EMPLOYMENT TRIBUNALS

Claimant: **Mr M Poolan**

Respondent: **David Lloyd Leisure Ltd**

Heard at: **North Shields Hearing Centre** **On: 15 – 18 July 2019**

Before: **Employment Judge Johnson**
Members Mrs E Menton
Mr D Morgan

Representation
Claimant: **Dr H Kay, Solicitor**
Respondent: **Mr J Anderson, of Counsel**

JUDGMENT having been sent to the parties on 25 July 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

1. These are the written reasons in respect of the Judgment originally delivered at the conclusion of the hearing on 18 July 2019, which Judgment was promulgated on 22 July 2019 and sent to the parties on 25 July 2019.

2. By letter dated 1 November 2019, Dr Kay on behalf of the claimant requested written reasons of that Judgment, respectfully pointing out that the request for written reasons had been made at the conclusion of the hearing on 18 July. Having examined its file to clarify the point, the Tribunal accepts a request for written reasons was made and that those written reasons should have been provided to the claimant. Those written reasons are now set out below.

3. The claimant was represented by Dr Kay, who called the claimant to give evidence. Dr Kay submitted on behalf of the claimant a witness statement from Mr Billy Johnson, although that statement was not signed and Mr Johnson was not called to give evidence. In those circumstances, the Employment Tribunal attached to Mr Johnson's statement such weight as was appropriate in all the circumstances.

4. The respondent was represented by Mr Anderson of Counsel, who called to give evidence Ms Carolyn Ward (General Manager), Mr Mark Sylvester (General Manager) Ms Michelle Chambers-Cran (Regional Manager) to give evidence.

5. The claimant and the three witnesses for the respondent had all prepared typed and signed witness statements where statements were taken "as read" by the Employment Tribunal, subject to questions in cross examination, re-examination and questions from the Tribunal. There was an agreed bundle of documents marked R1 comprising an A4 ring binder containing some 670 pages of documents.

6. By a claim form presented on 26 October 2018, the claimant brought complaints of unfair dismissal, automatic unfair dismissal for making protected disclosures, automatic unfair dismissal or bringing to the respondent's attention matters relating to health and safety and unlawful disability discrimination. The respondent defended the claim. In essence they arise out of the claimant's dismissal on or about 20 August 2018, for reasons which the respondent says related to the claimant's conduct. The claimant denied that any such conduct was reasonably categorised as gross misconduct justifying summary dismissal. The claimant further asserted that the sole or principal reason for his dismissal was because he had made protected disclosures and brought to his employer's attention matters related to health and safety. The claimant asserted that the respondent had failed to follow a fair procedure before dismissing him, that its decision fell outside the range of reasonable responses and that he had been subjected to unlawful disability discrimination throughout the investigation and disciplinary process.

7. At the conclusion of the evidence on day three of the hearing and prior to making closing submissions, Dr Kay on behalf of the claimant withdrew the allegations of unlawful disability discrimination, automatic unfair dismissal for making protected disclosures and automatic unfair dismissal for bringing to the employer's attention matters relating to health and safety. Dr Kay confirmed that those claims may be dismissed upon withdrawal by the claimant. The only claim outstanding which required a decision of the Employment, was that relating to ordinary unfair dismissal.

8. In respect of that remaining claim, the issues to be decided by the Tribunal were as follows:

   (1) Did the respondent genuinely believe that the claimant had committed the act/acts of misconduct alleged?

   (2) Were there reasonable grounds for that belief?

   (3) Had there been a reasonable investigation in all the circumstances?

(4) Did the respondent follow fair procedure before deciding to dismiss the claimant?

(5) Was the respondent's decision to dismiss the claimant one which fell within the range of reasonable responses open to a reasonable employer in all the circumstances?

9. Having heard the evidence of the claimant and the witnesses for the respondent, having examined the documents to which he was referred and having carefully considered the closing submissions of Dr Kay and Mr Anderson, the Tribunal made the following findings of fact on the balance of probabilities.

10. The respondent is a company which operates a chain of health, fitness and racket clubs throughout the United Kingdom and Europe. One of its clubs is the David Lloyd Newcastle club, where facilities provided by the respondent, include a swimming pool.

11. Included in the hearing bundle are a number of policies implemented by the respondent, including policies relating to health and safety with particular regards to the swimming pools. The respondent's employees are specifically trained in the contents of those policies, their application and implementation. Compliance with those policies is the responsibility of various tiers of management, depending upon which facilities operate within each individual premises.

12. Of particular relevance within those policies is the role of the "Senior Manager on Duty" ("SMOD"). At page 642 in the bundle under the heading "Health and Safety Induction – Employees", there appears a section headed "Senior Managers on Duty (SMODs) and team members taking the lead". The list of items to be included in the SMOD training includes "pool safety operating procedures and pool rules, swimming pool monitoring procedures."

