EMPLOYMENT TRIBUNALS

claimant:	Mr Ajay Parekh
respondent:	Whitbread Group PLC
Heard at:	Leicester Employment Tribunal
On:	2 March 2020
Before:	Employment Judge Jeram (sitting alone)

Representatives:

claimant	Ms N Webber of Counsel
respondent	Mr Foster, Solicitor

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

Introduction and Issues

1. By a claim form presented 8 November 2019, the claimant brought a claim against the respondent of unfair dismissal. It was resisted by the respondent.

2. The issues identified by the parties at the outset of the hearing were as follows:

   a. What were the facts known to, or beliefs held by, the respondent which constituted the reason, or if more than one the principal reason, for dismissal? Were they, as the respondent alleges, related to the claimant's conduct?

      The parties agree that the reason the claimant was dismissed was that he fell asleep whilst on night shift on the evening of Friday 24 May 2019, and that that amounts to dismissal for a conduct reason.

   b. Did the respondent act reasonably in all the circumstances of the case:

      i. in having reasonable grounds after reasonable investigation for its beliefs;

         The claimant says that the respondent failed to view or preserve the CCTV footage which would have exonerated him;

      ii. in following a fair procedure;
         The claimant says that the respondent: failed to provide him with the investigation report before the disciplinary hearing, or indeed at all; held the disciplinary meeting after the claimant had worked a night shift.

      iii. in treating that reason as sufficient to warrant dismissal?

         The claimant says that the sanction of dismissal fell outside the band of reasonable responses because:

         - *The policy that the claimant was alleged to have breached was not a written policy;*

- *He was not suspended, indicating that the matter was not considered to be so serious by the respondent;*
- *Although the claimant was subject to a final written warning, he had not been disciplined for any similar offence;*
- *As a matter of fact, the respondent had suffered no adverse consequences of the claimant's misconduct.*

c. If the respondent acted fairly substantively but not procedurally, what are the chances it would fairly have dismissed the claimant if a fair procedure had been followed?

d. If the dismissal was unfair, has the claimant caused or contributed to his dismissal by culpable and blameworthy conduct?

3. In the course of the hearing:
   a. I heard from the following witnesses: the claimant; for the respondent, Victoria Kirby (Hotel Manager) and Daniel Evans (Hotel Manager) and I read the statement of Nichole Eastman (previously employed as Deputy Hotel Manager)
   b. I had regard to a bundle comprising of 152 pages.

Findings of Fact

4. The claimant was employed from October 2014 until summary dismissal on 19 June 2019, as a night team member at the respondent's Premier Inn Hotel at Fosse Park in Leicester. The hotel accommodates approximately 300 guests; during the night time, the hotel is manned by night team members.

5. The claimant had undergone a disciplinary process in November 2018. In that process, the claimant was invited to a disciplinary hearing, by letter which enclosed an investigation report. It was alleged that the claimant had contravened the respondent's safety and security policies by capturing images from the CCTV system. The system is password protected but the claimant accepted that he captured images from it onto his mobile phone, albeit in an attempt to demonstrate that his line manager, Nichole Eastman, had been carrying out acts of misconduct. The claimant collated evidence in his own defence. On 19 November 2018, the disciplinary officer,

Donna Kemble, decided that the claimant had committed an act of gross misconduct and gave him a final written warning that would remain live for twelve months. The claimant did not appeal that warning. That warning was not subject to a challenge by the claimant in these proceedings.

6. On the evening of Friday 24 May 2019, the claimant undertook a night shift at the hotel; it was his first shift after his return from a two-week holiday. He was joined that evening by two colleagues, Christopher Hill and Thomas Eaton, who he had not met before (page 137). Christopher Hill and Thomas Eaton had started work the previous week, during the claimant's absence. They were approximately one week into a four-week training programme when they accompanied the claimant that evening. Being the most senior member of staff on the premises, the claimant was not only required to support in their training but he was also the only member of staff on the premises that evening with first aid training and with knowledge as to what to do in the event of a fire alarm sounding.

