EMPLOYMENT TRIBUNALS

Claimant: Mr A Anele

Respondent: Mayor and Commonalty and Citizens of the City of London

Heard at: London Central **On:** 5, 6, 7, 8 August 2019

Before: Employment Judge Quill (Sitting Alone)

Representation
Claimant: In Person
Respondent: Ms I Omambala

JUDGMENT having been sent to the parties on **12 August 2019** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Respondent is a local authority. The Claimant had been employed as a concierge on Barbican estate since around 2004 until he was dismissed with effect from approximately 9 July 2018.

2. Following a period of ACAS early conciliation from 25 September 18 to 25 October 2018, a claim was issued dated 20 November 2018.

3. The only claim being brought was unfair dismissal, and this was confirmed at a preliminary hearing on 28 March 2019 before Judge Potter and confirmed again at the start of this hearing.

4. There were two lists of issues in the bundle. One prepared by Respondent, which sought to include the Claimant's main arguments and a further one prepared by Claimant.

The Hearing

5. On the first day, the Claimant indicated that he might wish to submit a further, longer, list of issues. He confirmed that he was not seeking to amend his claim and that it was still just about unfair dismissal. On Day 1, I told Claimant that we would not add this new item to the bundle, but he could use it in his submissions if he wanted to. On Day 2, the Claimant informed me that he was withdrawing the item.

6. The hearing was set down for 4 days. On the morning of Day 1, I read the witness statements and we started evidence at 2pm. Respondent's first two witnesses were Marion Afoakwa – Assistant Director of Corporate HR and Change and Elizabeth Rogula, a member of the council, who had chaired the appeal panel.

7. At the Claimant's request, we did not start with the evidence of the Respondent's final witness until the next day to give him additional time to prepare. On the morning of Day 2, I heard from Ms Jacqueline Campbell, who – at the relevant time – had been an Assistant Director working for the Respondent. She was the hearing officer who took the decision to dismiss the Claimant.

8. On the afternoon of day 2, I heard from the Claimant.

9. On the morning of Day 3, I heard oral submissions from each side. Ms Omambala went through the issues in the order they were presented in the Respondent's list, and then the Claimant did likewise in relation to his own list.

Findings of Fact

10. On 7 November 2017, the Claimant was at work. A car approached the car park where he was on duty at the time.

11. This was driven by someone whom I will call C2. The Claimant knows who is being referred to, and has referred to her by her first name and/or by her first initial in some of the documents and his statement.

12. In the front passenger seat was someone that I will call C1. The Claimant knows who is being referred to, and she has been referred as "X" in some of the documents.

13. C1 and C2 are not employees of the Respondent. They were engaged by residents to clean the flats of residents. It does not matter for present purposes whether C1 was directly engaged by the residents or was a subcontractor of C2. C2 was someone who had been coming to the estate for several years and had met the Claimant previously. This was the first time that C1 and the Claimant had met.

14. The Claimant had a conversation with the occupants of the car through the open passenger side window. The exact details of what happened during this conversation are in dispute, and will be discussed in more detail later in these reasons. It was later alleged that the Claimant touched C1 inappropriately during this conversation.

15. The car then drove into the car park. Some time later, the car was about to leave the car park but stopped because of another vehicle. The exact details of what happened next are in dispute, and will be discussed in more detail later in these reasons. It was later alleged that the Claimant made an inappropriate remark to C2, namely "*I want to fuck you*".

16. Where it is necessary to distinguish between the two allegations, I will refer to the first one as the Touching Allegation and the second one as the Comment Allegation. Collectively I will refer to them as the Allegations.

17. In adopting these descriptions, I am not overlooking the fact that the Claimant alleges that there has been inconsistency in relation to what was alleged to have happened on 7 November 2017, and I will address that later in these reasons.

18. The claimant does not allege that C1 and C2 were in collusion with the Respondent's employees. I find as a fact that C1 and C2 were not in collusion with the respondent's employees.

19. In the claim form and response. There was some disagreement about the claimant's exact job title. The claimant described it as concierge, whereas the respondent had described it as car park attendant.

