EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122777/2018

Held in Edinburgh on 25, 26, 27 and 28 March 2019

Employment Judge: M Sutherland

Alan Morris	**Claimant** **Represented by:** **Mr D Boyd** **- Friend**
Tesco Stores Limited	**Respondent** **Represented by:** **Mr G Dunlop** **- Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the Claimant was not unfairly dismissed and the claim is dismissed.

REASONS

Introduction

1. This is a claim of unfair dismissal.

2. The Claimant initially represented himself and was assisted by his friend Duncan Boyd who is not legally qualified. Part way through the hearing Duncan Boyd assumed representation of the Claimant.

3. The alleged misconduct was that the Claimant had indecently assaulted a female colleague by deliberating reaching between her legs from behind and touching her private parts. At the start of the hearing, and on application from the Claimant and the Respondent respectively, an anonymisation order and restricted reporting order was granted under Rule 50(3)(b) and (d) of the Employment Tribunals Rules of Procedure 2013 and under Section 11 of the

Employment Tribunals Act 1996 preventing disclosure and publication of the identity of the Claimant and the alleged victim until promulgation of the decision.

4. At the end of the hearing, the Claimant made an unopposed application for the anonymisation and restricted reporting orders in respect of the Claimant to continue after promulgation of the decision. Publication of the Claimant's name in connection with the alleged misconduct is likely to be embarrassing to him and potentially damaging to his reputation and to his future employment prospects. An order may only be made in so far as it is necessary in the interests of justice or in order to protect convention rights. The tribunal rules and judicial authorities require the Tribunal to give very substantial weight to the principle of open justice, and to have cogent justification for derogating from that principle in the circumstances. *British Broadcasting Corporation v Roden* [2015] IRLR 627, EAT: "The default position in the public interest is that judgments of tribunals should be published in full, including the names of the parties. That principle promotes confidence in the administration of justice and the rule of law. The reporting of court proceedings in full without restriction is a particularly important aspect of the principle and withholding a party's name is an obvious derogation from it, requiring cogent justification for its restriction. … The mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of a judgment, as the authorities make clear."

5. The alleged misconduct occurred at work in front of work colleagues. The Claimant elected to have his complaint determined in a public forum. The tribunal does not adjudicate on the guilt or innocence of the Claimant but on whether the Respondent had a reasonable basis for their belief in his guilt. The tribunal has now determined that the Respondent did have a reasonable basis for their belief in his guilt. In all of the circumstances there is not cogent justification for derogating from the important principle of open justice and accordingly, the Claimant's application for permanent anonymisation and restricted reporting orders is refused.

6. The Respondent led evidence from Tom McGrorty (Service Shift Manager), Robert Milne (Distribution Centre Manager) and Nick Potter (Distribution Director). The Claimant then gave evidence on his own behalf.

7. The parties lodged separate sets of documents but there was significant duplication between the sets. Additional documents were lodged by during the hearing.

8. The Claimant confirmed that he sought compensation as a remedy and did not seek re-instatement or re-engagement.

9. The parties made closing submissions.

10. The Claimant raised in submissions issues which had not been raised in his claim. The purpose of the pleadings is to give fair notice of the material facts and to identify and focus the material issues in dispute. The legal authorities and the overriding objective countenance against taking an overly formal view of the pleadings. "Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it." (*Chandhok –v- Tirkey* [2015] IRLR 195, EAT).

11. The Claimant also raised in submissions issues which had not been put to the witnesses in cross examination. Prior to cross examination the Claimant was given time to identify disputes of fact material importance to his claim and reminded of the need to challenge Respondent witnesses about those issues. The Employment Appeal Tribunal in *King v Royal Bank of Canada* UKEAT/0333/10/DM stated*: "A Tribunal is not required to deal with every dispute of fact which may arise in the course of a hearing; but a Tribunal is required to address and consider disputes of fact which are of real importance to its conclusions… failure to cross examine about that issue will usually be relevant to a tribunal in two ways. Firstly, it may be implicit in the failure to cross examine that the issue is no longer pursued. Whether this conclusion can be drawn will depend on all the circumstances. The conclusion may be easier to draw if a litigant is represented than if a litigant is in person,*

unaccustomed to the rules of cross examination or to the orderly preparation of cross examination. In this case it would have been quite impossible for the Tribunal to draw that conclusion. [It] was raised squarely and plainly by the claim form and witness statement; and she adhered to it when she was cross examined. Secondly, it may be unfair to the opposite party to reach an adverse conclusion on an issue where it has not been raised in cross examination. If so, the Tribunal ought not to reach a conclusion adverse to the opposite party without raising the matter, hearing submissions and if necessary recalling the relevant witness. … If the Tribunal was minded to decide the facts against the Claimant, it would have been free to do so. If it was minded to decide them in favour of the Claimant, it may well be that it would have been necessary to raise the matter with the Respondent and afford the Respondent an opportunity of dealing with it". This approach was adopted in making findings of fact in relation to material issues not put to witnesses in cross examination.

12. It was agreed that in the event of a finding of unfair dismissal parties will be called upon to make additional written submissions on any financial loss arising from his departure from the Respondent's Sharesave scheme.