7. During that nightshift, Christopher Hill took two photographs of the claimant sitting in the back office, appearing to be asleep at his desk. By reference to a clock on the wall behind the claimant, the first was photograph taken at 03.05am and showed the claimant with his feet up on the desk, resting back in his chair, with his head tilted to his right-hand side, supported by his right arm. The second photograph, taken at approximately 4am, had the claimant sat in chair with the whole of his upper body slumped forward, over the desk, with his head touching or almost touching, the desk.

8. Christopher Hill also worked alongside the claimant on the following two nights, also i.e. Saturday 25 May and Sunday 26 May 2019. Thomas Eaton did not.

9. There is CCTV coverage in the hotel, but not in the back office. The claimant may, at all times, view the CCTV images as they are streamed live. What he is not permitted to do is to view footage that has already been recorded; indeed, the view back facility is protected with a password that the claimant is not entitled to have.

10. An investigation into the claimant's conduct took place, conducted by the claimant's manager, Nichole Eastman. The investigation consisted of two interviews with the

claimant, an interview with Christopher Hill and Thomas Eaton. The claimant was not suspended during the investigation.

11. The claimant's first interview took place on Wednesday 29 May 2019. He was asked about the tasks that he was completing between 3am and 4am on Sunday 26 May 2019 i.e. three days previously; he replied that he could not remember. When asked whether the claimant had taken any medication in the last 14 days, the claimant replied that he had taken 'Voltarol' for back pain, a condition that he had notified his line manager of, and had "maybe" taken codeine which, he said, causes drowsiness, and which he had not notified his manager of. When asked again what mediation he had taken in the last 14 days, he said he could not remember.

12. Nichole Eastman then interviewed Christopher Hill a few hours later, on the same day. In the main, the questions were about events on the evening of Friday 24 May 2019. Christopher Hill said that his role had been to clean the meeting rooms in preparation for the following day with Thomas Eaton and that he had helped Thomas close down behind the bar. Christopher Hill, when asked how he knew the claimant had fallen asleep, said *"Tom and I were to Hoover the lounge and mop but as we went into the back office where we found him asleep, so Tom and I went back out the front of and hoovered and mopped everywhere which took about an hour. After this we went back into the back reception area and AJ was still asleep"*. When asked whether the claimant was asleep Christopher Hill replied *"yes definitely, we were making a lot of noise… but he did not move at all".* He repeated that the claimant had not stirred, notwithstanding the fact that they have made *"lots of noise".* He said that the claimant was not aware that a photograph had been taken.

13. Christopher Hill confirmed that the claimant *"definitely"* been asleep on Friday 24 May 2019 and described the claimant on Saturday 25 May and on Sunday 26 May as *"dozing on and off".*

14. Still on the same day, Nichole Eastman interviewed Thomas Eaton who confirmed he and Christopher Hill were cleaning meeting rooms, hoovering, mopping and closing down the bar. He said that he observed the claimant with his head in his hands on the desk and unresponsive. Thomas Eaton said that the claimant had later asked him whether he had fallen asleep; when Thomas Eaton replied in the affirmative the claimant said*, "sorry I did not realise"*.