13. At page 644 it states that all team members shall receive monthly health and safety training, following the specific training plan set out on that page and recorded on each employee`s training record card. That training includes "swimming pool safety" in June of each year.

14. The respondent operates an internal training programme, which identifies those employees whom it considers to be suitable for training for the position of general manager. The training programme is called "Step up to GM Development Programme". It is effectively a leadership development programme, by which those employees identified with the appropriate potential to become a general manager, take part in a specific training programme.

15. The claimant's employment for the respondent began on 11 July 2016 and ended when he was summarily dismissed on 20 August 2018. The claimant was employed as a Sports Manager, but had been identified as suitable for and accepted upon the Step up to GM Programme.

16. In his capacity as Sports Manager, the claimant from time to time performed the role of Senior Manager on Duty (SMOD). Whilst there may on occasions have been a more senior manager on the premises, the claimant would be obliged to carry out the duties of the SMOD.

17. On 30 July 2018, the claimant was on duty at the Newcastle club. It is accepted that on this particular occasion the claimant was Senior Manager on Duty. On the premises at the same time there was an Operations Manager, Ms Caterina Pipitone. However, the claimant was the SMOD. In accordance with the respondent's general practice, at the beginning of the claimant's shift, he conducted a "huddle" with the other members of staff to discuss to discuss what the claimant described as "practical issues such as who will be doing what, who would cover lifeguard and reception breaks". Those huddles would include discussions about which members of the club would have access to various parts of the club at various times in the day. Of particular relevance, were the times when people would have access to the swimming pool, including when adults only would be permitted to use the pool, and where there was only "family time" where adults and children would be allowed into the pool and whether there would be any other activities where children would be allowed into the main pool or the children's pool. It was accepted that there was a requirement whenever children were permitted into the swimming pool, that a lifeguard would have to be on duty. It was also accepted that from time to time during the day, the lifeguard would be entitled to take a break either for meals, refreshments, toilet breaks etc. In those circumstances, it was the responsibility of the SMOD to ensure that cover was provided when the lifeguard was not at the pool side.

18. In his evidence to the Tribunal, the claimant maintained that it was the Operational Manager's responsibility to comply with any health and safety requirements with regard to the swimming pool itself. The Tribunal found that to be the Operational Manager's duty in his/her supervisory capacity, but that it was the duty of the SMOD to ensure that there was appropriate lifeguard cover at all relevant times by the swimming pool.

19. On 30 July 2018, the claimant had reason to go to the swimming pool, as he put it, "to collect the swimming registers". On arrival at the poolside, the claimant noticed that the lifeguard on duty was in fact sat outside the swimming pool, with his back to the swimming pool. The doors from the swimming pool area were slightly ajar, with the lifeguard sat just outside. The claimant's evidence to the Tribunal was that at the time there was a single adult in the main pool, but that there were no children in either the main pool or the children's pool. The claimant's evidence to the Tribunal was that he did not believe that at the relevant time, it was either "family time" or any other time when children were permitted into the swimming pool. The claimant's witness statement states that at the relevant time (12.00pm – 1.00pm) was usually "adults only", when no children were permitted in the pool. However, during the summer holidays, the club ran swimming lessons for children which ran from 10.15am – 1.15pm. The claimant accepted that the lifeguard in question was working a shift from 12.00pm – 1.15pm, due to those swimming lessons.

20. The claimant made no attempt to approach the lifeguard, or to attract his attention so as to enquire whether the lifeguard was on a break, or to obtain

an explanation as to why the lifeguard was sat outside the swimming pool area, with his back to the pool. It is clear from the diagrams of the layout of the swimming pool area and the photographs in the hearing bundle, that it would have taken a matter of a few seconds for the claimant to have done so.

21. Using his mobile telephone, the claimant took a photograph of the lifeguard, sitting outside with his back to the swimming pool. The claimant then left the swimming pool area and returned to the office, where he showed the photograph to the Operations Manager, Caterina Pipitone. The claimant's explanation for this to the Employment Tribunal was that ;

> "It was by no means certain that Theo (the Lifeguard) was on duty". He also stated that, "As I was unsure whether it was family time or whether Theo was on a break and I knew the Operations Manager was in her office, I took a photograph of the lifeguard on my phone and immediately went to see the Operations Manager to report this issue to her, as she is responsible for the lifeguards and the swimming pool and is also the designated health and safety officer for the club. When I reported to the Operations Manager that the lifeguard has his back to the pool approximately 1.31pm (it only took thirty seconds to get from poolside to the office where she was working). I asked her whether the lifeguard was on a break and also whether she was aware that he had his back to the pool. She responded that the lifeguard wasn't on a break and that she hadn't been aware that he had his back to the pool. I said that in that case, this could be potential gross misconduct and she should go to the poolside and the Operations Manager confirmed she would deal with it immediately. I understood this to mean that the Operations Manager would deal with the situation straight away, and that there was nothing further I needed to do as the Operations Manager was also a Senior Manager with ten years service with the respondent and this issue fell within her remit. It was the culture in the club that managers would refer issues to the manager with particular responsibility for the issue in question".