20. This was also mentioned in the preliminary hearing order. The respondent indicated that it takes no issue with the claimant's job title as he has described it.

21. In any event, the respondent has not argued that there was something about the claimant's specific duties that required him to adhere to higher standards of behaviour than its other employees in their dealings with non-employees such as C1 and C2.

22. The claimant has argued that the respondent's approach when dealing with the allegations made by C1 and C2 meant that he was treated differently than other people, on account of the past history of his relationship with the employer and with other employees of the Respondent.

23. My finding is that that is not the case. The Respondent received allegations on 7 November 2017 to the effect that one of its employees was said to have inappropriately touched another person. It is not unusual or surprising that the respondent therefore sought more information and my finding is that they would have done the same thing for any other employee, regardless of past dealings with that employee.

24. The matter first came to the respondent's attention when a Ms Delaney received a telephone call from a resident. Ms Delaney's note of that telephone call is in the bundle and is dated 8 November 2017. I take account of the fact that it is dated the following day, and is therefore not exactly contemporaneous, but I find that it is a reasonably accurate summary of what Ms Delaney believed that she had been told on 7 November 2017.

25. The Claimant regards the contents of Ms Delaney's note as important. It is in the bundle at page 159 and I have paid careful attention to its full contents. In summary, Ms Delaney reports receiving a call from a resident at around 1.45pm and that the resident referred to the concierge and named him as "*Austin*".

26. The note is redacted and amongst other things does not contain the name of the resident. The redactions also mean that the name of the person

making allegations is blanked out, and it has not been indicated in the redacted document whether the unredacted original referred to C1 or C2 or both. My finding is that it refers to C2 only, and that Ms Delaney believed that she was being told by the resident that the Claimant had manhandled C2 when C2 was collecting keys and that he said "*I want to fuck you*" later on as she left the car park.

27. The note goes on to say that Ms Delaney spoke to another employee, Barry Ashton, who asked for the resident to send an email. Ms Delaney passed that on to the resident, and Ms Delaney also suggested to the resident that perhaps the police should be called. The resident advised that C2 might not wish to involve the police. However, the resident said that he wanted urgent action to be taken.

28. The resident did email in at 14:09. As requested by Ms Delaney, this was sent to Michael Bennet and copied to Mr Ashton, both of whom are employees of the Respondent. This email is at 155 of the bundle and I have had regard to its full contents.

29. This email makes clear that the Touching allegation is that the Claimant touched C1 rather than C2. The "*I want to fuck you*" remark is also mentioned. The way that the email is written, it could be taken as implying that this remark happened straight after the touching, and/or that the comment was made to C1 rather than C2.

30. The resident goes on to say, in the email, that he wants to see the Claimant relieved of his duties. The resident also asserts that C2 is a reliable and trusted person, who is well thought of by her clients. The email reports that C2 was in floods of tears, and that C1 was a little shaken.

31. Approximately half an hour later, Helen Davinson, another employee of the Respondent, replied to the resident by email, and asked that her telephone number be given to C1 and C2 with a request that they contact her. She also repeated Delaney's advice that they should also contact the police.

32. The Claimant has alleged that the Respondent acted incorrectly by suggesting that the police be involved. My finding is that there was nothing

inappropriate or unreasonable about the suggestions that were made by Ms Delaney and Ms Davinson.

33. Ms Davinson spoke to C2 later that day. A note of the discussion is in the bundle and I have paid attention to its full contents, as requested by Claimant. According to the note, C2 saw the Claimant put his hand on C1, as C1 was in the passenger seat, and the Claimant was outside by the car window. C2 says that at the time she thought that the Claimant placed his hand on C1's hand, but that C1 told her later that it was the top of her leg/groin area. C2 says she responded to what the Claimant did by saying "*you fucking wanker*". This was approximately 11:20am according to C2.

34. The note goes on to says that C2 reported that on the way out of the car park the Claimant signalled to her, and so she wound down the driver's side window. She reported that he then said "*I want to fuck you*" to her. This was approximately 1:30pm according to C2.