15. On 6 June 2019 the claimant was re-interviewed by Nichole Eastman. The questions were now about Friday 24 May, Saturday 25 May and Sunday 26 May. The claimant said he could not remember what tasks he was undertaking on the 24 and 25 May, but that if he on was reception he *was "maybe [taking] a break or more than likely doing reception duties"*. He said he could not remember being asleep, but accepted that he was tired, having returned from annual leave, and that he sometimes puts his head down because of his contact lenses in order to rest his eyes. When asked whether what Thomas Eaton stated was correct, the claimant said that he could not remember. The claimant challenged Nicole Eastman as to how she could be sure that he had not drifted off during his 20-minute break, which, he pointed out, was unpaid and therefore, he suggested, he would be well within his right to fall asleep during his break. He said he did not believe it was acceptable to fall asleep and he understood the seriousness of the allegation, but he did not believe he had fallen asleep. Later in the same interview, he told Nicole Eastman that he had learned that photographs had been taken of him; he said that that was not right, a reference to the fact that he himself in recent months been given a warning for taking photographs of her on the hotel premises. He said that he understood the seriousness of the allegations being put to him. He offered a yet further possibility towards the end of that meeting, namely that he deliberately chose to ignore his colleagues during his 20-minute break, because, he said, they were talking all night. Of Christopher Hill, the claimant said that he had been advised to watch him; but he was always watching the claimant.

16. Nicole Eastman prepared an investigation report on 6 June 2019. In that report, she stated that she considered the claimant to be in serious breach of health and safety and security policies and procedures by falling asleep at work. She also noted that whilst reviewing her notes of the second investigation meeting, the claimant asked her to make certain corrections adding *"if you're going to screw me over, you may as well screw me over properly with the correct grammar"* that he became irate with her and asked her what she had against him and accused her of being *"out to get him"* and that she *"picks up on everything that he does".*

17. The claimant was invited to a disciplinary meeting by letter dated 10 June 2019. That meeting was due to take place on 17 June 2019 at noon. The allegation was cited as *“failure to follow procedures for securing the business including guest areas, private accommodation, company money, keys or swipe cards - falling asleep at work”.* The matter was described as serious; the claimant was reminded of his right to be accompanied to the hearing. A copy investigation outcome report was described as being enclosed with the letter. The claimant was told that a potential outcome of the disciplinary hearing was dismissal. The claimant was later invited by letter dated 13 June 2019 to a rescheduled hearing to take place on 18 June 2019.

18. In his evidence before the tribunal, the claimant said that, coincidentally, the day before his disciplinary hearing, he discovered that the CCTV was not password protected, so he took the opportunity to view the footage of the evening of 24 May 2019. This, he says, is when he realised for the first time that his movements had been captured on a video recording. He said the footage captured him *“completing the tasks that [his] colleagues claim they completed”.* The claimant gave evidence that he knew that to view anything other than live footage was forbidden, and recordings are password protected for that very reason, and furthermore, that he was acutely aware of this because of his previous disciplinary hearing.

19. The disciplinary hearing took place on 18 June 2019. The disciplinary officer was Victoria Kirby, hotel manager at the Premier Inn Hotel in Coventry. The claimant and Ms Kirby had had no previous dealings before. The claimant had been notified of his right to be accompanied to the hearing but chose to attend the hearing unaccompanied. The claimant told Ms Kirby that he had not received all the photographs and statements in advance the disciplinary hearing. Ms Kirby gave him the opportunity to review the documents; he declined the opportunity. Ms Kirby offered the claimant the opportunity to go through the documents at any time during the hearing; he did not do that, either. I accept Ms Kirby’s evidence that it would have been pointless to offer the claimant an adjournment where he was disinclined to look at the evidence at all.

20. During the disciplinary hearing, the claimant accepted that the photographs looked as if he was asleep. At the outset of the hearing, the claimant said that he had not been feeling very well that night that he had been taking medication for the past few days and that Nichole Eastman was aware of this. When asked what effect the mediation had on him, the claimant replied that he was not sure he was asleep. Throughout the

hearing, he gave by way of explanation for his posture in the photographs: it was untrue of his colleagues to say he was asleep; he had been mopping the floor in reception; he didn't think he was asleep; he was not sure whether he was asleep; it could have been during his break; he could have been resting his eyes; he was resting his eyes. After reviewing the handwritten notes of the hearing, the claimant added that the only time he could have fallen asleep was during his break.