22. The claimant goes on to say in his witness statement as follows:

> "About five or ten minutes later the Operations Manager came into my office and told me the situation had been dealt with, and asked me to send her the photograph I had taken to support the lifeguard's disciplinary. In the minutes of the investigation meeting with the Operations Manager, she stated that after I had the initial conversation with her where I showed the photograph of the lifeguard, she walked to reception and viewed the CCTV and could see that the lifeguard was back on the side of the pool. She stated that she had been with me for five minutes prior to checking the CCTV footage and that she could see from the CCTV that there were no children in the pool area and that the lifeguard was moving about. Her view was that the lifeguard had gone for some fresh air, as the pool "was like a greenhouse" and there were no children in the pool. When asked if she considered this to be a "near miss" she stated that she didn't. When asked if she had any expectations of me as the senior manager on duty at the time when I reported this to her, the Operations Manager

replied “no”. The Operations Manager was asked whether looking at the photo of the lifeguard, she would think that this is gross misconduct (on the part of the lifeguard), she replied “no” because there were no kids in the pool”.

23. The claimant accepts that, when he sent the photograph of the lifeguard to the Operations Manager, he added a comment “ha ha ha ha - its funny”. When asked before the Tribunal to give an explanation of that comment, the claimant described it as “so bad it was actually comical – in a black humour kind of way”. I certainly didn’t think it was funny in the normal sense of the word “.

24. Ms Jaclyn Winter (Member Relations Manager for the Newcastle club) became aware of the incident and reported it to Leanne Saunders, HR Business Partner, with a view to disciplinary action being taken against the lifeguard. Leanne Saunders expressed some concern at the response of the claimant when he discovered that the lifeguard was sat outside with his back to the swimming pool. It was agreed that Leanne Saunders and Carolyn Ward (General Manager of the whole Club) would visit Newcastle Club to conduct an investigation.

25. Ms Ward conducted 4 investigatory meetings on 3 August 2018, with the claimant, Caterina Pipitone, Jaclyn Winter and the reception team member, Ms Lesley Featherstone. Ms Ward’s evidence to the Tribunal was that following those investigations, the following facts were established:

    - Mark was the Senior Manager on Duty at the time of the incident.
    - Mark visited the pool approximately 1.30pm.
    - Mark saw the lifeguard sitting outside in the sun, with his back to the pool.
    - There was one adult member in the pool at the time.
    - Mark took a photo of the lifeguard.
    - Mark did not approach or speak to the lifeguard.
    - Mark acknowledged that he should have spoken to the lifeguard, but he didn’t.
    - Mark left the pool area without putting in place any protective or safeguarding measures.
    - Mark went to the Operations Manager Caterina Pipitone, and informed her of the incident.
    - Mark went to the Operations Manager “because I thought it was an issue because kids could have come into the pool”.

- Mark told the Operations Manager that he felt he was "quite serious, that it could be gross misconduct and she should go to the pool side. I suggested she might want to speak to Peninsula".

- Mark was unsure whether any action was taken by the Operations Manager after informing her of it.

- Mark would have acted differently if there had been kids in the pool.

- Mark accepted there was a risk that children could have been in the pool during the period he left poolside and went to see Caterina Pipitone.

- At the time of interviewing Mark, he didn't even know whether the lifeguard was aware that he had been caught sitting outside.

- Mark told the MRM, who was taking over as SMOD, of the incident, but told her it was being dealt with although he didn't know if that was true or not.

- Despite considering it as potential gross misconduct, he did not file an incident report.

26. Ms Ward also met with Caterina Pipitone and took note of that interview. Ms Ward and Ms Winter then viewed the CCTV footage of the club, including the poolside footage and reception footage. The evidence to the Tribunal was that she "had serious concerns over the way in which Mark Poolan and Caterina Pipetone had dealt with it". Ms Ward goes on to state;

> "I was concerned that neither party were taking a stand as a leader in the absence of the General Manager and that both had been privy to a potentially serious incident, yet neither had felt the need to take any decisive preventative or immediate action. I did not feel like I could make the decision to leave the Club in the hands of these two individuals, who had such poor judgement over matters of health and safety. Deciding that I could not ensure they would act appropriately, I made the decision to suspend".

27. Ms Ward advised Leanne Saunders to suspend both the claimant and Ms Pipitone. Leanne Saunders prepared the suspension letters on behalf of Carolyn Ward and those letters were sent to both employees on 6 August 2018.