13. The following initials are used as abbreviations in the findings of fact–

Initials	**Name**	**Title**
TM	Tom McGrorty	Service Shift Manager **(Dismissing Officer)**
RMe	Robert Milne	Distribution Centre Manager **(Appeal Officer)**
NP	Nick Potter	Distribution Director **(Second Appeal Officer)**
AV	Alleged Victim	Warehouse Operative
JM	John McFarlane	Warehouse Service Shift Manager
RMr	Robert Miller	Warehouse Operative
IB	Ildiko Barnei	Warehouse Operative
AT	Alan Thomson	Warehouse Operative
DK	Don Kerray	Planning Manager
NR	Niall Roberts	Warehouse Operative

Issues

14. The issues to be determined by the Tribunal at this final hearing were confirmed with the parties at the start of the hearing to be as follows –

(i) What was the reason (or, if more than one reason, the principal reason) for the Claimant's dismissal?

(ii) Was the reason for dismissal potentially fair within the meaning of Section 98 (1) or (2) of the Employment Rights Act 1996?

(iii) Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the Respondent acted reasonably in treating it as a sufficient reason for dismissing the Claimant? Did the decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17

(iv) If the reason for dismissal relates to the conduct of the Claimant –

1. Did the Respondent have a genuine belief in the Claimant's guilt?

2. Did the Respondent have reasonable grounds for that belief?

3. Had the Respondent conducted a reasonable investigation into that conduct?

British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303

(v) Did the Respondent adopt a reasonable procedure? Was there any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures? Did any procedural irregularities affect the

overall fairness of the process having regard to the reason for dismissal?

(vi) If the Respondent did not adopt a reasonable procedure, was there a chance the Claimant would have been dismissed in any event? *Polkey v AE Dayton Services Ltd* 1987 3 All ER 974.

(vii) To what basic award is the Claimant entitled? Did the Claimant engage in conduct which would justify a reduction to the basic award?

(viii) What loss has the Claimant suffered inconsequence of the dismissal? What compensatory award would be just and equitable? Did the Claimant contribute to his dismissal? Has the Claimant taken reasonable steps to mitigate his loses?

Findings in fact

15. The Tribunal makes the following findings in fact:

16. The Claimant was employed by the Respondent as a Warehouse Operative at its Livingston Distribution Centre from 26 April 2000 until 30 August 2018. The Respondent is a large retail company operating across the UK. The Respondent has around 300,000 employees across the UK and about 2000 in Livingston Distribution Centre.

17. The Claimant's duties involved assembly and loading of goods. The Claimant was also a Trainer for 12 years.

18. His gross annual salary at termination was £26,461.84. The employer's annual pension contribution was £1,626.59.

19. There are two disciplinary policies and procedures. There is a Disciplinary Policy which applies to staff working within stores, offices and customer fulfilment centres. There is also a Site Agreement Livingston which is a joint agreement agreed with the recognized trade unions which applies to staff

working in the Livingstone Distribution Centre. The Claimant's contract of employment expressly incorporates this joint agreement.

20. The Disciplinary Policy provides that the accused employee will be provided with the evidence relating to the disciplinary allegations and that "sometimes this is sent separately in advance of the disciplinary hearing". It provided that gross misconduct includes "assault, including harmful or offensive contact with another person."

21. The Site Agreement provided that gross misconduct includes "physical abuse". Unlike the Disciplinary Policy it also provided for a second appeal stage.

22. In July 2018 there was an incident involving the Claimant and AV. The incident was the subject of gossip at the workplace.

23. On 16 August 2018 DK met with AV to discuss the incident.

24. On 20 August 2018 there was a call the Protector Line which is a third-party whistleblowing service which reported an allegation of "sexual assault". The caller did not witness the incident but understood from others that sometime during in the past two weeks AV "was bending down to do her job when the Claimant forced his hand between her legs towards her groin area. When he removed his hand, he then sniffed his fingers".

25. JM was appointed to investigate the incident. JM had received training on conducting disciplinary investigations. The Claimant was not suspended pending the outcome of the disciplinary investigation.

26. On 23 August 2018 AV was interviewed by JM. AV stated that NR, RMr, AT and IB were all round the pallet laughing and joking; she bent over the pallet and was aware of "getting touched down below"; she didn't know who it was but when she turned round she saw it was the Claimant and she said "hoy you touched my fanny"; RMr told her that the Claimant touched her with two fingers and sniffed them afterwards; they were all laughing and joking; she felt embarrassed; she had a good relationship with the Claimant but she now wanted him to keep his distance; she didn't come forward because she didn't want this on her conscience; she went on holiday after the incident.

27. On 23 August 2018 NR was interviewed by JM. NR stated that deli counter meat fell over; AV had been bent over picking it up; the Claimant was at the back of AV; the Claimant then touched her – it looked like contact was made; AV shouted out he just touched my fanny; the Claimant smelt his fingers – he had gloves on; AV looked embarrassed.

28. On 23 August 2018 RMr was interviewed by JM. RMr stated that AV was lifting meat; the Claimant "put his two fingers together, placed them into the back of AV's private parts and pulled his fingers across her fanny"; AV screamed 'you have just touched my fanny'; the Claimant sniffed his fingers then walked away; the incident was witnesses by NR, AT, and IB; he told AV to report it as sexual assault.