21. At a point after the disciplinary hearing but before the outcome was notified to the claimant, he contacted Ms Kirby to tell her that there was in existence CCTV footage of him, demonstrating that he had not been asleep, but that he had been hoovering and mopping at the relevant time.

22. Ms Kirby inspected the CCTV footage of the night of Friday 24 May 2019 and the early hours of Saturday 25 May 2019 including between 3am and 4am. She said that it showed Christopher Hill and Thomas Eaton performing the hoovering and mopping tasks.

23. Ms Kirby then told the claimant that that is what she had observed. She did not take steps to preserve the CCTV; he did not ask her to.

24. On 22 June 2019, Ms Kirby sent to the claimant a disciplinary outcome letter, with a disciplinary report enclosed. The letter notified the claimant that she had found him to have committed *"an act of gross misconduct by falling asleep whilst on shift, thereby breaching the Health and Safety and Security Policy by failing to follow procedures for securing the business including guest areas, private accommodation, company money, keys or swipe cards".*

25. The accompanying report stated that Ms Kirby had viewed the CCTV footage to ascertain whether the claimant could be seen carrying to the mopping and the hoovering as he had claimed, but could see that his colleagues had carried out those tasks. She recorded *"Ajay had fallen asleep whilst on shift on the 24th May and was unsure himself on whether he had fallen asleep on the 25th & 26th May."*

26. I accept her evidence that in making a finding that the claimant had fallen asleep on the evening of Friday 24 May 2019, she had formed the view that he had fallen asleep for approximately 55 minutes. She dismissed the claimant on the basis that he had committed an act of what she described as gross misconduct, whilst being subject to a final written warning for another act of gross misconduct, although Ms Kirby added that even without that previous warning, she would have dismissed the claimant on those same facts.

27. Ms Kirby says she enclosed with her letter all the documents relating to the investigation that the claimant had said he had not received: this is not recorded in the letter itself, although there appears at the bottom of the letter as well as at the bottom of the disciplinary outcome report the words 'cc. file'. The claimant denies that the investigation documents were included with the letter and report.

28. The claimant was given 7 days to appeal the finding and was directed to address that letter to Donna Kemble.

29. On 30 June 2019 the claimant wrote two letters. The first letter was addressed to Human Resources, in which the he objected to the nomination of Donna Kemble as appeal officer on the basis that she was 'close friends' with the managers at the site at which he worked. He also requested the documentation relating to the investigation, stating that he was *"yet to receive or see any of it"*.

30. In his second letter, being his letter of appeal, the claimant stated that he was unwell and on antibiotics and that had led him to unintentionally fall asleep within his unpaid rest break, whilst maintaining that he did not sleep during paid hours. He claimed that a *"thorough"* viewing of the CCTV would demonstrate that he had carried out mopping and wiping down tasks, including the cleaning role that Thomas Eaton had commenced.

31. He repeated in his investigation letter his claim that he had not received any documentation relating to the investigation.

32. The appeal hearing took place on 16 July 2019, with Daniel Evans chairing the hearing. At that hearing, the claimant was told that the CCTV footage had not been preserved because, as is usual procedure, it had been deleted after a certain period of time. No notes were kept of that hearing but the claimant takes no issue with the meeting itself, only the outcome. The relevant findings in the outcome letter recorded that Mr Evans accepted Ms Kirby's account that she could not see the claimant on any CCTV camera between 3am and 4am and, furthermore, that the documentation relating to the investigation had been offered to the claimant at the disciplinary hearing and that he had declined to view them. The appeal was rejected.

33. Mr Evans understood that he was upholding a finding that the claimant had been dismissed for falling asleep on 24 May 2019 only.

34. Of the issues identified by the parties at the outset of the hearing, there were two significant factual issues that required resolution. The first was whether, as the claimant suggested, he had ever received the investigation documents at all, before disclosure in these proceedings and second, whether the CCTV footage, which Ms Kirby had not taken steps to preserve, showed the claimant awake and carrying out his duties at the relevant time. Given the lack of documentary evidence, my findings were significantly informed by my assessment of the witnesses' credibility.

