had been examining the Disciplinary Panel's decision in order to determine whether the Panel had reasonable grounds for its conclusion one would have expected the tribunal to take this into account.

[25] Even more significantly the Disciplinary Panel in assessing the evidence of Mrs Tweedie clearly give weight to the fact that immediately prior to the incident Mrs Tweedie was not just a colleague but a personal friend of the respondent. That was not just asserted by her but was accepted by the respondent. In his submissions counsel for the respondent criticised the Disciplinary Panel for asking why Mrs Tweedie would lie. Indeed the tribunal appears to have concluded that by raising such an issue the Disciplinary Panel imposed an improper burden on the respondent. It is a matter of concern, however, that in considering this issue the tribunal neither in its case stated nor in its written decision makes any reference to the close personal relationship between Mrs Tweedie and the respondent immediately prior to the incident. That relationship was clearly material, both to the question of delay in reporting and also to the question of whether the witness was likely to be giving an account which reflected her best memory of the events. The omission of these highly relevant matters strongly suggests that the tribunal was not engaged in assessing whether the Disciplinary Panel had reasonable grounds for the conclusion reached by it.

[26] In relation to incident three the tribunal noted that the Disciplinary Panel had relied entirely on the evidence of Mrs Bell despite the fact that there was no corroboration and that Mr Fitzpatrick who was involved in the

incident did not see the alleged assault. The tribunal acknowledges that the Disciplinary Panel attended the scene so as to examine the sight lines that would have been available to Mrs Bell. In her evidence to the Disciplinary Tribunal Mrs Bell described how she had spoken to her husband at great length about whether she should report this incident and also sought advice from another nurse. The nurse in question confirmed that she had been approached by Mrs Bell although she had no recollection of a reference to a punch. The tribunal noted that the Disciplinary Panel had accepted the evidence of Mrs Bell not withstanding the claimant's denial, the fact that Mr Fitzpatrick did not see any such incident and the lack of medical corroboration. All of these factors were clearly known to the Disciplinary Panel. The judgment as to the weight to be given to evidence was for the Disciplinary Panel and not for the tribunal. In this instance it appears that the tribunal has strayed into the forbidden territory of making its own determination of the evidence.

[27] In relation to the allegations by Mr Mathews the tribunal noted that there had been some personal conflict or difficulty between him and the respondent. In those circumstances the tribunal concluded that in the absence of corroboration a certain measure of circumspection would have been advised. It is clear that the Disciplinary Panel was aware of the previous history in relation to the respondent and Mr Mathews and it was for the Disciplinary Panel to assess the weight that should give to his evidence. In a number of passages the tribunal refers to the assessment of each incident in isolation from any other allegations. Although we have expressed our concern about the fact that the Disciplinary Panel did not specifically indicate its findings in relation to each incident it was perfectly proper for the Panel where it found an incident established on the material before it to take that into account on the issue of propensity when considering other incidents. To that extent it was perfectly proper for the Disciplinary Panel to take into account the evidence about the incidents as a whole. In our view the conclusion by the tribunal that "the Panel found as proven fact incidents of assault as having occurred against the clear weight of the evidence" is a firm indication that the tribunal engaged in the weighing of these matters when it was for the Disciplinary Panel to carry out that task.

[28] In relation to the criticisms of the reasonableness of the investigation we find these entirely without substance. It is contended that there was not inquiry with Mrs Walsh about the demeanour of Mrs Tweedie after the incident. In fact this evidence was before the Disciplinary Panel and was directly considered during Mrs Tweedie's evidence. The circumstances in which witnesses came forward after 3 August were expressly considered by the Disciplinary Panel who looked at correspondence dealing with the extent to which such witnesses might be liable to disciplinary action for failing to report in the first place. The tribunal engaged in speculation in relation to this matter which was quite inappropriate. The tribunal's conclusion that the

Disciplinary Panel had not approached this matter in a fully open and enquiring manner appears to have been reached because of its view about the weight of the evidence. None of this is an indicator of a lack of reasonable investigation.

[29] The question that arises from the tribunal's decision is whether it was correct in law in concluding that respondent had been unfairly dismissed in the circumstances. For the reasons given above that question must be answered in the negative.

[30] This is the first occasion on which this court has had an opportunity to examine the remarks of the House of Lords in Boyle v SCA Packaging [2009] UKHL 37. For the reasons set out by Lord Hope and approved by each member of the House it is clear that Rules of Court should now be made as a matter of urgency to enable cases of this kind to proceed by way of appeal on point of law. I direct that a copy of this judgment be provided to the joint secretaries of the Court of Judicature Rules Committee so that work on such rules should now begin.

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Judgment: approved by the Court for handing down | *Delivered:* **13/10/09**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPEAL FROM THE OFFICE OF INDUSTRIAL TRIBUNALS

AND IN THE MATTER OF A CASE STATED BY AN INDUSTRIAL TRIBUNAL UNDER ARTICLE 22 OF THE INDUSTRIAL TRIBUNALS (NORTHERN IRELAND) ORDER 1996

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BETWEEN:

PATRICK JOSEPH ROGAN

Claimant-Respondent;

and

SOUTH EASTERN HEALTH & SOCIAL CARE TRUST

Respondent-Appellant.

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GIRVAN LJ

[1] I have read in draft the judgment of the Lord Chief Justice and I agree with his conclusions.

