THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**
sitting alone

BETWEEN:

Mr R Williams

Claimant

and

Sussex Police

Respondent

ON: **5 & 6 September 2017**

Appearances:
For the Claimant: **Mr R Marlow, Friend**
For the Respondent: **Mr G Self, Counsel**

REASONS FOR THE JUDGMENT DATED 6 SEPTEMBER 2017
(PROMULGATED ON 3 OCTOBER 2017)
PROVIDED AT THE REQUEST OF THE CLAIMANT

1. In this matter the claimant complains that he was unfairly dismissed.

Evidence

2. I heard evidence from Superintendent De La Rue, the disciplining manager, and from Chief Superintendent Honnor, who heard the appeal. I also heard from the claimant and had an agreed bundle of documents before me.

Relevant Law

3. By section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his or her employer.

4. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

5. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.

6. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
    a. genuinely believed the claimant was guilty of misconduct;
    b. had reasonable grounds on which to sustain that belief; and
    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

7. Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

8. The approach in Burchell is modified to the extent that even if the respondent fails to establish one or more of the three limbs above the Tribunal must still ask itself if the dismissal fell within the range of reasonable responses referred to below. Further, in a case where the underlying facts were not in dispute then it will not always be necessary to adopt the Burchell approach (Boys and Girls Welfare Society v Macdonald 1997 ICR 693).

9. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23). One factor to consider is whether the respondent has acted inconsistently in its treatment of employees but only where those employees are in "truly parallel circumstances". The EAT emphasised in Hadjioannou v Coral Casinos Ltd (1981 IRLR 352) that flexibility must be retained and employers are not to be encouraged to think that a tariff approach to misconduct is appropriate.

10. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

11. In coming to these decisions, the Tribunal must not substitute their own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

Findings of Fact

12. Having assessed all the evidence, both oral and written, I find on the balance of probabilities the following to be the relevant facts.

13. The claimant, a former Inspector with the Metropolitan Police, commenced employment with the respondent on 13 July 2009 as a Policy and Inspection Officer. At the time of his dismissal he was working particularly on delivery of the integrated offenders' management (IOM) programme.

14. His contract of employment included provisions, as one might expect, as to the standards of conduct required of him both within and outside work. In particular it states at clause 20:

> "You are required to conduct yourself in a professional and polite manner at all times and to comply with our Equal Opportunities Policy and associated policies, when dealing with the public, colleagues and any other personnel with whom you come into daily contact through your employment with us…"

and at clause 21:

> "Whilst your personal life is your own concern, as an employee of Sussex Police it is essential that you do not conduct yourself outside work in a way that may damage the interests, reputation or credibility of Sussex Police."

15. Those policies were contained in the staff handbook a copy of which was received by the claimant on 6 August 2009.

16. The section on Conduct states:

> "Always treat members of the public, colleagues and anyone else with whom you come into contact with whilst carrying out your duties with respect and courtesy and in a fair and consistent manner at all times and in accordance with the Equality and Diversity Policy … and the Police Staff Council Standards of Professional Behaviour.
>
> If you are a line manager you are expected to lead by example.
>
> Offensive language unprofessional conduct or behaviour by employees towards anyone will not be tolerated under any circumstances."

17. Under conduct outside work, it states:

"…you should be mindful of the impact of (sic) your conduct may have on the organisation's reputation"

18. The disciplinary policy is typical of the policy one expects to see in this type of organisation. It includes within the non-exhaustive list of offences considered to be gross misconduct:

"Conduct prejudicial or likely to be prejudicial to the reputation and good name of Sussex Police…
Attending work under the influence of alcohol…
Incapability at work due to the effect of alcohol…
Serious breach of the Sussex Police rules, policies and procedures…
Bullying, harassment…"

19. The disciplinary process includes an investigation stage, disciplinary hearing and the right to appeal. In relation to the right of appeal, it states that an appeal hearing may increase, confirm, decrease or rescind the original disciplinary sanction.