35. I found the claimant's evidence unsatisfactory; it was inconsistent and contradictory to the point of being dissembling. By way of example, the claimant's account of whether he had, or might have, fallen asleep or not were difficult to follow in the accounts given at the investigation and disciplinary stage; under cross-examination, he accepted he had fallen asleep albeit only for 5 minutes (and only during his break), in direct contradiction to his witness statement (paragraph 13). On other matters, he abandoned significant parts of his case when pressed in cross-examination (he claimed that his reference to taking medication were simply comments in answer to a line of enquiry was instigated by Nicole Eastman, and not a line of defence he was advancing himself, in direct contradiction to the first ground in his letter of appeal; he abandoned an issued raised at the outset of the hearing, namely the timing of the disciplinary hearing, notwithstanding the fact that he had made significant criticism of it in his witness statement).

36. Where there was a conflict of fact, I preferred the evidence of Ms Kirby to that of the claimant.

37. Turning then to the claimant's claim that he had not received the documentation in relation to his investigation, until the disclosure stage of this litigation. I find that he did have possession of the documentation before the disciplinary hearing for the following reasons. First, the claimant knew that the documents were important and relevant to the disciplinary hearing primarily because the invitation letter stated that they were included, but more so because the claimant had been through a disciplinary process only months previously and so understood its relevance. Second, he knew that they were particularly important, because he was told in terms that he was at risk of dismissal. Third, he had the ability to ask for copy documentation, if he genuinely had not received the documents (as he did so after the disciplinary hearing) but inexplicably did not do so. Fourth, I find it wholly incredible that the claimant, having not sought a postponement, would then decline the offer of copy documents at the outset of the hearing, which documents may have included evidence which may have supported him, as much as detracted from his case. I find that, on his own admission, having been offered, but declined copy documents, by Ms Kirby, his suggestion to the contrary to Donna Kemble and to Human Resources was at best misleading, and at worst disingenuous. Furthermore, I find it difficult to accept that, having only recently received the investigation report of Nicole Eastman, he had nothing to say of its contents.

38. Most pertinently, if I were to accept his claim, the logical implication is that the claimant was not only compelled to attend a disciplinary hearing without the documentation, but also voluntarily attended his own appeal hearing, in an attempt to overturn a finding based on evidence he had yet to have sight of.

39. In short, I find that the claimant's conduct is far more consistent with having received, but being in denial of his having received, an inconvenient set of evidence, rather than not having possession of it at all. That said, the opportunism displayed by the claimant would not have been possible had it not been for the lack of attention to detail in the documentation generated by the respondent. For the avoidance of doubt, I find that the claimant received the investigation pack with the letter of invitation on 10 June 2019 and again with the disciplinary report and letter of dismissal on 22 June 2019.

40. Likewise, I reject the claimant's claim that there was in existence CCTV footage of him awake and alert and carrying out his tasks between 3am and 4am on the evening of Friday 24 May 2019. Had that footage existed, it was such an obvious line of defence,

that I find that the claimant would have raised it very swiftly in response to the allegation, and certainly during the investigation stage. When asked why he had not mentioned the existence of the CCTV footage before the disciplinary hearing itself, the claimant responded that he had only seen the footage the day before. I reject the implicit suggestion that it had not at any stage earlier occurred to him that there would be in existence of incontrovertible evidence of his movements that evening had not occurred to him, notwithstanding the fact he was at work between 29 May 2019, when he was formally on notice of an investigation, until 17 June 2019, the day before his disciplinary hearing, and during which time he would been able to view live footage of CCTV images in the back office.

41. I reject the claimant's alternative or additional explanation, i.e. that he was reluctant to mention that he had viewed the recorded footage, because of his previous disciplinary proceedings: first because he would not have to have admitted as much in order to raise the defence, second, perhaps most more pertinently, that is precisely what he did in any event.