[2] The appellant as employer bore the burden of proving the reason for the dismissal and that it was a justifiable reason falling within Article 130(2). In this case the employer relied on Article 130(2)(b) that is to say that the dismissal related to the conduct of the employee. Deciding whether the decision was fair or unfair it depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. This question falls to be determined in accordance with equity and the substantial merits of the case.

[3] In a misconduct case as shown in British Home Stores v Burchell [1978] IRLR 379 the employer must show:

(a) that he genuinely believed that the employee was guilty of the misconduct in question;

(b) that he had reasonable grounds for that belief; and

(c) in forming that belief he had carried out such investigation into the matter as was reasonable in all the circumstances.

Arnold J in that case points out that it is not relevant that the tribunal would itself have shared the view in the circumstances nor is it relevant for the tribunal to examine the quality of the material which the employer had before him.

[4] In Harvey on Industrial Relations and Employment Law at paragraph 1466 it is suggested that in exceptional cases where there is a need for an employee to have complete and unimpeachable integrity any real doubt about his reliability will justify dismissal. In the case of a nurse in charge of vulnerable adults it could be argued that where there is any real doubt about the nurse's dismissal on the grounds of misconduct the dismissal may be justified. In this case the employer acting through the disciplinary panel concluded that the case had been made out on a balance of probabilities. Applying that test was one favourable to the employee.

[5] The tribunal concluded that no reasonable employer on the basis of this investigation given the nature of the evidence would have found the allegations proven. The conclusion shows the tribunal was substituting its view of the evidence for that of the employer. The panel concluded that there had been acts of violence albeit that it entertained doubts as to the accuracy of Mrs Tweedie's version of events. There is nothing to suggest that the panel did not genuinely believe that the respondent did on occasions use violence on patients. They said so and they had evidence before them which entitled them to reach such a conclusion. The tribunal criticised the panel for giving undue weight to the number of allegations rather than exploring each allegation on an individual basis. The panel notes show that each allegation was in fact looked at separately and indeed one matter was specifically excluded from consideration as a consequence. There is nothing to show that the panel failed to explore the individual allegations. Faced with a number of separate allegations and having rejected, as it was entitled to in the circumstances, that there was a conspiracy between the complainants, the number of the independent allegations could properly have influenced a reasonable decision-maker such as the panel in deciding whether or not there was something seriously amiss with the respondent's conduct. While Mrs Devlin may have proved to be an unsatisfactory witness (and we do not have the benefit of a transcript of her evidence) this does not detract from the existence of a number of serious and independent allegations of violence any one of which would have more than justified a decision to dismiss.

[6] The employer had formed a genuine belief of inappropriate physical abuse on the part of the respondent. There were reasonable grounds for the panel to so believe.

[7] The investigation which was carried out involved a 2 day hearing of the evidence from witnesses the recording of a right of separate representation (there being no substance in the claim that the respondent was entitled to legal representation) and a recent decision which showed that the panel had thought through the issues and formed a judgment in good faith. The investigation was one which was reasonable in the circumstances it is clear from the authorities that the employer's reasoning must not be subjected to the kind of scrutiny to which an appellate court would subject a tribunal decision.

[8] The evidence accordingly pointed to the conclusion that the employer believed that the employee was guilty of misconduct, that the employer had reasonable grounds for that belief and that in forming that belief it had carried such investigation as was reasonable in all the circumstances.

[9] As the speech of Lord Hope in SCA Packaging v. Boyle [2009] UKHL 37 shows the case stated procedure, if not properly managed, can significantly add to delay in the determination of an industrial tribunal case and create unnecessary additional procedural complications in proceedings which may already have been lengthy. I agree with the comments of the Lord Chief Justice in relation to the desirability of the introduction of rules of court to enable appeals from Industrial Tribunals to be brought by way of straightforward appeal rather than by the more cumbersome case stated procedure which, as Lord Hope points out, is a procedure which proceeds on the assumption that detailed findings of fact and reasons do not emerge clearly from the lower court or tribunal's decision. Lord Hope at paragraph 14 of his speech went on to say:-

> "If the original decision contains all the tribunal's findings of fact that are relevant to the point at issue and a narrative of the evidence on which the findings are based it will be sufficient for the decision itself to be used as the basis for consideration of the question of law in the Court of Appeal. All that needs to be added is an introductory narrative and the questions on which the case is being stated."

[10] As long as the appeal procedure from the Industrial Tribunals continues to be by way of case stated, in the light of Lord Hope's comments (with which the rest of the House agreed) in many if not most instances it will be sufficient for the tribunal to incorporate in the case stated by reference its written decision without the necessity of restating or reformatting what is clear from

the contents of the decision. It may be that in some cases it will be necessary to state some additional findings of fact or rehearse some additional evidence not apparent on the face of the decision but that should happen rarely since the tribunal's decisions should set out the relevant findings and reasons with sufficient clarity.

[11] Furthermore the formulation of the question or questions raised in the case stated requires some considerable thought. The tribunal should seek to establish the key issue or issues to be addressed in the formulation of the questions for this court. This court has, of course, a power to reformulate the questions to focus attention on the true matters in dispute. While the tribunal in this case stated posed seven separate questions the real question is whether the tribunal was correct in law in considering the respondent had been unfairly dismissed by the appellant in the circumstances. For the reasons given I agree with the Lord Chief Justice that the answer to that question should be No and the appeal allowed accordingly.