29. On 23 August 2018 AT was interviewed by JM. AT stated that AV was bent over; the Claimant licked his finger; rubbed his finger round from front to back; then smelt his finger; AV got up and looked surprised; they had a bit of banter afterwards.

30. On 23 August 2018 IB was interviewed by JM. IB stated that AV was bent over the pallet; the Claimant "then touched AV's pussy; AV jumped up and said 'fuck sake'; she looked like she enjoyed the situation.

31. On 23 August 2018 DK was interviewed by JM. DK stated that having been advised of the incident by a third party, he spoke to AV who advised that the Claimant had placed his hand in the region between her legs; that she felt uncomfortable; that she did not want to make a complaint because she was embarrassed and didn't want the Claimant to lose his job; she subsequently told the Claimant she had spoken to management and he then apologised profusely; and DK had not investigated because she did not want to make a formal complaint.

32. The Claimant and the witnesses to the incident had good working relationships.

33. On 23 August 2018 the Claimant was interviewed by JM. The invite stated that the Claimant was invited to an investigation meeting to discuss allegations of sexual assault and advised him of his right to be accompanied. The Claimant

was not provided with a copy of the Protector Line call. The Claimant stated that he was aware of the alleged incident; the Claimant stated that on 11 July 2018 the hams felt off the pallet; AT and IB were there; he shouted to AV that it was AT's pallet that fell over; AV shouted "Big Alan [AT] you can shove that pallet up my arse"; AV then bent over showing her arse to AT; "I went to press AV on the buttock, my hand went too far"; he never felt anything; AV shouted 'he touched my foof'; AV jumped up laughing; "I wiped my gloves, everyone was laughing"; he denied smelling his fingers; "I never intentionally touched her privates"; AV possibly moved back - he never tried to touch her privates; the incident was witnessed by NR, AT, IB and RMr; he was friends with AV; AV joked with him about needing a bribe to keep quiet about the incident; colleagues were saying derogatory things to him about the incident; and he had apologized to AV about the incident and she had accepted his apology and she didn't want to make a complaint.

34. On 25 August 2018 JM wrote to the Claimant inviting him to attend a disciplinary hearing with TM to discuss an allegation of sexual assault. The Claimant was warned of the risk of dismissal and advised of the right to be accompanied by a colleague or union rep.

35. The disciplinary hearing was held by TM on 30 August 2018. TM had received training in conducting disciplinary hearings. Whilst he had previously conducted disciplinary hearings this was his first hearing where there was a risk of dismissal. The Claimant was accompanied by a trade union representative. TM relied upon the Disciplinary Policy rather than the Site Agreement.

36. Immediately prior to the disciplinary hearing the Claimant's union representative sought a copy of the witness statements. He was provided with a copy and advised to take as much time as he needed to consider them.

37. At the disciplinary hearing the Claimant stated that AV bent over, she said 'stick it up my ass'; he went over to point; AV moved inadvertently, then his hand went down to between her legs; her face was red when she jumped up – he could see she was not happy about the situation; he never meant to touch her;

he only meant to point at her bottom – it was an accident – there was no sexual motive; he told his wife about the incident; he did not lick his glove; the incident happened 6 weeks ago and the witnesses have all had time to speak; they were coaxing him to lick his fingers – there was lots of banter; he apologised once she had been to see DK because he then realized it was serious. TM offered to re-interview the witnesses but the Claimant declined the offer.

38. TM was not aware of the exact date of the incident but knew it had been a few weeks previously. TM did not consider the date to be important because there was no dispute by anyone, including the Claimant, that there had been an incident. The dispute was about the details of the incident.

39. The disciplinary hearing was adjourned for 45 minutes to enable TM to reach a decision. TM considered that the witness statements were consistent and he believed that the Claimant had indecently assaulted AV. He had researched the difference between sexual and indecent assault and concluded that sexual assault involved penetration. He concluded that there was touching but not penetration. He didn't believe the witnesses were being dishonest or had colluded - the statements were not an exact match and the Claimant and the witnesses had a good relationship. Although the notes of the meeting state that "this meeting could result in no further action or dismissal", they are not verbatim and he considered a range of penalty options in light of the Claimant's length of service. He concluded that dismissal was appropriate because the incident was so serious. After the adjournment TM advised the Claimant that "In my opinion the incident assault was deliberate and [the Claimant] got carried away with the banter" and that he was being summarily dismissed for indecent assault on a colleague with effect from 30 August 2018. The Claimant was advised of his right of appeal.

40. The matter was not reported to the policy because the mangers considered that this was a matter for AV to decide.

41. The Claimant was 56 years old as the date of termination.

42. On or about 4 August 2018 the Claimant submitted his grounds of appeal namely that the grounds for dismissal were unfair and harsh and requesting

CCTV footage and details of the Protector Line call (which had been omitted from the package of evidence he had received).

43. On 7 September 2018 the Claimant was advised that RMe would conduct the appeal hearing. RMe had received training in conducting disciplinary appeal hearings. RMe relied upon the Site Agreement (and not the Disciplinary Policy).

44. The appeal hearing was held on 13 September 2018. The Claimant was accompanied by his union rep. The Claimant provided RMe with a written statement setting out his grounds of appeal. At the hearing the Claimant said that he pointed at AV's buttocks; that AV moved which mean the Claimant's hand went in between her legs and his finger touched her. RMe adjourned to read the Claimant's written statement. The Claimant said that they remained in contact after the incident; that they ceased being friends after DK spoke to her; that he didn't get the witness statements until the day of the disciplinary hearing; CCTV would show there was no licking or sniffing; there's been a lack of confidentiality; the witnesses, excluding IB, all same the same thing – he was not saying they are lying – just saying they've had time to get their statements together; he's a trainer and loves his job; he's been there over 18 years and has a clean record.

45. The Claimant's written statement of appeal stated in summary that he was not given a fair hearing; there was a lack of confidentiality throughout; the witnesses had 44 days to get their story together and their story grew arms and legs; the witness statements are full of holes, are inconsistent and don't hang together; the date of the incident is not recorded in the investigation; the positions (line of sight and hearing) of the witnesses is not noted in the investigation (the Claimant provided a diagram which showed that he, RMr and NR were closest to AV); the warehouse is large, there are obstacles in the way and it's noisy; the investigation was flawed and the conclusions illogical; it ought to have been investigated by a third party; he was not given the witness statements with the disciplinary hearing invite and the disciplinary hearing ought to have been cancelled to allow him to properly consider the witness statements; he was not given details of the Protector Line call; he believes the

CCTV does cover the area of concern; the disciplinary hearing was flawed and the conclusions illogical; and the penalty was too harsh.

46. RMe would normally reach a conclusion on the appeal at the appeal hearing but he concluded that there were a number of issues that required further consideration in light of the claimant statement of appal. RMe adjourned the appeal hearing to enable him to investigate and consider these issues. The witnesses did not have access to their previous statements when they were re-interviewed by RMe.

47. On 17 September 2018 RMe interviewed DK and on 5 October RMe interviewed JM and TM.

48. On 21 September 2018 RMe interviewed RMr who stated that AV bent over to pick up meat; the Claimant put two fingers together then reached forward and touched her; she said you just touched my fanny; the Claimant then sniffed his fingers as he walked away; he can't say the Claimant physically touched her but he put his fingers in; the incident happened before her 2 week holiday; before he gave his statement to JM he had only discussed it with AV. He marked his position on a diagram of the warehouse.

49. On 21 September 2018 RMe interviewed IB who stated that the Claimant touched AV, she said fucks sake, she was smiling; she was not sure if it was banter; "another person said he touched/ smell finger but that didn't happen" (RMe understood this meant she didn't see it – English is not her first language and she was one of the furthest away); IB physically saw the Claimant touch AV; no-one had influenced her before she gave her statement. She marked her position on a diagram of the warehouse.

50. On 21 September 2018 RMe interviewed AT who stated that Sharon bent over pallet, he leaned over put fingers between her legs then stuff his fingers in; he saw him lick his fingers; he had not discussed the matter with anyone before he gave his statement to JM; he said the incident happened one day before she went on a two week holiday. He marked her position on a diagram of the warehouse.

51. On 25 September 2018 RMe interviewed NR who stated that the Claimant approached AV, he put his hand between her legs, he saw the motion but not the contact, AV shouted he touched my fanny, he walked away sniffing his fingers, no-one influenced his statement. He marked his position on a diagram of the warehouse.

52. On 25 September 2018 RMe wrote to the Claimant to advise that he had fully investigate his appeal points. The appeal hearing was delayed from 1 October to 8 October 2018. On 3 October 2018 RMe interviewed AV who stated that the incident occurred the just before she went on two weeks holiday; they were having a laugh and a she bent down to pick something up, she did not back into him, she felt someone touch her, she stood up, the Claimant was at back of her, she said “you just touched my fanny”, and she saw him sniff his fingers; she was shocked and embarrassed but laughing it off; she got on well with the Claimant and it was out of character; she had discussed it with RMr but that didn’t influence her statement. She marked her position on a diagram of the warehouse.

53. On 8 October 2018 RMe reconvened appeal hearing. The Claimant was not provided with a copy of the additional witness statements from the RMe investigation until after the appeal hearing. RMe upheld the decision to dismiss on the grounds of unwanted physical contact in an intimate area. He concluded that the Claimant had intended to lean in and to touch her. In the hearing the Claimant stated that the Arm Mounted Terminal (AMT) (which track and record movements) would show that where everyone was. RMe provided the Claimant with a document seeking to answer all the points raised in his written statement of appeal in light of his further investigation. His findings were that the date of the incident was omitted from the first investigation but was not imperative to the evidence; the incident occurred the Saturday before AV went on holiday for 2 weeks meaning that the incident occurred on 21 July and not 11 July; the investigation should have commenced following the informal complaint; there was no delay investigating matters following the official complaint; they were unable to stop witnesses talking but there was no evidence that the witness statements were a distortion of the evidence; the

Claimant was given the witness statements before the disciplinary hearing and had time to read them; the Claimant did not advise that he did not have sufficient time to prepare or seek an adjournment; he was given the opportunity to have with witnesses re-examined and additional questions put to them; there is no CCTV coverage of this area; the decision to dismiss was based upon the investigation and not the Protector Line call which was merely a catalyst; the witnesses have a good recollection; the witness statements gave sufficient detail; the witnesses were not corrupt and gave their own accounts; their statements were not affected by shop floor gossip; the witnesses were re-interviewed to challenge what they had seen and to confirm their locations which corroborate what they saw and heard; the witness gave consistent statements; whether or not there was banter does not excuse inappropriate and unwanted physical contact.

54. In immediate response to the appeal outcome, the Claimant lodged a prepared statement that he'd been dismissed on the strength of a malicious call to Protector Line; AV didn't want to make a complaint; witness statements were not cross examined; the Respondent was unwilling or unable to provide CCTV which would contract licking/ sniffing of gloves suggesting a sexual nature; the Respondent should be looking for evidence that this was an innocent accident.

55. On 9 October 2018 the Claimant intimidated his second appeal on the ground that the dismissal was harsh and unfair and he sought copies of the witness statements taken by RMe. On 12 October 2018 the Claimant was advised that his second appeal would be heard by NP on 7 November 2018.

56. The Second Appeal hearing was conducted by NP On 7 November 2018. NP had received training in conducting disciplinary appeal hearings. NP relied upon the Site Agreement (and not the Disciplinary Policy). The Claimant was accompanied by his union rep. NP advised that the purpose of the second stage appeal was to check all processes and procedures had been followed in relation to the first appeal and to check that the decision to dismiss is fair and reasonable. He advised that his role is not to re-investigate or to reconsider evidence from the first investigation. NP considered the notes of the disciplinary hearing and the first appeal. NP also considered the evidence from

the second investigation (conducted by RMe) and was willing to consider any new evidence that hadn't previously been considered. During the second appeal hearing NP recognised that the process had not been perfect procedurally – the informal complaint should have been investigated and the Claimant should have been given the first witness statements earlier but that these failures did not affect the overall fairness of the decision in the circumstances.

57. The Claimant lodged a 21 page second appeal document which contained feedback on RMe's appeal document; a timeline; comments on confidentiality/distorted story; comments on lack of evidence; confirmation that the reasons for his second appeal are essentially the same as the first appeal; comments on notes of the appeal hearing outcome meeting; and comments on the second witness statements. It did not contain any new evidence pertaining to the alleged incident. The only evidence lodged was a set of texts between the Claimant and IB, with IB commenting on the Claimant's summary of the witness evidence and the unfairness of his dismissal and also a picture of someone wearing an AMT and rigger gloves. The appeal document was not read closely by NP if at all. NP sought to be addressed verbally on the grounds of appeal in the second appeal hearing.

58. NP met with RMe to discuss the first appeal hearing.

59. On 16 November 2018 confirmed his decision to uphold the decision to dismiss – "it was essentially Alan's word which was a different version of events to the four other witness statements. I also have a reasonable belief that by Alan's own admission of Tom Foolery he knew that his actions were inappropriate. Either way, AV made a formal complaint, this was thoroughly investigated and I have a reasonable belief that the witness statements corroborate AV's version of events, this being the case I upheld the decision". NP recognised that AV had not made a formal complaint prior to the disciplinary process but he regarded her complaint as formal because it was being maintained as part of a formal disciplinary process.

60. In the period between 5 September 2018 and 16 January 2019 the Claimant registered with an agency and applied for a significant number of jobs. He applied for only one warehouse operative position. The Claimant was permanently restricted by the Respondent's HR provider from lifting items weighing more than 6kg. The Respondent made adjustments to accommodate that permanent restriction. The Claimant did not believe that a prospective employer would be willing to make such an adjustment for a new employee. If they had been willing to make such an adjustment the Claimant could potentially have secured work through an agency within weeks of his termination at £8.50 an hour.

61. The Claimant received Job Seekers Allowance from 16 November 2018 until 12 December 2018.

62. On 7 December 2018 the Claimant secured permanent work for UK ABM as a groundsman earning £7.83 an hour. The Claimant then understood he had secured higher paid work with Edinburgh Airport starting 7 January 2019 and he resigned his position with UK ABM effective 22 December 2018. Unfortunately the work with Edinburgh Airport never materialised. The Claimant then secured permanent employment with a paint company starting 11 February 2019 and earning £9,031 a year.

Observations on the evidence

63. The Respondent witnesses gave their evidence in a measured and consistent manner and there was no reasonable basis upon which to doubt the credibility and reliability of their testimony. They answered the questions in full, without material hesitation and in a manner consistent with the other evidence. They accepted that there was room for improvement in the process. The dismissal and appeal officers appeared entirely genuine and sincere in their belief that the Claimant had engaged in the alleged misconduct and that that it amounted to gross misconduct.

Relevant Law

64. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not be unfairly dismissed by the Respondent.

65. It is for the Respondent to prove the reason for his dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.

66. If the reason for his dismissal is potentially fair, the tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this second stage of enquiry the onus of proof is neutral.

67. If the reason for the Claimant's dismissal relates to his conduct, the tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation in the circumstances (*British Home Stores Ltd v Burchell [1978] IRLR 379*, *[1980] ICR 303*).

68. In determining whether the Respondent acted reasonably or unreasonably the tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if the decision to dismiss fell out with that range. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Limited v Jones [1983] ICR 17 (EAT))*.

69. In determining whether the Respondent adopted a reasonable procedure the tribunal should consider whether there was any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The tribunal then should consider whether any procedural irregularities identified affected the overall fairness of the whole process in the circumstances having regard to the reason for dismissal.

70. Any provision of a relevant ACAS Code of Practice which appears to the tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides in summary that –

    (i) Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

    (ii) Employers and employees should act consistently

    (iii) Employers should carry out any necessary investigations, to establish the facts of the case.

    (iv) Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

    (v) Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

    (vi) Employers should allow an employee to appeal against any formal decision made

71. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.

72. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. Subject to an employee's duty to mitigate their losses, this generally includes loss of earnings up to the date of the Final Hearing (after deducting any earnings from alternative employment), an assessment of future loss of earnings, if appropriate, a figure representing loss of statutory rights, and consideration of any other heads of loss claimed by the Claimant from the Respondents.

73. Where, in terms of Section 123(6) of ERA, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

74. An employer may be found to have acted unreasonably under Section 98(4) of ERA on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred (Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)). In this event, the Tribunal requires to assess the percentage chance or risk of the Claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.

75. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than a 25% uplift. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.

Respondent's submissions

76. The Respondent's submissions were in summary as follows: -

77. It is not for the Tribunal to adjudicate on the guilt or innocence of the Claimant (*Burchell*)

78. In determining whether the employer acted reasonably the Tribunal should not substitute its own views for that of the employer – it should not consider what it may have done (*Foley v Post Office [2000] ICR 1283, CA)*

79. Having a very lengthy clean service record does not render a dismissal unfair (*British Leyland UK Ltd v Swift* 1981 IRLR 91)

80. In assessing the reasonableness of a disciplinary process it is necessary to look at the procedure as a whole (*Taylor v OCS Group* [2006] ICR 1602)

81. The reason for the dismissal was intentionally placing his hand between the legs of the victim and touching her 'fanny'

82. The Claimant accepted that he intended to touch her bottom. The witnesses describe a deliberate act rather than accidental contact.

83. He didn't apologise initially because he thought it was all fun. He first expressed regret on day of dismissal

84. The Claimant and witnesses were friends –no credible reason was given as to why the witnesses would not tell the truth

85. The witnesses gave evidence of smelling or licking his finger but this was merely supportive rather than determinative

86. No ulterior motive for dismissal was suggested

87. The Respondents undertook a reasonable investigation and interviewed all relevant witnesses

88. The mangers were trained and experienced. The two appeal managers had previously overturned dismissals.

89. Whilst the union rep did not have the witness statements before the day of disciplinary hearing, they were given as much time as necessary to read them, no adjournment was sought and they indicated that they were ok to proceed.

90. The first appeal officer's appeal was comprehensive and included a fresh investigation. There were no attempts to restrict lines of inquiry and there were repeated offers of further investigation.

91. The second appeal officer's appeal was a further check in the process.

92. The Respondent candidly accepted that there were lessons to be learned in terms of the procedures but this did not mean that the dismissal was unfair

93. The dismissing and appeal officers took into account the Claimant's length of service and clean employment record in reaching or upholding the decision to dismiss

94. The Claimant failed to mitigate his losses by applying for warehouse operative roles. The Claimant could have secured work through an agency within 4 weeks of termination at £8.50 an hour. The Claimant's decision to resign his permanent position with UK ABM broke the chain of causation.

95. Any collusion (which is denied) was not the fault of the Respondent but by the delay in making the complaint

96. The date of the incident was not material – the Claimant and the witnesses all knew which incident was being discussed

97. The Claimant's assertions are contradictory – the statements are too similar evidencing collusion; the statements are contradictory and cannot be relied upon. The Claimant's forensic analysis of the statements is neither reasonable nor appropriate in the circumstances. The statements were fit for use in a disciplinary process.

98. The Claimant was represented by his union throughout the disciplinary process

99. The investigating managers were satisfied that the witnesses were telling the truth

Claimant's Submissions

100. The Claimant's submissions were in summary as follows: -

101. The Claimant was directed to the Disciplinary Policy and was not provided with a copy of the Site Agreement (It is noted that this issue was not raised in the claim and was not put to the Respondent witnesses)

102. The Respondent failed to comply with the Site Agreement (It is noted that this issue was not raised in the claim and was not put to the Respondent witnesses)

103. AMT data would have been of benefit in identifying where witnesses were positioned

104. The invite to the first appeal outcome meeting stated that the matter had been fully investigated when AV had not been interviewed by the first appeal office

105. The Claimant ought to have been provided with witness statements prior to investigation meeting

106. The Claimant ought to have been provided with witness statements prior to day of disciplinary hearing

107. The Claimant ought to have been provided with a copy of Protector Line call prior to appeal hearing

108. The Claimant ought to have been provided with the additional set of witness statements prior to first appeal hearing (It is noted that this issue was not raised in the claim and was not put to the first appeal officer)

109. The witnesses were not independent and their recollection of events had been corrupted by the 44 day time lapse and the shop floor gossip. This extended to 87 days by the time they are re-interviewed.