42. The claimant does not suggest that Ms Kirby did not view the CCTV footage, and does not dispute that she responded to him to say that she saw nothing of relevance. But he did not ask Ms Kirby to ensure the footage was preserved notwithstanding her report to him: had the CCTV footage contained incontrovertible evidence in his defence, I find that he would have taken such a simple step as to ask her to either keep the footage, or at least to allow him to view it. He did not do so because he knew it contained nothing which would assist him, and the absence of such imagery would likely cause him further difficulties. I reject the claimant's claim that it had not occurred to him that retention of the CCTV footage might be time limited, not least because his explanation to Donna Kemble at his earlier disciplinary hearing was that he had captured images of Nicole Easton on his mobile phone as evidence because he *"felt they could of deleted the CCTV".*

43. In summary, I find that the claimant's claim of the existence of supportive CCTV footage to be not only disingenuous, but I find the delay in making that claim to Ms Kirby consistent with an attempt to maximise the chances of the footage having been destroyed.

The Law

44. Section 98 of the Employment Rights Act 1996 ('ERA 1996') provides: *"(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –(a) the reason (or if more than one the principal reason) for dismissal(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.(2) A reason falls within this subsection if it relates to ..... the conduct of the employee."*

45. The reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee: Abernethy v Mott Hay & Anderson, per Cairns L.J. The reason for dismissal must be established as at the time of the initial decision to dismiss and at the conclusion of any appeal. Although it is an error of law to over minutely dissect the reason for dismissal, it is essential to determine its constituent parts.

46. Section 98(4) ERA 1996 provides: *"Where an 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 all 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 (b) shall be determined in accordance with equity and the substantial merits of the case."*

47. The Tribunal must determine, with a neutral burden of proof, whether the employer had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable, see British Home Stores v Burchell (as qualified in Boys & Girls Welfare Society v McDonald).

48. Where there is an internal appeal, irrespective of the nature of the appeal, i.e. whether it is by way of rehearing or review, it is the procedure as a whole which must be considered to determine if it was fair: Taylor-v-OCS Group.

49. The applicable test in all matters both substantive and procedural is that of the *'band of reasonable responses'*: Iceland Frozen Foods v Jones (approved in Sainsburys v Hitt).

Conclusions

Fair Reason

50. The parties agree that the respondent held a genuine belief that the claimant had fallen asleep whilst on night duty on the evening of Friday 24 May 2019 and, furthermore, that this related to a potentially fair reason for the dismissal, namely conduct.

Reasonable Grounds after a Reasonable Investigation

51. I consider that the respondent had ample grounds, after conducting a reasonable investigation. My reasons are as follows.

52. Whilst the claimant was keen to explain that his posture was consistent activities other than sleeping, such as simply resting his eyes, that is simply not the test with which I am concerned. Applying the principle in Sainsbury's v Hitt, I need to consider, whether it was within the band of reasonable responses open to an employer to interpret the evidence as a whole as showing an employee having fallen asleep on duty.

53. Even viewed in isolation, the postures adopted by the claimant in the photographs would unusual postures to adopt simply in order to rest the eyes.

54. Furthermore, the evidence did not simply consist of the photographs, but also the witness evidence, and that was something that the claimant simply failed to engage with. Conspicuous by its absence was any challenge on the part of the claimant of Christopher Hill's evidence that he was making a lot of noise, or that the claimant was in a deeper sleep on Friday night but only dozing on other nights, or that of Thomas

Eaton, to whom the claimant is said to have said *'sorry I didn't realise'* when he awoke from his sleep.

55. Furthermore, the clock in the background is self-evidently sufficient evidence from which a reasonable employer could infer that the claimant had been asleep for almost an hour.