20. 9 & 10 March 2016

21. The claimant, together with four of his colleagues (Inspector Swinney, Ms Pettman (IOM manager), PC Mitchell & Mr Sellings (IOM Manager)) attended a national IOM conference on 9 and 10 March 2016. On the night of 9 March he, his colleagues and other attendees at the conference attended a dinner and had drinks in the bar afterwards. It is common ground that the claimant became drunk and that his colleagues were also drinking to some degree, probably having at least four alcoholic drinks each. It is also common ground that the claimant behaved inappropriately, to some extent at least, during the course of the evening.

22. The next morning the claimant's line manager, Ms Swinney, together with Ms Pettman approached the claimant in the venue foyer and asked him to leave the conference due to his behaviour the night before. The claimant did leave. Exactly what was said is a matter of dispute between the parties.

23. Disciplinary investigation

24. Ms Swinney subsequently reported the claimant's behaviour to the respondent and a disciplinary investigation was commenced by DCI Ockwell.

25. On the morning of 10 March the claimant sent a text to Ms Swinney. That text said:

"Rachel. I'm sorry about everything that happened. I only usually drink beer and even then just one or two. I was drunk and was obnoxious I. drank most of that boottle of wine in addition to what I had before. I was still drunk when I left this morning. . I feel awful. Please apologise to Toni and Laura Phil and my sincere apologies to you. I let you down and I'm so sorry." (sic)

26. On 11 March Chief Inspector Hahn emailed Ms Swinney setting out his recollection of events the night before. His account was broadly neutral

but did confirm that he witnessed exchanges between the claimant and Ms Pettman and Ms Swinney where both had encouraged him to relax. He also recalled the claimant calling Ms Swinney "girl" which Mr Hahn had thought was inappropriate.

27. On the same day both Ms Mitchell and Mr Sellings set out their recollections in written statements.

28. Ms Mitchell witnessed the claimant being drunk and loud and making various offensive comments including "Fuck the Queen" and "The Jews had come over and introduced usury and fucked everything up". He also said that he had taken magic mushrooms and smoked weed recently and gave details about his cannabis habit and beliefs. She recounted an incident where a female colleague from another force who has a large birthmark on her face borrowed a lighter and the claimant said, to Ms Mitchell, that if she did not bring it back she should "burn that fucking slug off her face". They also had a discussion about Ms Mitchell's relationships (she is gay).

29. Mr Sellings stated the claimant had loudly called the Queen a "fucking bitch" and that Ms Swinney had tried to "shush" him regularly during the evening. He also confirmed that the claimant talked about his use of magic mushrooms.

30. Mr Ockwell met the claimant on 11 March, informed him that serious allegations of potential gross misconduct had been made against him and suspended him pending further investigation. The suspension was confirmed in writing on the same day.

31. On 14 March Mr Ockwell wrote to the claimant inviting him to an investigatory interview on 21 March to discuss allegations that on 9 March at a work conference he had made inappropriate and offensive comments, had demonstrated aggressive and challenging behaviour, expressing some extreme views in the company of others and had used inappropriate language.

32. On 14 March Ms Pettman set out in writing her recollection of events. She stated that the claimant expressed quite extreme opinions and that Ms Swinney had tried to quieten him down. Also that as she was saying goodnight the claimant placed his chin on her shoulder and said "Toni Toni Toni". She told him to stop and he asked her if she was planning to go to bed alone. Eventually she said she had to tell him firmly to "back off". She was also present the next morning with Ms Swinney when she told the claimant to go home and stay home and said that the claimant became angry and aggressive.

33. On 17 March Ms Swinney set out her account of the events in question. She said that early in the evening the claimant had said to her "I would give you one" when she asked him if she was dressed ok. As the evening progressed she witnessed him express intense views around the royal family and she told him to "shhh". After dinner she heard the claimant

refer to the Queen as a bitch and later when she tried to stop him expressing extreme views he said "Fuck off girl and don't talk to me". She said that the claimant had been rude and aggressive to a CI (Hahn) and she had also heard the claimant talk about his use of cannabis. The next morning, having discussed the claimant's behaviour with colleagues, she waited for him in the reception area with Ms Pettman and when he appeared asked him to leave the conference. His reply was aggressive and he said that he was leaving anyway.

34. The investigatory meeting took place as planned on 21 March. Mr Ockwell was accompanied by a note taker. After the interview the claimant was invited to agree the notes as accurate. He did not do this. He tells me that he sent a text to Mr Ockwell asking for a further interview as he wanted to clarify some of his answers. That text is not before me but the respondent does not challenge this evidence. I accept that the claimant made this request but do not conclude that this makes the notes unreliable. I accept them as a broadly accurate account of what was said. Of course Mr Ockwell should have replied to that text but I do not consider his failure to do so to be a significant flaw especially as the claimant later had every opportunity to put his case to the dismissal manager.

35. In any event at the investigatory interview on 21 March the claimant, who was not accompanied but expressly confirmed that he was aware of his right to be so, stated that he did not remember everything that was discussed that evening or said to him as he was drunk but recalled apologising before he left. He estimated that he had consumed at least two bottles of wine. He also confirmed that he had still been drunk the following morning and still had alcohol in his system. It was when he had got home and the effect had worn off that he realised what he had done and he had texted Ms Swinney (as above).

36. In relation to the specific allegations, the claimant said that he did not recall saying to Ms Swinney "yes, I would give you one" but that if he had made that remark it would have been when he was sober and said in jest. He also confirmed that it was more than possible that he had referred to the Queen as a "fucking bitch" and said "fuck the Queen". He said he could only apologise and agreed these were not appropriate comments to make. He could not recall a conversation with or about the woman with a birthmark on her face but said he would only imagine saying something as alleged if he was drunk and apologised again.

37. He said he recalled having a "tait a tait" (sic) with Ms Swinney but could not remember the details and apologised if he had said "fuck off girl don't talk to me". He confirmed that the comment was possible. In relation to the allegation regarding Mr Hahn he said he did not remember being aggressive or swearing at other people but had realised that he had overstepped the mark. As far as the comment about Jews is concerned, he acknowledged that his views "were not everyone's". He said that he believed the statement about usury was factual so could not be considered racist. In response to the allegations made by Ms Pettman the notes record that the claimant "called bullshit". He said he did not recall it and

apologised and said he had “no intentions” on her and that this was a surprise to him to hear. However he did say that if he did do this it was an indication of how drunk he was and he could only apologise.

38. As far as the next day was concerned he said that Ms Swinney approached him and said they needed to talk but he said he was going sick with stress and left.

39. When asked by Mr Ockwell if he thought his behaviour at the conference was in keeping with the standards of professional behaviour policy, the claimant said that he was drunk and most likely guilty and that he would not have done this deliberately. Later he said that all he could do was apologise and he had clearly lost control.

40. Mr Ockwell produced a report setting out the allegations, the process that he followed, the witnesses, documentary evidence, summary of facts and a conclusion. He found that there was a disciplinary case to answer in respect of eight allegations.

41. Dismissal

42. The claimant was informed on 27 April by Ms Palmer of HR that he was required to attend a disciplinary hearing on 9 May, to be chaired by Mr De La Rue, in respect of allegations of gross misconduct as follows:

> “1. engaging in conduct prejudicial unlikely to be prejudicial to the reputation and good name of Sussex police;
> 2. being incapable to work due to the influence of alcohol;
> 3. taking illegal drugs at home;
> 4. engaging in conduct considered to amount to bullying;
> 5. engaging in conduct considered to amount to sexual [harassment] and;
> 6. exhibiting behaviour which could be considered to be racist;
> 7. failing to act with self-control and tolerance;
> 8. failing to treat members of the public and colleagues with respect and courtesy.”

43. The investigatory report together with the supporting documents and relevant policies were enclosed and the claimant was invited to submit any further evidence he wished along with the names of any witnesses he wished to call.

44. The claimant submitted a lengthy written submission on the day before the disciplinary hearing. This document expresses, in some parts, extreme and unorthodox views together with, at times, views that many would consider extremely offensive. In the course of that document he also admitted that he had been drunk on the night in question, that he could not remember everything that happened and that he was ashamed of his behaviour. He also stated that he was not a racist or sexist and that he had allowed the evil of alcohol to manifest itself through him and apologised for any upset he caused. He also said that he was drunk on 9 March and out of control, had lost his inhibitions and upset a few people and again wanted to apologise. He also said that he fully expected to be sacked.

45. The claimant attended the disciplinary meeting with Mr De La Rue on 12 May. Again notes were produced by a notetaker. The claimant says that they are inaccurate and do not represent the true flavour of the meeting. I accept them as broadly accurate and he has specifically confirmed the accuracy of what I regard as certain key passages.

46. The claimant attended alone notwithstanding that he had been informed of his right to be accompanied and again this was confirmed at the start of the hearing. The allegations were put to the claimant and that they could amount to gross misconduct and result in summary dismissal. Mr Ockwell summarised his investigation and findings. Mr De La Rue questioned Mr Ockwell as did the claimant. The claimant queried some details particularly regarding the chronology of events but again admitted making the "slug on the face" comment but instantly regretting it. The minutes record that he also admitted pushing Ms Pettman's shoulder 10 minutes before bed and asking if she was going to bed alone which he said was a joke and was a reference back to a previous discussion about her possible relationship with another colleague. He also admitted putting his head or chin on her shoulder and saying "Toni Toni Toni" but he said this was not a sexual advance. The claimant says that these parts of the minutes are inaccurate in that he did not admit pushing Ms Pettman's shoulder.

47. In conclusion the claimant said that he was drunk, should have known better, he spoke about topics he normally wouldn't as they were viewed as extreme and aggressive. He apologised. The claimant confirmed to me that this part of the notes was accurate.

48. After an adjournment Mr De La Rue informed the claimant that he had concluded that the investigation had been conducted fairly and that his actions amounted to gross misconduct. He was satisfied that the conduct which was described in the investigation report had happened, that the witness accounts tended to corroborate one another and that the claimant had admitted many of the specific acts.

49. In relation to the specific allegations he found allegation 1 proven, allegation 2 proven in part (in that he was incapable of work on the following morning but accepted being on duty in the evening was a grey area), allegations 3 & 4 not proven and allegations 5, 6, 7 and 8 all proven.

50. In relation to sanction although he acknowledged the claimant's good record of employment, Mr De La Rue concluded that the allegations were extremely serious and that dismissal was the appropriate sanction. The claimant was informed of his right to appeal.

51. This was all confirmed to the claimant in a letter dated 17 May.

52. <u>Appeal</u>

53. The claimant wrote a letter of appeal on 31 May in summary saying that he considered the investigatory meeting to be flawed and that there was new evidence arising from the results of his own investigation that should be

taken into account. He enclosed images he had obtained from CCTV at the venue and also a statement he obtained from a receptionist.

54. In the meantime the claimant had also made a complaint to the respondent's Professional Standards Department but this was rejected very quickly. A copy of that complaint was considered by Mr Honnor.

55. The claimant was invited to attend an appeal meeting with Mr Honnor which he did on 17 June. Again he was not accompanied despite having been advised of his rights in that regard. At that appeal the claimant's arguments were in summary that there was an ineffective investigation, a criminal investigation should have been undertaken in relation to the drugs allegation, his submission was not taken into account and he had obtained new evidence. Mr Honnor confirmed that during the appeal meeting that he had read the new statements submitted but felt they did not add any weight to the allegations made.

56. In the course of the meeting the claimant repeated that he acknowledged he had been drunk and sworn and that he was sorry for that but he disputed that he was sexist or racist. He also said that he had not been drunk on the morning of the 10th despite what he said in the text to Ms Swinney that day although he accepted that he was under the influence of drink. He also expanded upon his argument relating to the allegation of drug use.

57. Mr Honnor wrote to the claimant on 23 June setting out the appeal outcome which was that it was unsuccessful but in the course of coming to that decision, Mr Horner reversed two of the decisions of Mr De La Rue in that he found count 2 not proven (being incapable of work due to alcohol on morning of the 10th) and count 3 proven (use of drugs at home). This was within his permitted remit according to the policy. As an observation if a respondent is going to adopt such an approach, I would expect to see a clear statement in advance to the employee of that possibility which was not done in this case. In the event however it made no material difference.

Conclusions

58. It is clear that the reason for the claimant's dismissal was conduct.

59. I then ask first, by the standard of a reasonable employer, whether the respondent genuinely believed the claimant was guilty of misconduct and conclude that very clearly both Mr De La Rue and Mr Honnor did although they differed slightly on which allegations were proved.

60. Then, were there reasonable grounds on which to sustain that belief? In this respect the claimant made significant admissions. During the disciplinary process he admitted being very drunk on the night in question and also that he made (or was likely to have made) various comments that included profane language, views that most would find offensive about the Queen and Jewish people together with an insulting comment about a woman's birth mark. He also accepted that he behaved in a certain way

towards Ms Swinney (the "I'd give you one" comment) and Ms Pettman (putting his chin on her shoulder and asking if she was going to bed alone). He did not accept however that this amounted to sexual harassment. He said that was a matter of interpretation as he did not intend to sexually harass but accepts that harassment is a matter of perception. His explanation for all this behaviour is that he was very drunk.

61. The claimant also argued that there was a responsibility on Ms Swinney as his line manager to manage his behaviour when it got so bad. He accepts that she shushed him on a few occasions but says that was not enough. I do not accept that submission. Perhaps a stronger line manager would have done more but the claimant and the claimant alone is responsible for his behaviour on that evening.

62. I conclude that there are certainly reasonable grounds for the respondent concluding that allegations 1, 5, 6, 7 and 8 (in respect of colleagues) were made out. As far as allegation 2 is concerned this was overturned at appeal. Although I do not agree with the claimant that allegation 3 should have been dealt with as a criminal matter, I can see at least an argument that Mr Honnor – as I have said above – could have dealt with this aspect better. There was also at least some uncertainty about the provenance of some of the evidence on this matter and so I err on side of caution in respect of that allegation as to whether there were reasonable grounds and find there were not. It is more than outweighed however by the other allegations and I do not accept that it in some way taints the rest of the case against the claimant or was highly prejudicial. What the claimant admitted to was prejudicial enough.

63. Turning then to whether, at the stage at which it formed that belief on those grounds, the respondent had carried out as much investigation into the matter as was reasonable in the circumstances of the case. The claimant says they did not in various ways – not least because of the evidence from the receptionist that he obtained – but ultimately that evidence went to allegation 2 that was overturned at appeal in any event. I agree with the respondent that in all other respects the investigation was reasonable. Further investigations could have been made but given the admissions made by the claimant, what was done cannot be unreasonable.

64. As far as the process followed by the respondent is concerned, I find this was completely reasonable. All steps that should be taken were and the claimant was afforded all the protections he was entitled to expect.

65. As far as the reasonableness or otherwise of the sanction imposed is concerned, given the findings of Mr De La Rue and Mr Honnor it was well within the band of reasonable responses to find that this amounted to gross misconduct and that summary dismissal was appropriate. The claimant's only real argument here perhaps could be if there was a lack of consistency of treatment. There was no evidence before me however of anyone else in truly comparable circumstances to those of the claimant

being dealt with differently. The fact that others on that night were intoxicated is irrelevant. The claimant was not dismissed for being drunk. He was dismissed for what he did and said whilst drunk.

66. Accordingly the claim of unfair dismissal fails.

Costs

67. The respondent made an application for costs totalling £16,856.76 pursuant to rule 76(1) of the Employment Tribunal Rules of Procedure 2013. The solicitors acting for the reps had written to Mr Marlow on 8 February 2017 putting him on notice that should the claimant continue to pursue his claim such an application would be made. They set out the relevant rule and that their opinion that he had no reasonable prospects of success and the reasons for that view. In all respects except one, those reasons correspond to the reasons I have given for my finding that the dismissal was fair. He was invited in that letter to withdraw his claim within 14 days and if he did so no costs order would be pursued. Mr Marlow replied to that letter by email dated 23 February 2017 indicating that the claimant intended to pursue his claim.

68. The claimant's submissions on this application were that he believed he had a good case and he did not consider it to be vexatious. He is not working at the moment but is in receipt of a pension of £2,000 per month and rental income of £550 per month. He has his own mortgage to pay and has one dependant.

69. Costs orders are not to be made lightly but on this occasion I am persuaded that it is appropriate given the nature of the costs warning letter sent and my findings. I summarily assess costs to be paid in the sum of £3,000.

_____
Employment Judge K Andrews
Date: 27 November 2017