35. Ms Davinson again suggested police, and C2 said she preferred not to as she was busy. The note also indicated that Ms Davinson wanted to get an interpreter to speak to C1 and that would happen within the next couple of days. That meeting did take place, and the note is in the bundle at page 160. I have paid full attention to its contents. According to the note, C1 alleged that the Claimant touched her at the very top of her thigh, close to the groin. She does not report knowing what the Claimant said to C2 on leaving the car park, but she does say she knows he did speak to C2 through the car window.

36. The Claimant was suspended from work, on full pay, late on 7 November 2017. This was initially done orally by Mike Sanders. The Claimant did not know full allegations at that time.

37. The Respondent's disciplinary procedure - at paragraphs 14, 15, 16 - deals with suspension. An interview with the employee prior to suspension is not required by the procedure. The decision to suspend was not unreasonable and was not a breach of procedure. Suspension can take place either before a formal investigation starts, or after it has started.

38. On 14 November, the Respondent gave details of the allegations in a letter from Paul Murtagh which also confirmed the suspension. The letter also confirmed that a formal investigation had now commenced. The Claimant has emphasised in his witness evidence and his submissions that he thinks that this was a breach of procedure, and an interview with him was required before deciding to start formal investigation. He relies on paragraph 6 of the procedure. However, that is not what paragraph 6 says.

39. The Respondent's decision to commence a formal investigation was not unreasonable. As mentioned by Ms Afoakwa, the respondent did take into account the seriousness of the allegations, and decided that it was not appropriate for employer to interview Claimant straight away, in case police wished to do so.

40. The 14 November letter was emailed to the Claimant and he replied by email the following day, commenting on the allegations, denying them, and making a counter allegation that C2 had attempted to blackmail him.

41. The Claimant was interviewed by police on 10 November 2017. Around 30 November 2017, the police decided that there would not be a prosecution of the Claimant. There was also not going to be a prosecution in relation to Claimant's allegation that C2 had attempted to blackmail him.

42. On 12 January 2018, Mr Murtagh wrote again to the Claimant. This was to give him the name of the investigator.

43. The Claimant says that the delay between 30 November 2017 (which was when Respondent knew there would be no prosecution) and 12 January 2018 was too long. The Respondent mentions that the Christmas period caused or contributed to the delay. Ms Afoakwa also mentioned that it was the Respondent's normal policy that investigations would not commence in December. The Respondent's explanations are not adequate explanations and my finding is that this delay was unreasonable. That is something which I will have to take into account when assessing whether the procedure as a whole was fair or unfair.

44. The Claimant objected to the person chosen to be the investigator and Andrew Carter, Director of Community & Children Services wrote on 6 February 2018 to confirm an external investigator would be used. The person appointed was Andrew Savage. He was engaged approximately 9 February 2018, or thereabouts. He submitted his finished report on 25 April 2018 or thereabouts.

45. The report itself was 33 pages long, and was in 287 numbered paragraphs. Amongst other things, the report contained a detailed timeline of CCTV images at the times said to be relevant to each of the two allegations from 7 November 2017.

46. I have not seen the CCTV myself, but I am satisfied that Mr Savage's account in his report is sufficiently accurate. Both Ms Campbell and the Claimant informed me that the CCTV was viewed several times at the hearing. If there were any important or relevant discrepancies between the CCTV and what was written by Savage about it, then these would have been brought to my attention.

47. The report also had attached approximately 60 pages of interviews with witnesses. These were as follows:

    (a) Claimant – 15.02.18

    (b) Delaney – 22.02.18

    (c) Davinson – 22.02.18

    (d) Anonymous Resident – 22.02.18

    (e) Ashton – 22.02.18

    (f) Nixon (employee of respondent) – 26.02.18

    (g) C2 – 26.02.18

    (h) C1 – 26.02.18 (English version only. Spanish is C1's main language. It is stated in the report that the Spanish version was also signed by C1, but the Spanish language version has not been supplied to the Claimant or to me)

(i) A police officer – 26.02.18

(j) Claimant's 2nd interview – 08.03.18

(k) C2's 2nd & 3rd interviews – 21 & 27 March 2018

(l) Yaffie (not an employee of Respondent) – 29.03.18

48. The decision was made that the matter would go to a disciplinary hearing, and the Claimant got to see all of the report and appendices (barring some redactions of confidential information).