56. As to the adequacy of the investigation, whilst it was undoubtedly lax to have not inspected the CCTV footage at the outset of the investigation, I have already found that, ultimately, prior to the decision to dismiss, Ms Kirby did conduct a search of the CCTV footage that evening, and, as I have already accepted, it did not reveal the claimant awake and circulating the building at the time in question.

57. Finally, it was no part of the claimant's case that there were any other lines of enquiry that the employer should have followed, the absence of which would render the investigation as being one that falls outside the band of reasonable responses.

Fair Procedure

58. I have made a primary finding that, contrary to the claimant's case, he did in fact receive the investigation pack prior to the disciplinary hearing under cover of his invitation letter on 10 June 2019. Had he not received it then, my secondary finding is that he had received it by under cover of the outcome letter dated 22 June 2019, thereby allowing the claimant to have a fair appeal hearing. In either event, the process viewed as a whole, was a fair process.

59. Whilst the timing of the disciplinary hearing was raised at the outset of the hearing as a matter going to the fairness of the procedure, Ms Webber, quite properly after the claimant's evidence was received on this matter, no longer pursued the point.

60. In the circumstances, I find that the procedure adopted by the respondent was reasonably fair.

Sufficient Reason to Dismiss

61. I find that the decision to dismiss fell firmly within the band of reasonable responses open to an employer.

62. I deal with the claimant's arguments first.

63. It was raised on behalf of the claimant at the outset, that the security policy relied upon by the respondent was not a written policy. I do not accept that that is a distinction of relevance on the facts of this case. The purpose of a written policy, is to ensure that employees are cognisant of what is and is not acceptable behaviour and how seriously the respondent might regard it. The claimant clearly knew it was not acceptable to fall asleep whilst on duty, and he also confirmed that the respondent would view it was a serious matter (page 126).

64. It was also argued on the part of the claimant that the lack of suspension indicated that the respondent did not regard what the claimant had allegedly done as serious. Again, I see no merit in that argument: Ms Kirby's explanation was that, having been notified of the investigation, it was considered less likely that the claimant would do precisely that which he was on notice of being suspected of. As Mr Foster properly pointed out, that explanation is consistent with principles of good practice i.e. to avoid suspension unless it is necessary. On the facts of the case, it appears that the respondent's rationale was well founded; there is no suggestion that the claimant was suspected of falling asleep on duty once notified of his employer's concerns.

65. The claimant argued that dismissal fell outside the band of reasonable responses because whereas he may have a disciplinary record, it was not for a similar matter. As a matter of fact, that is correct, but it is also correct to observe that, as with this matter, it was his conduct for which he was currently on a final written warning. That said, I agree with Ms Webber for the claimant that it is not helpful to label what may be properly regarded as serious conduct as inevitably amounting to 'gross misconduct'. Whilst the lack of adverse consequences is also a matter of fact, I do not consider that to be a factor upon which much weight can properly attach; if that were the case then the luck would be the determining factor in cases involving the most serious or even intentional conduct.

66. Conversely, I prefer the respondent's case that dismissal was very clearly a sanction which was open to an employer acting reasonably. The claimant was the most senior person on duty that night; his colleagues had barely commenced their training. The claimant, therefore, was left in charge of a building, containing up to 300 guests, at night when the guests would be sleeping and therefore slow to be alert to or react to any problems. The circumstances required the claimant to be awake, alert and in charge of the situation he had been entrusted with. He was not, and the lapse was not momentary: he fell asleep for almost an hour. The claimant was some 6 months into a final written warning, which was not in issue before me, and Ms Kirby was properly able to take that warning into account, it being live, recent and also for a conduct matter.

67. The decision to dismiss is a sanction that, on the facts of the case, was clearly one that was open to a reasonable employer.

68. In the circumstances, I find that the dismissal was a fair one, in accordance with s.98(4) ERA 1996. It is not therefore necessary for me to consider such matters as contributory fault or Polkey.

69. I am grateful to both representatives for the constructive manner in which they conducted their cases.

Employment Judge Jeram

Date: 29 May 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE