IN THE INDUSTRIAL TRIBUNAL

Case Nos. Ind Tri 19 & 20/2015

BETWEEN:

JEREMY WYATT

KARISANNE GARCIA

Complainants

-AND-

MULTIPLE SCLEROSIS THERAPY CENTRE

Respondent

DECISION

The decision of the Tribunal is that the Complainants were unfairly dismissed by the Respondent.

Chairperson:	Gabrielle O'Hagan
For the Complainants:	Daniel Feetham, one of her Majesty's Counsel for Gibraltar, instructed by Hassans
For the Respondent:	Nicholas Gomez of Counsel, instructed by Charles Gomez & Co

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Background

1. The Respondent is a registered charity which provides oxygen therapy sessions in hyperbaric chambers to patients with various painful and serious medical conditions. The Complainants were both employed by the Respondent as Chamber Operators, in the case of Mr Wyatt from 14 January 2013, and Ms Garcia from 2 January 2014. (It is not disputed that Ms Garcia's Originating Application incorrectly recorded her commencement date.)

2. On Thursday, 5 March 2015, both Complainants refused instructions to enter a chamber to assist patients. Later that day, they were told to go home and by letter

dated Friday, 6 March 2015, received by them on Tuesday, 10 March 2015, the Complainants were suspended with pay for gross misconduct, namely "*deliberately refusing to carry out a reasonable and safe instruction from a superior*". Following a meeting of the Respondent's Trustees and Management on 10 March 2015, both Complainants were summarily dismissed effective 13 March 2015 by letters dated 12 March 2015, without notice or pay in lieu of notice, for gross misconduct.

3. On 13 March 2015, a meeting took place at the Centre between the Complainants, the Centre Manager Jamie Pratts, Mr Pratts' father-in-law (a Labour Inspector) and 3 Unite the Union representatives. According to Mr Pratts, he was asked whether he would be prepared to reinstate the Complainants and he said that he could not because the Complainants had "*broken the trust that there was between an employer and employee*". There is no dispute that the Union representatives told Mr Pratts that the dismissal procedure followed by the Respondent had not been fair. Mr Pratts says that the Union representatives told him that proper procedure would be for the Respondent to provide a "*Statement of Facts*" and allow the Complainants to appeal their dismissals. Mr Wyatt says that Mr Pratts was additionally told that the Complainants had not been allowed to put their case; and that he and Ms Garcia also told Mr Pratts that the disciplinary proceedings as a whole should be withdrawn as both Complainants had not been fit medically to enter the Chamber on 5 March 2015 and had medical certificates to prove it. They also told him that they were prepared "*to go quietly but ... did not want a Gross Misconduct charge on [their] record*".

4. The Respondent's Trustees and Management met again, on 16 March 2015, and decided, "*to be fair*", to follow the procedure described by the Union representatives, by providing the Complainants with Statements of Facts and allowing them to appeal against their dismissals. This was confirmed to the Complainants by letters from the Respondent dated 23 March 2015, enclosing the Statements of Facts. The letters refer only to the suspension decision and appear to give a right of appeal against the same, but all parties seem to have proceeded on the basis that the decisions to be appealed were the dismissal decisions.

5. By letters dated 23 and 24 March 2015 respectively, Mr Wyatt and Ms Garcia each withdrew their appeals and requested their termination documentation and pay. When they came to the Centre to pick this up, they refused to sign the ETB Termination of Employment forms because they gave the reason for dismissal as gross misconduct. Their representative, Mr Feetham QC, subsequently also requested that the ETB forms be amended but the Respondent refused because, according to Mr Pratts, neither he nor the Trustees could "*resile from the fact that it [the Complainants' actions] undermined the professionalism of the service we provide and put the health of others at risk*".

6. In their Originating Applications for unfair dismissal dated 3 June 2015 (filed on 4 June 2015), the Complainants claim that the suspensions and the dismissals were not reasonable or fair in the circumstances because in each case there was no fair reason for the dismissal and, if there were a fair reason, the Respondent had not followed a proper and reasonable procedure. They also made an alternative claim of constructive unfair dismissal, if the Tribunal were to find that the Complainants had resigned (instead of being dismissed).

7. The Respondent, in its Notice of Appearance dated 18 June 2015, submits that the Complainants' conduct (deliberately refusing to carry out an instruction from a superior) constituted gross misconduct, being a fundamental and inexcusable breach of their contracts of employment and wholly unreasonable; and that the procedures followed by it were reasonable and fair.

8. The matters came before this Tribunal for Preliminary Hearings on 14 September 2015 and a case management Order made, including that the cases be consolidated and heard together. The Hearing was originally listed to start on 9 May 2016, but following an application by the parties at a Preliminary Hearing on 5 May 2016, was re-listed to start on 15 June 2016 (and a further case management Order was made). The parties then again made an application by consent for a further postponement and the Hearing was re-listed to start on 26 July 2016. On 20 July 2016, the Respondent applied for a further postponement, which was granted, and the Hearing was re-listed to 3 October 2016. On 25 September 2016, the Respondent applied for a further postponement, opposed by the Complainant, which was granted and the Hearing eventually took place on 29 November 2016.

9. The Tribunal heard evidence from both Complainants and, for the Respondent, Mr Pratts and Mr Katkowski, who was at the relevant times and remains employed as a supervisor by the Respondent.

The law

Unfair dismissal: Section 65 of the Employment Act

10. *"(1) In determining ... whether the dismissal of an employee was fair or unfair, it shall be for the employer to show - (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal*", and that that reason is one of the fair reasons set out in Section 65(2), which include a reason which *"(b) related to the conduct of the employee*".

11. Under Section 65(1), it is therefore for the employer first to establish one of the statutory fair reasons for the dismissal. Where this is misconduct (Section 65(2)(b)), the employer must establish that at the time of the dismissal the employer:

    (i) genuinely believed the employee to be guilty of the misconduct;
    (ii) had reasonable grounds for that belief; and
    (iii) had carried out as much investigation as was reasonable in the circumstances.

    "*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" (*British Home Stores Ltd v Burchell* [1978] IRLR 379, 302).

Gross misconduct: refusal to obey a lawful and reasonable instruction

12. Refusal by an employee to obey a lawful and reasonable instruction given by his or her employer may constitute gross misconduct entitling the employer to summarily dismiss the employee.

13. The Respondent's Staff Handbook Disciplinary Procedure (which it was not disputed forms part of employees' contractual terms and conditions) provides in the "*Misconduct*" section a list of "*Gross Misconduct*" offences, which include: "*Deliberately refusing to carry out a reasonable and safe instruction from a superior*" (and states that: "*In these cases and others of similar severity the offending employees will normally be summarily dismissed without notice*"). "*Serious Misconduct*" on the other hand is defined to include "*Failure to carry out lawful, reasonable and safe instructions given by superiors*".

14. In *Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698* at page 700, Evershed MR said:

"*... the question must be — if summary dismissal is claimed to be justifiable — whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard — a complete disregard — of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.*"

15. He went on to say: "*one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions. ... the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions.*"

16. Relevant to (but not determinative of) the fairness of the dismissal is the question of whether the instruction in question was lawful (*Farrant-v-The Woodroffe School* [1998] ICR 184), and this will include:

- whether the employer had a contractual right to require the employee to carry out the instruction;
- whether there was a custom and practice of employees of that kind undertaking the work instructed; and
- the reasonableness of the employee's reason for the refusal.

Section 65(6) substantive fairness

17. The Tribunal must also consider the reasonableness of the employer's actions under Section 65(6) of the Act:

"*(6) ... the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances he acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case.*"

18. The test for substantive fairness in respect of the decision to dismiss is whether the employer's decision and the investigation fell within the band of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods-v-Jones* [1982] IRLR 439). It is not relevant whether the Tribunal would have taken the same decision or action; the Tribunal must not substitute its view for the employer's view (*Foley-v-Post Office; Midland Bank Plc-v-Madden* [2000] IRLR 82). The reasonable responses test also applies to the investigation which led to the decision.

Section 65(6) procedural fairness

19. In addition, when applying and interpreting the statutory requirements as to reasonableness, the courts and tribunals have developed a requirement that, in order to act reasonably, an employer must follow a fair procedure when dismissing an employee. Otherwise, the dismissal will be unfair. The band of reasonable responses test also applies to the question of procedural fairness (*Whitbread Plc-v-Hall* [2001] IRLR 276).

20. For there to be an objectively fair procedure in misconduct cases, case law has established that as a very minimum (and the Acas Code of Practice on Disciplinary and Grievance Procedures goes much further), an employee must be made aware of the case against them (both at the stage when charges are put and when the employee is provided with supporting evidence of the allegations), must know that they are at risk of dismissal and why, must be allowed to state their case and make representations (usually at a meeting or hearing), and must be allowed a right of appeal.

21. These principles of fair procedure are reflected by the Introduction to the Respondent's Staff Handbook Disciplinary Procedure: "*3. At each stage of the procedure the employee against whom action may be taken must be interviewed, informed of the complaint taken against them and given the opportunity to state their case and to call any witnesses to support their explanation. During the interview, they may be accompanied by an employee of their choice*". In addition, the "Gross Misconduct" section (6b) provides: "*As soon as it is believed that an employee may have committed an act of gross misconduct, he/she will be informed of the nature of the allegation by the Centre Manager and then suspended with pay pending further investigation. ... During the investigation the employee will be given every opportunity to state his/her side of the case.*"

22. It is now well established that, in certain circumstances, employers can on appeal "cure" defects in procedure which have already occurred. However, for this to be possible, the appeal must be by way of a complete re-hearing, not a review of the original decision.

23. Where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" i.e. that the dismissal should be regarded as fair because a fair procedure would have made no difference to the outcome (*Polkey-v-AE Dayton Services Ltd* [1987] IRLR 503 (HL)). The only exception is in extraordinary cases where the misconduct is so heinous that an employer would be justified in taking the view that no explanation or mitigation would make any difference.

Polkey

24. *Polkey-v-AE Dayton Services Ltd* [1987] IRLR 503 (HL) provides that where a Tribunal finds that a dismissal is unfair because of procedural failings, consideration of what might have happened had a fair procedure been followed is relevant to the assessment of any compensation to be awarded to the Complainant (the Tribunal should reduce the amount of compensation to reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair). As described above, the decision is not relevant, except in really extraordinary cases, to consideration of the fairness of the dismissal itself.

Decision

Was there a termination by the Respondent or a constructive dismissal (employee's resignation by reason of the Respondent's conduct)?

25. As a preliminary point, Counsel for the parties have agreed in correspondence that the Complainants were dismissed by the Respondent, rather than the Complainants having resigned. However, I shall deal with this issue briefly, as constructive dismissal was initially pleaded in the alternative by the Complainants.

26. The Respondent submits that it agreed to "*withdraw the dismissal*" of 13 March 2015, after it received notice of the Complainants' appeal. I do not consider that such a withdrawal is precluded by the basic principle that notice of termination, once validly given, is effective and can neither be refused by the recipient nor withdrawn by the person giving it, without the other's agreement, since in this case, the withdrawal does appear to have been agreed to by the Complainants and their Union representatives on 13 March 2015 (for the purposes of the requested appeals). However, as a result of the Complainants then withdrawing those appeals (by their letters dated 23 and 24 March 2015) and requesting their termination documentation, and the Respondent providing the same (with the ETB Termination Form "*Reason for termination*" question being answered "*gross misconduct*"), it seems to me that at the time all parties treated the agreed withdrawal as having fallen away, so that the original dismissals stood. If I am correct on this, then the Complainants' termination dates would correctly be 13 March 2015.

Was there a statutory fair reason for the Respondent's dismissal of the Complainants?

27. The Respondent's principal object and purpose is to provide the hyperbaric chamber sessions to patients.

28. Both Complainants were employed as "Chamber Operators". The Complainants say that their role was primarily a technical one. They were responsible for maintaining and running the chamber equipment and pressure levels, and ensuring that the readings were recorded. Ms Garcia says in her Witness Statement that as Chamber Operators, she and Mr Wyatt were "*in charge of running chambers and loading patients*". The Complainants both say that their role did not include entering the chamber with patients, although they admit that they were "expected" (the term used in the Complainants' Counsel's Skeleton Arguments) to cover when necessary for the Chamber Assistant, Lyanne Santos.

29. Mr Pratts agreed in oral evidence that employees should not enter the chamber if they are unwell - for employees' own benefit and for the protection of and to avoid disruption to patients. The chamber door needs to be closed during a session to maintain the required treatment pressure so, if somebody has to leave, the opening of the door will compromise the pressurisation process.

30. It is not disputed that Ms Santos was not entering the chamber on 5 March 2015 because she had a cold, nor that Ms Garcia was covering for her. Nor is it in dispute that, as a result of the refusals on that day by first Ms Garcia and then Mr Wyatt to enter the chamber, with patients already in the chamber to start a session, Mr Pratts had to request a Line Manager to enter the chamber for the session.

31. Mr Wyatt says in his Witness Statement that he had told Mr Pratts that his refusal to obey the instruction to enter the chamber on 5 March 2015 was because during the week he had developed a stomach bug and was going to the bathroom very regularly and so was not fit to enter the chamber (the chamber sessions lasted 90 minutes). As he clearly put it in his Witness Statement, "*I could do my job but I needed access to a toilet in case I needed to go*". He was very convincing in his oral evidence on this point. Mr Wyatt says that he had informed the Centre Supervisor, Richard Katkowski, of the problem earlier in the week. In oral evidence, Mr Katkowski said that on the Monday of that week (2 March 2015), Mr Wyatt had mentioned that he had caught something, possibly from his brother, but it did not seem to alter what he was eating or drinking. It was 3 days later that Mr Wyatt said that he could not enter the chamber because of his stomach problem, at the point of being asked to enter. Mr Wyatt's said in oral evidence that he had not thought it worth saying again that he was still feeling unwell, as he had made the effort to come to work and operate the machinery and there were usually sufficient staff to cover inside the chamber.

32. The Respondent's position was that on 5 March 2015 Mr Wyatt had not put in a sick note or on that day informed management that he was unwell (if he had done so he would have been relieved of his duties), and was therefore considered fit for work. Mr Pratts said in oral evidence that usual practice was for employees to inform management by telephone of a sickness absence or on their arrival at work in the

morning if they were feeling unwell. Mr Wyatt had previously followed the sick note procedure (his previous sick notes were put in evidence).

33. On being telephoned by Mr Katkowski to come to help solve the problem, Mr Pratts says in his Witness Statement that, when he first asked Mr Wyatt to enter the chamber, Mr Wyatt had refused, "*for the same reason as her*", namely Ms Garcia whose first reason was that Ms Santos should enter instead of her. Only then, according to Mr Pratts, did Mr Wyatt say that he could not enter because he had a "*tummy ache*". Mr Katkowski agrees that these were the reasons given to him by Mr Wyatt (in the same order). The Respondent's position is that this was the first time that day that Mr Wyatt had made any reference to being sick and that this was not believed.

34. Mr Pratts introduced new evidence at the Hearing that he had been sitting near the Centre bathrooms for much of the morning before the Complainants were asked to enter the chamber and he had not seen Mr Wyatt go into them. He also said in re-examination that he had seen Mr Wyatt drinking black coffee that day, which he thought surprising of someone with a stomach problem. These allegations were not made in his Witness Statement and this was the first time that the Complainants had heard or had the opportunity to respond to them. I am not therefore minded to give this evidence as much weight as I might have done had it been properly introduced.

35. In her Witness Statement, Ms Garcia says that at the relevant time she was suffering from work-related anxiety and stress and that she felt that she and Mr Wyatt were generally being treated unfairly at work. She gives as examples 2 incidents which happened in February 2015. The first being that Mr Wyatt was given a written warning dated 6 February 2015 for allowing a patient to enter the chamber when he smelled of tobacco, in breach of protocol, but Ms Santos and Mr Katkowski, who were also present, were not given a warning; and in a similar case where Ms Garcia had reported a patient for smelling of smoke, the patient was given a warning and then allowed to enter the chamber. Second, Ms Santos was not disciplined for 2 alleged offences of which Ms Garcia was aware. Ms Garcia also raised these issues in her oral evidence. She goes on to say in her Witness Statement that later in February 2015, she went to see a doctor because she "*felt really anxious and stressed because [she] felt [they] were being treated unfairly*".

36. Ms Garcia says that she had already reported her anxiety and stress problem to Mr Katkowski on 3 and 4 March 2015, although on both those days she did enter the chamber. Mr Katkowski's response had been to suggest an anti-depressant he was taking. Ms Garcia says that on 5 March 2015 her hands were shaking as a result of her anxiety problems. When she was to assist in the chamber, she says that she told Mr Katkowski that she was feeling unwell, that her hands were shaking and she was feeling anxious and nervous, and so she was in no fit state to enter the chamber. In his oral evidence, Mr Katkowski confirmed that he and Ms Garcia had previously discussed her feelings generally and that he had suggested seeing a doctor to obtain anti-depressants. However, he was clear (and convincing) that on 5 March 2015 Ms Garcia had not told him that her hands were shaking or that she had told him earlier that she could not enter the chamber. This had only occurred when she was asked to enter the chamber; and he did not think that there was any question of Ms Garcia being unable to operate the equipment.

37. When Mr Pratts arrived, Ms Garcia says that he tried to insist that she enter the chamber or there would be "consequences", but she refused, saying that she could not. She says in her Witness Statement that she suggested that Ms Santos could assist as Ms Santos was due to fly the following day and, as the pressurisation process of flying is the same as in the chamber, Ms Santos must have been well enough to do both. It also emerged in evidence that staff with colds have been known to enter the chamber, despite the possible risk.

38. Ms Garcia expanded in her oral evidence on the resentment she felt generally towards Ms Santos and specifically in respect of having to cover for her and enter the chamber and she seemed to link this to her feelings of stress and anxiety. Towards the end of her oral evidence, she said that she was suffering from stress because of the favouritism she perceived was given to Ms Santos by Mr Pratts. She also said that she had seen Ms Santos being treated "*special*" and so she could not go into the chamber.

39. Mr Wyatt says in his Witness Statement that he heard the conversation between Ms Garcia and Mr Pratts as described in her Witness Statement. However, on cross-examination, he said that Ms Garcia had made no mention of Ms Santos going into the chamber; and that Ms Garcia had only said that she could not enter because her hands were shaking and that she was suffering from stress and anxiety. He said that was what he recalled, he was there and that is what Ms Garcia said in her Witness Statement. The fact that Mr Pratts and Mr Katkowski say differently was, in Mr Wyatt's view, their opinion.

40. The Respondent's version of events indeed differs. On being telephoned by Mr Katkowski to come to help solve the problem, Mr Pratts says in his Witness Statement that Ms Garcia did not mention being unwell but refused (twice) to enter the chamber solely because, she told him, Ms Santos should enter, given that Ms Santos was flying the following day and thus must be well enough to enter the chamber. Mr Katkowski also says that this had been the reason given to him by Ms Garcia. This is reflected by the Respondent's Statement of Facts dated 23 March 2015. Thus, Mr Pratts' preliminary position was that the first time Ms Garcia made any reference to not being able to enter the chamber as a result of being sick was in her Originating Application.

41. However, under cross-examination, Mr Pratts said that Ms Garcia did state that she had stress and anxiety and could not enter the chamber, at the point of being asked to enter, although not before. But he went on to say that he did not witness Ms Garcia's allegedly shaking hands and that he thought that, if her condition was so serious, she would have gone to the doctor.

42. Once the chamber was pressurised by the Complainants and the patients' treatment had started, Mr Pratts told the Complainants to leave and come back the following week. The Complainants then went to see doctors at the health centre. Mr Wyatt says that the doctor told him that, until 9 March 2015, he was not fit to go into the chamber for 90 minutes without access to a toilet and gave him a certificate to that

effect. In fact, the sick note dated 5 March 2015 simply gives a diagnosis and a fit for work date of 9 March 2015, with no further detail.

43. Ms Garcia has put into evidence a sick note dated 5 March 2015 for stress giving a fit for work date of 6 March 2015 and a second sick note dated 6 March 2015 for depression and anxiety, giving a fit for work date of 14 March 2015. In oral evidence, she explained that the doctor she saw on 5 March 2015 had said that she should return the next day for a follow-up appointment.

44. In oral evidence, it emerged that, following their doctors' appointments on 5 March 2015, the Complainants then went to the Union.

45. The Complainants' sick notes were handed in to the cleaner at the Centre by the Complainants on Tuesday, 10 March 2015. Mr Pratt cannot remember when that week he first saw them.

Findings

46. Counsel for the Respondent in his Skeleton Arguments made submissions based on *PJ Sutherland v. National Carriers Ltd.* [1975] I.R.L.R. 340, in which it was held that an employee can by failing to appeal against his dismissal effectively acquiesce in his dismissal. This decision has long since been distinguished and the correct current legal position is quite the opposite (*Chrystie v. Rolls-Royce (1971) Ltd.* [1976] I.R.L.R. 336). A failure to appeal may only be of evidential value as an indication of the employee's attitude to the dismissal at the time. However, there is nothing in the Complainants' letters dated 23 and 24 March 2015 from which any inference can be drawn (indeed there is no reference at all to the alleged misconduct offence). Mr Wyatt's evidence in his Witness Statement appears to be that the Complainants withdrew their appeals principally because they thought that pursuing them would be pointless - going "*through the motions*" – and they just wanted to be paid what they were owed. He says that Mr Pratts had told them that for this to happen they would need to withdraw their appeals. There was some suggestion by Counsel for the Complainants during the Hearing that the Complainants had been told by Mr Pratts that they would not be paid if they did not withdraw their appeals. This was denied by Mr Pratts and Counsel for the Respondent disputed this, pointing out that neither Complainant picked up their final cheque for another month. I am not sure that much turns on this issue, since in any event the Complainants gave no indication of wanting to continue with their appeals. In any event, I do not find that the withdrawals of their appeals by the Complainants constituted or has evidential value on there being an acceptance by the Complainants, implied or otherwise, of the Respondent's findings of gross misconduct and of their dismissals being fair, as submitted by Counsel for the Respondent.

47. As regards the instruction given to both Complainants to enter the chamber, in both cases, I find the instruction itself to have been lawful and reasonable: the Complainants admit that entering the chamber to cover for the Chamber Assistant, Ms Santos, was expressly part of their duties; this was expected. I do not think that the fact of Ms Santos not entering the chamber resulting in such an instruction should be relevant to an assessment of the reasonableness of the instruction. I find that the issue of such an instruction, regardless of why it was necessary, was likely

to be reasonable, given its purpose, to ensure that a chamber session could proceed. I also find that a refusal to comply with an instruction to assist in the chamber may constitute gross misconduct, since this could jeopardise a chamber session and the provision of such sessions to patients is the Respondent's primary object and purpose.

48. In respect of the refusal by Ms Garcia to obey the instruction to enter the chamber on 5 March 2015, I find that Mr Pratts genuinely believed that Ms Garcia was deliberately and unreasonably refusing to follow a lawful and reasonable instruction to do so.

49. When Mr Pratts was questioned about why he considered Ms Garcia's refusal to be deliberate, making it a gross misconduct, rather than a serious misconduct, offence under the Respondent's Staff Handbook, Mr Pratts responded that he took that view because the Complainants had known all week that Ms Garcia was covering for Ms Santos in the chamber.

50. I also believe Mr Pratts' evidence that he took the view that at the relevant time there was no apparent ground precluding Ms Garcia from going to sit in the chamber. I find that this was a genuine and reasonably held view on the part of Mr Pratts, since I believe his evidence that Ms Garcia's first given reason for not entering the chamber was because she thought Ms Santos should enter (objectively, not a good reason); and that he considered that her subsequent complaint of stress and anxiety, albeit recollected by him only in oral evidence, was not so serious to inhibit her from being in the chamber for 90 minutes. Ms Garcia had not on arrival at work that morning made any mention of being unwell or being unable to enter the chamber (in the knowledge that she was covering for Ms Santos), had not taken a sickness absence from work, had not obtained a sick note, did not, according to Mr Katkowski, look ill, and her alleged illness was not so serious that she could not undertake other tasks. I have also considered Ms Garcia's own evidence, particularly her oral evidence, on the resentment she felt generally towards Ms Santos and specifically in respect of having to cover for her and enter the chamber due to, so she believed, Ms Santos' favourable relationship with Mr Pratts. To the extent that Mr Pratts was aware of this, this would also have contributed to Mr Pratts' belief that Ms Garcia's refusal to enter the chamber was wilful and unreasonable. Finally, Mr Pratts' primary concern was to ensure that the chamber sessions proceeded without disruption. If he genuinely believed that Ms Garcia was too sick to enter, he would surely have instructed her not to enter, to avoid any potential disruption to the session. Finally, on this subject, I do not place much weight on Mr Wyatt's recollection of the reason(s) actually given by Ms Garcia to Mr Pratts, since he was inconsistent on this in his oral evidence. Ambiguity also arises from his own reported first response to the request to enter the chamber, "*for the same reason as her*". If he said this, then this would surely mean that either he was also suffering from stress and anxiety, or that he too thought that Ms Santos should be asked to enter instead. Overall, and weighing up all the various accounts, on the balance of probabilities, I prefer the Respondent's evidence to the Complainants on this issue.

51. In respect of Mr Wyatt, I find that Mr Pratts genuinely believed that Mr Wyatt was also deliberately and unreasonably refusing to follow the lawful and reasonable instruction to enter the chamber on 5 March 2015. I believe Mr Pratts' evidence that

he took the view that Mr Wyatt's complaint (stomach problems so serious to inhibit him from being in the chamber for 90 minutes) was not true. I find that this was a genuine and reasonably held view on the part of Mr Pratts, since I think it probable that Mr Wyatt first said that he would not enter the chamber because he thought Ms Santos should enter. In respect of his complaint of stomach problems, he had not on arrival at work that morning made any mention of being unwell or being unable to enter the chamber, had not taken a sickness absence from work, had not obtained a sick note, did not, according to Mr Katkowski, look ill, and his illness was apparently not so serious that he could not undertake other tasks. Although I am not minded to give much weight to Mr Pratts' late evidence on Mr Wyatt not using the bathroom and drinking coffee that day, I consider that this is in any event unnecessary. I therefore also find that the considerations detailed in this paragraph in my view outweigh the persuasiveness of Mr Wyatt's oral descriptions at the Hearing of his stomach problems on the day in question.

52. In respect of both Complainants' sick notes, I do not think that these provide much support to the Complainants. None of the sick notes were obtained by the Complainants or were available to the Respondent prior to or at the time of their complaints of sickness on the morning of 5 March 2015. All that they can establish is that later on 5 March 2015 the doctors' opinion was that the Complainants were suffering from the illnesses specified in the sick notes. They give no opinion on the Complainants' state of health earlier that day. I also note that both Complainants were apparently well enough to attend the health centre on 5 March 2015 and also then to visit the Union.

53. I therefore find that on the evidence available, the Respondent genuinely believed that on 5 March 2015 each Complainant had deliberately and unreasonably refused to obey a lawful and reasonable instruction to enter the hyperbaric chamber and to do the job they were employed to do. The Respondent also believed that the refusals carried serious enough implications to constitute gross misconduct, constituting a repudiatory breach of the Complainants' terms and conditions of employment, since that employment required them to assist patients in the chamber when instructed. A refusal to do so was not a trivial matter. It could jeopardise chamber sessions, cause damage to patients and to the reputation of the Respondent; and so struck at the heart of the employment relationship.

54. I am satisfied that this misconduct was the Respondent's reason for the Complainants' dismissals (there was no evidence that there was any other reason for the dismissals) and that the Respondent genuinely believed that the Complainants had committed that misconduct.

<u>The investigation and the decision to dismiss</u>

55. The Respondent's Staff Handbook Disciplinary Procedure provides that "*During the investigation the employee will be given every opportunity to state his/her side of the case*".

56. Mr Pratts acknowledged in cross-examination that no investigation was conducted in the one day between the events of 5 March 2015 and the suspension decision letters

dated 6 March 2015, nor was any investigation or interview undertaken prior to the dismissal letters of 12 March 2015, and that he did not attempt to interview the Complainants or to obtain their side of events.

57. However, I find that this omission to undertake any investigation might fall within the band of reasonable responses of a reasonable employer in these circumstances, objectively viewed. The only issue for the Respondent was limited to the Complainants' refusals to enter the chamber on 5 March 2015, and the fact of those refusals was not in dispute, with the Complainants having already stated their justifications at the time. In such circumstances, a reasonable employer might decide that there was nothing else to investigate and the only individuals who might be interviewed had all been present and heard on that day.

58. In respect of the decision to dismiss, employers have differing views on what action to take in a given situation and it is not for the Tribunal to decide what the Tribunal would do if it were the employer. In this case, the employer's effective "business", its principal purpose, is to provide services to patients with a range of painful medical conditions such as multiple sclerosis by means of the hyperbaric chamber oxygen therapy sessions. As the Complainants were well aware, if employees are not available to enter the chamber, then it is difficult, if not impossible, for the Respondent to provide these services at all, thereby potentially causing suffering to the patients who rely upon the services. In circumstances where the Complainants had refused to enter the chamber, in both cases in the Respondent's opinion deliberately and unreasonably, I find that the decision by the Respondent to dismiss the Complainants could fall within the range of reasonable responses which might be adopted by a reasonable employer faced with such a situation. After all, any reasonable employer would surely be seriously concerned about whether it would be possible to rely upon the Complainants to do their jobs going forwards and the potential risk to patients, as Mr Pratts described it in his oral evidence. Therefore, it was, I consider, reasonable of the Respondent to view the refusals as conduct serious enough to overturn the contract between it and the Complainants, so justifying summary dismissal.

59. As appears from the minutes of the meeting of the Trustees and Management on 10 March 2015, the Respondent did consider the Complainants' disciplinary histories, work performance, as well as the nature of its own business (in particular, patient care and safety), when considering the penalty.

Did the Respondent follow a fair disciplinary and dismissal procedure?

60. I do not find that the withdrawal of their appeals by the Complainants was an acceptance by them, implied or otherwise, that the procedure used to dismiss them was fair. There is nothing in the Complainants' letters dated 23 and 24 March 2015 from which this inference can be drawn (indeed there is no reference at all to the disciplinary/dismissal procedure (or lack of the same)), nor has any other evidence been proffered supporting this submission by Counsel for the Respondent. Mr Wyatt's evidence in his Witness Statement appears to be that the Complainants withdrew their appeals principally because they thought that pursuing them would be pointless: going "*through the motions*". Again, the authority of *PJ Sutherland v.*

National Carriers Ltd. [1975] I.R.L.R. 340 referred to by Counsel for the Respondent in his Skeleton Arguments on this subject does not reflect current law.

61. It is clear that there were serious failings by the Respondent in the disciplinary and dismissal procedure it followed.

62. Most damningly, as is clear from the face of the suspension letters dated 6 March 2015 and the dismissal letters dated 12 March 2015, the decisions were taken without any proper procedure at all being followed, including as laid down in the Respondent's Staff Handbook Disciplinary Procedure: "*3. At each stage of the procedure the employee against whom action may be taken must be interviewed, informed of the complaint taken against them and given the opportunity to state their case and to call any witnesses to support their explanation. During the interview, they may be accompanied by an employee of their choice*".