49. This is a convenient moment to address some criticisms made by the Claimant of the process up to that point. The Claimant has made some criticisms of both Mr Savage and of the report itself.

50. The Respondent has used Mr Savage as an investigator in the past. I am satisfied that its only reason for selecting him on this occasion was that the Respondent believed that he was suitable for the job. It did not select Mr Savage in order to be unfair to the Claimant in any way.

51. I have considered the report in detail, and the report is very thorough and appears to have taken time to analyse pretty much everything that has been said to him by witnesses, and also to analyse what the CCTV did and did not show.

52. I do not think that Mr Savage took an unreasonably long time to complete the report in all the circumstances. He seems to have contacted and interviewed the Claimant fairly soon after appointment. From that point onwards, he seems to have been proactive in taking steps to complete the report reasonably quickly. This included contacting witnesses, overseeing notes of interviews, having witnesses check and sign them.

53. It would potentially also have been reasonable for Mr Savage to interview fewer witnesses, and thereby complete the report more quickly. However, the fact that there was more than one different approach which could have been taken does not make the actual decisions which Mr Savage did take unreasonable.

54. The Claimant suggests that Savage placed too much weight on the CCTV. As investigator, Savage's role was to investigate and to make recommendations, not to make final decisions. That is what he did. His analysis of the CCTV was not unreasonable, and he went to the lengths of speaking to an engineer (Mr Yaffie). The engineer explained how motion detection worked, and the limits on it.

    (a) The recordings were only made when the sensors detected motion.

    (b) Mr Savage asked the engineer if image enhancement was possible, and the engineer said it was not, for this recording.

55. All this information was available to the Claimant. If the information was helpful information to the Claimant, he had the opportunity to make use of it at the hearing. In any event, the quality of the CCTV was not something in Mr Savage's control.

56. When intervied by Mr Savage, the police officer gave little substantive detail of what witnesses had said to police, and there was nothing else Savage could have done to obtain information in relation to the police's confidential enquiries.

57. In relation to measurements made of car seats, the issue of whether that was strictly necessary or not was one for the discretion of the investigator. There is no right or wrong answer. The information was in the report and the Claimant was able to comment on it and to challenge it.

58. In relation to whether any witnesses lied to the investigator, the Claimant made clear that he was not suggesting that there was collusion between investigator and supposedly dishonest witnesses. He made clear that his allegation simply was that the witnesses were, in fact, dishonest, and that the investigator was incompetent and that a competent investigator would have realised that witnesses were lying. My view of the report is that the investigator has made a reasonable attempt to cross-reference the evidence and to point out where things that a witness has said are potentially corroborated by, or else potentially contradicted by, other evidence. Ultimately the decision in relation to credibility is more for the hearing officer than for the investigator. Mr Savage's report appears to be

transparent and so both the hearing officer and the Claimant were able to consider the contents for themselves, and were not obliged to agree with Mr Savage's assessment of the credibility of any of the witnesses.

59. In view of the Claimant's criticisms, I do need to comment on what some of the interview notes say.

(a) Delaney confirmed accuracy of her 8 November note, and indicated that it was her assumption that the Claimant had been holding some keys which C2 needed. This was not a direct comment from resident.

(b) Ms Davinson reported that she met both C1 and C2 at about 4pm on 7 November. The note of the 7 November discussion with C2 was signed by C2 on 8 November. The interview with C1 took place on 8 November, and the note signed 9 November by C1. C2 was present when C1 was interviewed, and so was an interpreter Luis. Ms Davinson had met police and supplied a copy of CCTV to the police.

(c) The Anonymous Resident said that C2 cleaned for him and that C1 helped her. The resident made clear that his knowledge of whether C2 did or did not collect any keys from Claimant was second hand at best, and he had not been referring to his own keys. He also said that he did not think that he had told Ms Delaney that C2 had been collecting keys at the time of the Touching Allegation. He said that C2 and C1 had come to his apartment to clean and told him about the allegations. He said that it was clear to him from what they said at the time that the Touching Allegation was that Claimant touched C1 (not C2) and also that the Comments Allegation was later on (not at same time) and also that the Comments Allegation was about a remark allegedly made to C2 (not to C1). The resident also said that, as far as he was concerned, he had told Ms Delaney that the Touching Allegation related to C1 (not C2) and that he thought he had made clear that he was referring to inappropriate touching not "manhandling", which was the word used by Ms Delaney in her note. I have had full regard to the rest of what the resident said,

including in relation to the languages spoken by C1 and C2, and in relation to the police, and also in relation to his assertion that he had later checked whether the Claimant was still on duty.

(d) I have had full regard to the contents of the notes of the 26 February 2018 interview with C2, but I will not recite it all. Suffice to say that in relation to the Comments Allegation, I find no important differences (taking into account the passage of time) compared to the earlier description given to Ms Davinson on 7 November 2017. However, in relation to the Touching Allegation, C2 does not now say that she originally thought that the Claimant had touched C1 on hand (and that she, C2, later found out it was C1's leg/groin area). Instead, C2 now says she originally thought that the touching was on the leg, and that she later found it was higher on the leg than she originally thought, and closer to the groin. She said that the "*fucking wanke*r" remark was in response to the Claimant touching her colleague. The investigator - quite rightly - asked questions to C2 based on what the Claimant had said in February: C2 denied there had been any book in C1's possession; denied taking C1's hand to force a handshake; denied blackmailing Claimant and asking for £250 on 7 November. C2 said that her reasons for not wanting to go to police included the money she would lose while spending time on the matter

(e) C1's English version is in the bundle at page 219. It was 26 February 2018. I have had full regard to entire contents, including the parts which I do not refer to expressly in this paragraph. C2 was in the room for support but wearing headphones and did not speak. The translation was via a phone translation service. There are no significant differences between this version of C1's account and the one given to Ms Davinson, taking account of passage of time. C1 is asked if she had a book with her on 7 November 2018, and she says no.

(f) In the 21 March interview with C2, she again denies that there was any book. She is shown CCTV and identifies at what point on the CCTV she thinks the Touching Allegation occurred. C2 says C1 had on jeans. C2 says that on driving out of the car park she was not waving to Claimant. She says that she was making a hand

gesture while talking to C1 about the actions of another driver who was in her way. She also points out where on the CCTV she alleges the Comments Allegation occurred. The investigator also asked detailed questions to C2 about other points the Claimant had raised about past interactions between C2 and Claimant.

(g) In the 27 March interview with C2, C2 said that C1's hands had been on C1's upper leg at the time of the Touching Allegation. She said she had seen the Claimant touch around that area. That was why she said what she said to Ms Davinson on 7 November. She stood by the assertion that the reason that she had called the Claimant a "*fucking wanker*" on 7 November because of what she had just seen him do to C1, and she said this was the only time she had made this comment to him.

60. I will now briefly comment on what the Claimant said to investigator. It is not necessary for me to thoroughly comment on what the remaining witnesses said, as the hearing officer, Ms Campbell said that what the remaining witnesses said was not very important to her decision.

61. In his 16 February interview, according to the notes:

(a) The Claimant said he did not know why C2 had stopped car by his office, and he did not think she needed to.

(b) He said C2 stopped and called him over. The Claimant said that C2 wanted to introduce C1. He said C1 was reading a book and did not initially acknowledge him until C2 grabbed C1's hand and pushed C1's hand towards C2 for a handshake.

(c) The Claimant said that this caused the book to drop onto the passenger seat. The Claimant says he asked to look at the book. C1 then opened her legs wide so that they were away from the book. The Claimant took this to mean that he was to pick up the book, which he did.

(d) He then said that he looked at the book inside the car for a short time (15 seconds was his estimate). He said he did not take the book outside the car, but rather leaned his head inside the window,

and leafed through the book using both hands. He then handed the book back to C1 who started reading it again without commenting.

(e) The Claimant aid that later, as they were leaving, C2 stopped the car again and beckoned him. He said a conversation took place with him standing a few feet from the car at this point. He said that C2 said "*give us £250 or we make your life a living hell*". He said that he replied "*no*" and C2 drove off.

(f) He believed there were about 40 minutes between the incidents.

(g) He told Mr Savage that the police had told him on 10 November that the allegation was of touching C1's groin. He also said he told police that C2 had asked for £250. He gave his version of his past dealings with C2. Amongst other things, he said that C2 had wanted to go out with him and he turned her down and that her behaviour changed after that.

62. On 8 March, the Claimant gave his second interview to Mr Savage.

(a) In relation to the Touching Allegation, there were no significant changes to his earlier account. He went into a lot more detail about the book.

(b) When asked, he said he was sure that he did not touch C1's leg at all, even accidentally, when picking up the book. He said that he had seen that there was enough room for him to pick up the book. He said that had the space been narrow, he would not have done it.

(c) He mentioned that C1 made eye contact with him. He said that this eye contact, in addition to her spreading her legs, was also something he interpreted as C1, using nonverbal communication, telling him that he should pick up the book from between her legs.

(d) The Claimant denied that C2 had said "*you fucking wanker*" at this point. He said they just spoke about Lisbon.

(e) In relation to the Comments Allegation, on being asked, the Claimant said that C2 had not been waving goodbye but had beckoned him over. He repeated that he had not gone near the car at the time of the Comments Allegation. He stuck by the allegations of prior blackmail attempts by C2. He said he had not reported those attempts to R or anyone else because he was embarrassed and also because he thought he might be challenged as to why he had been alone with C2 in his office.

63. During the same interview, Mr Savage played the CCTV to the Claimant.

(a) The time stamp on the CCTV was approximately 11:35pm at the time of the Touching Allegation. On the Claimant's account, this was the time that he had leaned into the car, and leafed through the book. The Claimant was asked to show where on the CCTV he had his head and both hands inside car leafing through book. The footage was shown several times to the Claimant and his rep, and they said it supported what the Claimant had said all along about the Touching Allegation.

(b) The time stamp on the CCTV was approximately 13:18pm at the time of the Comments Allegation. In relation to this allegation, the Claimant confirmed that he was the person on the video who placed his hand on the car door and leaned down towards driver's side window. His head was close to window and he was seen to be speaking. The Claimant said that it had been slightly earlier - while he was a few feet away from the car - that C2 asked for £250.

64. In relation to what the CCTV footage actually showed, I am satisfied that the comments in the Savage report are correct in relation to timings, and I do not intend to read those timings out fully. Importantly, there is no dispute that the Claimant was on the CCTV and no dispute that the footage did not show the insides of the car (due to the opaqueness of the windscreen) and that it did not have audio.

65. There is also no dispute that it was a motion detection system and so the recording is not continuous.

66. The Claimant had alleged that the system might have been faulty and there might have been motion that was not recorded. There is no evidence before me to suggest that that is the case. However, more importantly, I am satisfied that the respondent – through the investigator and through the hearing officer – considered that suggestion very thoroughly and decided that there was no evidence to support it.

67. There is also no dispute that the recording was played several times to the Claimant by the investigator and at the disciplinary hearing.

68. The hearing started 5 July 2019. The notes of the hearing are in the bundle, and I have taken their contents into account. The Claimant had a union rep. The investigator appeared in person and so did Ms Davinson.

69. The Claimant had wanted Mr Nixon to attend. Human Resources had agreed with Mr Nixon that he did not need to come. This was because he told Human Resources that he was scared of reprisals. I do not need to make any finding as to whether he was genuinely scared. I accept that Ms Afoakwa genuinely believed him and that, for that reason, the employer acted reasonably by not insisting Mr Nixon attend. (In any event, as mentioned earlier, Ms Campbell said that the evidence which Mr Nixon gave to Mr Savage was not important to her eventual decision).

70. The Claimant had also wanted Ashton to attend. Mr Ashton did not tell HR that he was scared of reprisals, but he did say he preferred not to come. Ms Afoakwa took the view that Mr Ashton's evidence was not so relevant that the employer needed to try to insist that he come. I will comment on this later.

71. I am satisfied that the disciplinary hearing was fair and reasonable and that the Claimant had the opportunity to say everything that he wanted to say.

72. The Claimant was fully able to, and he did, criticize the investigation report, and deny the allegations, and to give his version of events.

73. I am satisfied that Ms Campbell was telling the truth when she informed me that no-one else tried to influence her decision.

74. In terms of the Claimant's previous disputes with the Respondent, I am satisfied that Ms Campbell did not know about those before the Claimant referred to them in his emails to her shortly before the hearing.

75. Ms Campbell later came to realise that, in fact, her husband had dealt with a previous issue, having reinstated the Claimant on an appeal against dismissal. This is not something which causes me to doubt Ms Campbell's impartiality in any way.

76. I am satisfied that Ms Campbell did in fact decide, on the balance of probabilities, that the Claimant committed the misconduct in question.

77. In other words, she decided that it was more likely that he did do it, than that he did not do it. She did not seek to distinguish between the Touching Allegation and the Comments Alelgation, but she looked at them both together.

78. Ms Campbell analysed the totality of the evidence, and it was the totality of the evidence which convinced her that, on the balance of probabilities, the Claimant did commit the misconduct.

79. The dismissal letter dated 9 July 2018 contained her genuine reasons, and I will discuss these below when considering if she had sufficient evidence to make those findings.

80. Subsequently, the Claimant appealed and the appeal took place on 18 September 2018. This was also a fair hearing. Ms Rogula and the rest of the panel engaged with what the Climant said and would have been willing to overturn the dismissal if they thought that was appropriate. They came to their own decision and genuinely decided that the appeal should be dismissed.

The law in relation to unfair dismissal

81. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for misconduct. If the respondent fails to persuade me that it had a genuine belief that the claimant committed the misconduct and that it genuinely dismissed her for that reason, then the dismissal will be unfair.

82. Provided the respondent does persuade me that the claimant was dismissed for misconduct, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) Employment Rights Act 1996, which says:

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

83. In interpreting and applying Section 98(4), I have had regard to the guidance in British Homes Stores Ltd v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT; Beedell v Westferry Printers Ltd [2000] IRLR 650 EAT and [2001] ICR 962 CA, and Foley v Post Office / Midland Bank plc v Madden [2000] IRLR 82 CA.

84. As is well known, the principles derived from Burchell are:

(a) First of all, there must be established by the employer the fact that it did believe that the employee committed the misconduct;
(b) Secondly, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief.
(c) And thirdly, that the employer - 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 all the circumstances of the case.

85. I have also had regard to what was said in the Employment Appeal Tribunal, in A v B [2003] IRLR 405. It was noted that the relevant circumstances to be taken into account include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to work in his or her chosen field of employment is potentially affected. Those comments do not, of course, imply that the standard of proof, or the burden of proof changes, just that the employer is to carry out a detailed investigation.

86. The Court of Appeal in Salford Royal NHS Foundation Trust v Roldan [2010] EWCA Civ 522, 2010 WL 1649032 said that were there are competing versions of the same (alleged) events, then it is not necessarily sufficient for the employer to compare these two version of events to each other and to make a decision that, if the accuser's version of events is more plausible than the accused employee, then the accused employee must therefore be deemed to be lying, and therefore liable to be dismissed. The actual decision which has to be made is whether the employer is satisfied on the evidence that the misconduct did occur.

87. In terms of the sanction of dismissal itself, I must consider whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances.

88. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).

89. It is not the role of this tribunal to assess the evidence and to decide whether the claimant did or did not commit misconduct, and/or whether the claimant should or should not be dismissed. In other words, it is not my role to substitute my decisions for the decisions made by the respondent.

90. When an employer is considering misconduct allegations, the standard of proof which the employer is entitled to apply is the civil standard of balance of probability, rather than the criminal standard beyond reasonable doubt.

Applying those principles to the facts of this case

91. I am satisfied that Ms Campbell did decide, on the balance of probabilities, that the Claimant committed the misconduct in question. I am also satisfied that her reason for dismissal was her belief that the Claimant committed this misconduct.

92. In terms of procedure, I will comment on two potential defects. Firstly, there was a delay from 30 November 2017 to 12 January 2018 in starting the investigation. I do not hold the Respondent responsible for the slight further delay until Mr Savage was then appointed and started work.

93. Secondly there was the failure to have Mr Ashton attend the disciplinary hearing. The Claimant having asked that he attend.

94. These two things do not sit in a vacuum to be assessed separately. The overall question that I have to ask myself is whether there has been a reasonable investigation before the decision made. That includes not just what Mr Savage did, but also what Ms Campbell did before making her decision.

95. My finding is that that there was a reasonable investigation. There was a genuine attempt by Ms Campbell to get to the truth of what happened, and that included, amongst other things, listening carefully to what Claimant had to say.

96. Ms Campbell analysed the totality of the evidence, and it was the totality of the evidence which convinced her that, on the balance of probabilities, the Claimant did commit the misconduct.

97. I also have to consider whether Ms Campbell had reasonable grounds to reach her decision, and whether the dismissal was in the band of reasonable responses.

98. As per her letter, dated 9 July 2018, Ms Campbell listed 13 bullet points as her reasons for finding the misconduct proven.

99. Ms Campbell did not ignore the slight change in C2's evidence in relation to whether C2 originally thought it was C1's hand or C1's leg that was touched, nor the uncertainty of whether it was C1's right or left leg.

100. Ms Campbell found these differences were minor and did not significantly undermine C2's overall credibility.

101. The reports made by C1 and C2 were made promptly and were consistent in all main respects throughout. To extent that the Claimant relies heavily on the 8 November note by Ms Delaney in support of an assertion of inconsistency between that note and what C1 and C2 later said, I find that any inconsistency is insignificant and is fully explained by the interview with the resident and by Mr Savage's interview with Ms Delaney. Ms Delaney was a housing officer making a note of a telephone call, rather than a trained police officer writing down a witness statement. Furthermore, Ms Delaney did not speak to C1 or C2. I find that it was not unreasonable for Ms Campbell to reject the Claimant's assertions of inconsistency, and that it was reasonable for her decide that C1 and C2 had been reasonably consistent throughout.

102. Furthermore, on the evidence presented to her, I find that Ms Campbell was fully entitled to reject the Claimant's account as very implausible in relation to what he said about the book, and putting his head inside the car and leafing through the book. This was not shown on the CCTV and the time stamps of what was shown on the CCTV made the Claimant's account implausible. Furthermore, the Claimant's account was inherently implausible.

103. Based on the evidence presented to her, Ms Campbell was not acting unreasonably when she decided that C1 and C2 were not lying about the book.

104. The CCTV evidence did not support the Claimant's account that C2 had asked him for £250 at around the same time that, according to C2, the Comments Allegation occurred. The CCTV was consistent with what C1 and C2 had reported about that incident (with C2 being the only person to allege hearing "*I want to fuck you*").

105. It is theoretically possible that, having heard the evidence, Ms Campbell could have decided that she believed the Claimant's version of events, or else found that the case was not proven. However, the actual decision Ms Campbell made was that she genuinely decided the case was proven, and she had reasonable grounds to form that opinion.

106. In relation to the decision to dismiss, given the nature of the misconduct, it was not outside the band of reasonable responses. I note that at paragraph 30 of the disciplinary procedure, it lists some examples of gross misconduct. It is not an exhaustive list. In any event, it does include harassment. Ms Campbell decided that the Claimant's misconduct fundamentally undermined the relationship of trust and confidence between the employer and employee, and that this merited summary dismissal, and this was not an unreasonable decision for her to make.

107. For the reasons mentioned above, the claim of unfair dismissal fails.

Employment Judge Quill

23rd August 2019

REASONS SENT TO THE PARTIES ON

28/08/2019

FOR THE TRIBUNAL OFFICE