110. The officers involved in the disciplinary process were not impartial (It is noted that this issue was not raised in the claim and was not put to the Respondent witnesses)

111. The text messages from IB presented by the Claimant at the second appeal hearing amounted to new evidence at the and ought to have been considered

112. The investigating officer failed to establish the date of the event and the positions of the witnesses

113. The investigating officer and subsequent investigations failed to seek exculpatory or mitigatory evidence and failed to cross examine the witnesses or permit the Claimant to cross-examine at the hearing

114. The conclusions from the investigations were not logical – there was not time for an extended act; no-one would respond to the comment 'shove that pellet up my arse' by indecently assaulting someone in that way in an open environment; no-one would ask for CCTV if innocent; AV was joking and laughing rather than embarrassed

115. The matter was only investigated because of the Protector Line call which was malicious. AV didn't want the matter investigated.

116. The disciplinary and first appeal officers were aggressive (this issue was not raised in the claim and was not put to the Respondent witnesses)

Decision

117. The Claimant was dismissed by the Respondent on the ground that he had indecently assaulted a female colleague by deliberating reaching between her legs from behind and touching her private parts. There was no evidence that the dismissing officer or the appeal officers were affected by any other motivating factors or had any other reason in mind when they made or upheld the decision to dismiss. The tribunal therefore concludes that the reason for dismissal was the stated ground. This reason related to his conduct and that is a potentially fair reason within the meaning of Section 98(1) of the ERA 1996.

118. The invitation to the investigation meeting described the incident as an allegation of sexual assault (rather than indecent assault). The invite did not specify the date of the incident but the Claimant and the witnesses were in no doubt as to the event being investigated. The Claimant submits that he was not provided with a copy of the Protector Line call or the other witness statements during the investigation. It is reasonable to seek the Claimant's version of events prior to sharing the other evidence.

119. The investigating officer interviewed 6 witnesses to the incident including the alleged victim. The findings from these interviews were that: staff were engaged in banter before the incident (AV); AV was bent over the pallet (AV, NR, AT); the Claimant reached between AV's legs from behind (NR); AV was touched (or appeared to be touched) in the private part between her legs (AV, RMr, IB); AV shouted at the Claimant for touching her private parts (AV, IB); AV looked embarrassed/ surprised (NR, JM); AV looked like she enjoyed the situation (IB); the Claimant sniffed his fingers afterwards (AV, NR, RMr, AT); the banter continued afterwards (AT); and the witnesses including the AV had a good working relationship with the Claimant (AV, RMr, AT, IB).

120. The Claimant was interviewed by JM. The Claimant stated that the hams felt off the pallet; AT and lB were there; he shouted to AV that it was AT's pallet that fell over; AV shouted that AT could shove that pallet up her arse; AV then bent over showing her arse to AT; the Claimant went to press AV on the buttock but his hand went too far or AV possibly moved back – he did not intend to touch her private parts; he never felt anything; AV shouted that he'd touched her private parts; AV jumped up laughing; the Claimant wiped his gloves, everyone was laughing; he didn't smell his fingers; AV joked with him about needing a bribe to keep quiet about the incident; and he had apologized to AV about the incident and she had accepted his apology and didn't want to make a complaint.

121. There was over a month's time lapse between the incident and the first investigation and nearly 3 months between the incident and the second investigation. Whilst the delay was not ideal it was not unusual or unreasonable and there was no evidence that it had materially affected witness recollection. The delay did not render the disciplinary procedure unfair in the circumstances.

122. The invite to the disciplinary hearing warned of the risk of dismissal and the Claimant was accompanied throughout the disciplinary process. The Dismissing Officer relied upon the Disciplinary Policy rather than the Site Agreement in error but there were no relevant material differences between them in the circumstances other than the second appeal.

123. The Claimant was not provided with a copy of the witness statements until the day of the disciplinary hearing. However the Claimant was afforded as much time as he needed to consider them and his union rep did not require additional time or an adjournment. The failure to provide the witness statements earlier did not render the procedure unfair in the circumstances.

124. The Claimant submits that he was not afforded the opportunity to cross examine the witnesses but dismissing officer offered to put to questions to the witnesses which the Claimant declined.

125. At the time of his dismissal, the dismissing officer believed that the Claimant had indecently assaulted a female colleague by deliberating reaching between her legs from behind and touching her private parts. There was clear evidence that AV was bent over the pallet; that the Claimant had deliberately reached in to touch AV; that the Claimant had reached between her legs; that AV was touched (or appeared to be touched) in her private part between her legs; and that AV jumped up, shouted that she had been touched there and was embarrassed. There was a reasonable basis for the Dismissing Officer's belief that the Claimant had done so having regard to the available evidence.

126. The Dismissing Officer was not aware of the exact date of the incident other than it had been a few weeks previously. It was not unreasonable for the Dismissing Officer to conclude that the exact date was not important because there was no dispute by anyone, including the Claimant, that there had been an incident. The dispute was about the details of the incident.

127. The Dismissing Officer concluded that the relevant label was indecent assault rather than sexual assault because the incident didn't involve penetration. The change in label was not unreasonable and did not prejudice the Claimant because the dispute concerned what actually happened rather than what it might be called.

128. The Dismissing Officer appeared entirely genuine and sincere in his belief that the Claimant had indecently assaulted a female colleague by deliberating reaching between her legs from behind and touching her private parts. There was no evidence that he had any other reason in mind and that his belief was

not genuine. There was a reasonable basis for that belief based upon a reasonable investigation. The tribunal therefore concludes that the Dismissing Officer held a genuine belief in the Claimant's misconduct at the time of his dismissal.

129. The Claimant's grounds of appeal were in summary that he hadn't deliberately touched her private parts; that he didn't get the witness statements until the day of the disciplinary hearing; CCTV would show there was no licking or sniffing; given the lack of confidentiality and delay, the witnesses have colluded; the witness statements are inconsistent and the conclusions drawn illogical; the lines of sight and hearing of the witnesses were not explored; and the penalty was too harsh given his length of service and clean record. The appeal officer undertook a thorough and impartial investigation of the grounds of appeal. That investigation produced evidence which was consistent with and did not contradict the first investigation. The only new findings were that the incident occurred immediately prior to AV's two-week holiday and that there did not appear to be any collusion between the witnesses.

130. The Claimant was not provided with a copy of the additional witness statements from the RMe investigation until after the first appeal hearing. There were no material findings that contradicted the first investigation, or which provided exculpation or mitigation of the misconduct. The failure to provide the additional witness statements earlier did not render the procedure unfair in the circumstances.

131. The Claimant submits that the AMT data would have been of benefit in identifying where witnesses were positioned. Their positions were only relevant to what they could see or hear and there was no evidence that they could not adequately see or hear and in any event their positions were explored in the additional witness statements.

132. At the time of the appeal hearing, the appeal officer believed that the Claimant had indecently assaulted a female colleague by deliberating reaching between her legs from behind and touching her private parts. He concluded that the incident occurred on 21 July, there was no evidence of collusion and there was

no CCTV coverage of this area. There was a reasonable basis for the Appeal Officer's belief that the Claimant had done so having regard to the available evidence. There was no evidence that he had any other reason in mind and that his belief was not genuine. There was a reasonable basis for that belief based upon a reasonable investigation. The tribunal therefore concludes that the Appeal Officer held a genuine belief in the Claimant's misconduct at the time of the appeal hearing.

133. The Claimant was afforded a second stage appeal. The purpose of that appeal was to check all processes and procedures had been followed in relation to the first appeal and that the decision to dismiss was fair and reasonable.

134. Claimant lodged a second appeal document which did not contain any new evidence pertaining to the alleged incident. The appeal document was not read closely by the Second Appeal Officer if at all. Ideally the Second Appeal Officer would have read the Claimant's appeal document closely but it did not contain any new evidence and in any event the Second Appeal Officer sought to be addressed verbally on the Claimant's grounds of appeal. The failure to read the second appeal document closely did not render the decision to uphold the dismissal unfair in the circumstances.

135. At the time of the second appeal hearing, the second appeal officer believed that the Claimant had indecently assaulted a female colleague by deliberating reaching between her legs from behind and touching her private parts. There was a reasonable basis for the Second Appeal Officer's belief that the Claimant had done so having regard to the available evidence. There was no evidence that he had any other reason in mind and that his belief was not genuine. There was a reasonable basis for that belief based upon a reasonable investigation. The tribunal therefore concludes that the Second Appeal Officer held a genuine belief in the Claimant's misconduct at the time of the appeal hearing.

136. The Respondent complied with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Respondent carried out a reasonable investigation to establish the facts of the case. There was no material line of enquiry that was not pursued with materially relevant

witnesses. The Claimant was informed of the basis of the problem and given an opportunity to put his case in response before any decision was made. The Claimant was advised of his right to be accompanied. The Claimant was allowed to appeal against the decision to dismiss. There was no evidence of any unreasonable delay or inconsistent treatment. Considering the disciplinary process as a whole, and having regard to the reason for dismissal, the procedure adopted fell within the range of reasonable responses open to an employer acting reasonably in the circumstances.

137. The Claimant had 18 years' service and no prior disciplinary warnings. The Respondent had concluded that the Claimant had indecently assaulted a female colleague by deliberating reaching between her legs from behind and touching her private parts. Although the Dismissing Officer and the Appeal Officers recognised that the Claimant had got carried away with the banter, it was not unreasonable to conclude that this conduct amounted to gross misconduct. The Dismissing Officer and the Appeal Officers gave consideration to his lengthy clean service record but it was not unreasonable for them to conclude that dismissal was the appropriate penalty in the circumstances. The decision to dismiss fell within the band of reasonable responses.

138. The tribunal therefore determined in accordance with equity and the substantial merits of the case that the Respondent acted reasonably (including the procedure adopted) in treating the reason given as a sufficient reason for dismissing the Claimant in the circumstances (including the size and administrative resources of the Respondent's undertaking).

Employment Judge: Michelle Sutherland
Date of Judgement: 11 April 2019
Entered in register: 18 April 2019
And copied to parties