63. Most importantly, the Complainants were not at any stage given any opportunity to put their own cases in response to the complaints. The 12 March 2015 dismissal letters make it clear that the dismissal decisions were taken by the Respondent without having heard from the Complainants at all: "*... the Management and Trustees met on the 10th March 2015 to discuss your case of Gross Misconduct. After deliberating, the board has decided to terminate your employment forthwith on the grounds of Gross Misconduct*". When it was put to Mr Pratts that this constituted a breach of paragraph 3. of the Disciplinary Procedure and so a breach of contract, he did not respond. He also accepted that it was perhaps correct that the Complainants' sick notes, which he believed he had had sight of before 12 March 2015, would have been material to the dismissal decision of the Trustees and Management, although he took the view that they would not have changed the decision.

64. It seems that in addition the Complainants had at no stage been notified that dismissal was a possible consequence of the events of 5 March 2015.

65. I am also concerned by the fact that the dismissal decisions taken by the Respondent at the meeting of the Trustees and Management on 10 March 2015, as evidenced by the minutes, were grounded not just on the events of 5 March 2015, but on a succession of acts of "*minor misconduct and serious misconduct*" by both Complainants, and the Complainants were entirely unaware of this. These other acts are not referred to as forming part of the reason for dismissal in the suspension decision letters or the dismissal decision letters and so the Complainants were never given the opportunity to address these.

66. Mr Pratts has even put into evidence what he describes as a "*log of events*" in respect of each Complainant, namely a description of historic disciplinary misdemeanours and offences starting in October 2014, most of which were apparently not dealt with by disciplinary proceedings at the times they occurred, but which were apparently taken into account by the Trustees and Management when considering the dismissal decisions. In respect of Mr Wyatt, it seems that some of these complaints had at least been the subject of disciplinary proceedings; and verbal warnings and also a written warning were given. But in respect of Ms Garcia, none of the complaints articulated in the minutes appear to have given rise to

disciplinary proceedings and she stated in oral evidence that this was the first time she had seen Mr Pratts' log. Thus, she was unaware of the incidents recorded and unaware that they amounted to disciplinary offences, let alone had she been given the opportunity to respond to them or make improvements if appropriate. I put to Counsel for the Respondent at the Hearing that taking Ms Garcia through the log in cross-examination did not in my view therefore assist his case.

67. It is the case that these defects in the disciplinary/dismissal proceedings might have been cured by the Respondent if the Complainants had pursued the appeals and these were conducted by the Respondent by way of complete re-hearings (albeit that no evidence has been adduced to establish that this was the Respondent's intention). But as a result of the Complainants choosing not to pursue this course of action, this is not an issue.

68. In summary on this issue, neither Complainant was put on notice of the nature of all of the Respondent's complaints against them or of the possible penalties, including dismissal, which could be imposed. No disciplinary meetings or any other opportunity for the Complainants to put their cases before the dismissal decisions were made was given. Instead, the Complainants were simply notified of their dismissals.

69. The Respondent has made no attempt in its pleadings or through its Witnesses' evidence to justify its apparent utter disregard for the requirement to undertake a fair disciplinary/dismissal procedure, in particular, giving employees the right of response to complaints made against them. Mr Pratts even on the day of the Hearing did not appear to understand that giving employees a right of appeal against a disciplinary decision is not equivalent to, first and much earlier in a disciplinary procedure, giving employees a right of response to and to defend themselves against complaints which may or may not result in a disciplinary decision.

70. A refusal to obey an instruction does not in my mind come anywhere near the "heinous misconduct" (utterly odious or wicked) exception to the requirement that employers follow a fair dismissal procedure. Nor do I see any other facts or circumstances which would except the Respondent from the requirement in this case.

71. I find that the disciplinary/dismissal procedure carried out by the Respondent was fundamentally and significantly unreasonably and unfairly handled.

Conclusion

For the reasons set out above, I find that the Respondent dismissed both Complainants because it genuinely believed them to be guilty of gross misconduct, namely a wilful and unreasonable refusal to obey what the Respondent genuinely believed to be a lawful and reasonable instruction on 5 March 2015, and had reasonable grounds for its belief, despite not carrying out an investigation. However, I find that the failure by the Respondent to undertake a reasonable or fair (or indeed any) disciplinary/dismissal procedure renders the dismissal of each of the Complainants by the Respondent unfair.

Gabrielle O'Hagan

Gabrielle O'Hagan, Chairperson

5 January 2017