28. By letter dated 10 August 2018, the claimant was invited to attend a disciplinary hearing on 14 August 2018. The letter appears at page 211 in the bundle and states as follows:

> "Following an investigation with you conducted by Carolyn Ward, Investigating Manager, I am writing to invite you to attend a formal disciplinary meeting to discuss an allegation of potential gross misconduct, namely a negligent breach of company health and safety

provisions, specifically that on Monday 30 July 2018, as the senior manager on duty you:

- Failed to address the inappropriate behaviour and non compliance with duties by a lifeguard, causing potential risk to pool users,

- Failed to follow the reporting of a near miss incident in line with the company process and procedures".

29. The disciplinary hearing took place on 14 August 2018 and was conducted by Mr Mark Sylvester, the General Manager of the Newcastle Club, where the claimant was employed. The minutes of the disciplinary hearing appear at pages 213 – 216 in the bundle. The claimant does not challenge that he was given a fair hearing by Mr Sylvester. The charges were properly put to the claimant and he was given a fair and reasonable opportunity to respond to those allegations. The relevant extracts from the claimant's witness statement for these Tribunal proceedings include the following:

> "I confirm that I have checked that there were no children in the pool and I also told Mark Sylvester that sometimes when there were no children in the pool, the lifeguard stood outside to get some fresh air. I reiterated that I thought the situation had been dealt with because I had brought it to the Operations Manager's attention straight away. I also stated that if the Operations Manager had asked me to deal with it, I would have done so. When asked whether I would have dealt with this differently in hindsight, I accepted that with the benefit of hindsight I should have spoken to the lifeguard at the time. I did not consider it to be a "near miss" because there were no children in the pool at any time during approximately five minutes that Theo had his back to the pool. In any event children are not allowed in the pool area without being accompanied by an adult, and it is the respondent's rule that children are the responsibility of the accompanying adult. There had been an incident on 18 May 2018, where a child had to be rescued from the pool; this was categorised as a "near miss" and that is what I understood a "near miss" to be".

30. Mr Sylvester's statement confirmed that he was aware that the claimant is dyslexic, but that he did not consider this this impacted in any way upon the conduct of the disciplinary hearing. Mr Sylvester records that the claimant, as the SMOD, was fully acquainted with the respondent's policies about near miss reporting and that he would be fully acquainted with the health and safety policies regarding swimming pool and the requirement for lifeguards to be in attendance.

31. At paragraph 43 of his statement, Mr Sylvester records that the claimant provided the following information:

- "Mark went to the pool at 1.30pm where he saw the Lifeguard, Theo, sat outside the pool area with his back to the glass doors, facing the tennis courts. There was one adult member in the pool at that time.

- Mark identified that there was something wrong with his situation, but did not go and speak to Theo or get his attention in any way at that time.

- Instead he took a photo of him sitting outside.

- After taking a photo, Mark left the pool area and went to Caterina's office, where he showed her the picture and told her to speak to our employment law advisors, Peninsula.

- At the leadership meeting later that afternoon (approximately 2.30pm) which was led by Mark, no mention of it was made and no clarification sought from Caterina that it had been dealt with or steps taken.

- After the leadership meeting Mark mentioned it to Jaclyn Winters, our Membership Relations Manager.

- Sometime around 4.00pm, Caterina messaged Mark asking him to forward his photo of Theo, which he sent us.

- Mark left at 5.00pm.

- On Thursday evening 2 August, our HR business partner Leanne Saunders called Mark about having an investigation meeting the following day, Friday 3 August.

- On the morning of the investigation, Mark looked at the CCTV of the incident on 30 July".

32. Mr Sylvester went on to record the claimant's explanation that he did not consider the incident to be a "near miss". He records the claimant's interpretation of "near miss" as meaning "when something physically has happened like a rescue or acting upon something, not if there was a potential risk". Mr Sylvester records the claimant's explanation, which was that he had told Caterina what he had seen and had felt that she was dealing with it.

33. The claimant stated that he was aware of other situations where lifeguards were not present at poolside when children had access to the pool. In particular, he referred to what are called "Aqua Classes", when children are given instruction by swimming instructors, who use various types of equipment to deliver those lessons. That equipment is stored away from poolside and requires those delivering the instruction to go and collect the equipment and bring it back to the poolside. The claimant's allegation was that when the equipment was being collected, children were at the side of the pool without an instructor or lifeguard being present. Mr Sylvester checked the CCTV for the 2 and 3 August when aqua classes took place on each morning. In both cases, when instructor left to collect the equipment, there was at least one qualified employee who remained with the children at the poolside. Mr Sylvester satisfied himself that the correct procedures were being followed and he reiterated that as part of the appeal process.

34. Mr Sylvester did not find the claimant's explanation for his behaviour as being acceptable. Mr Sylvester was satisfied that the claimant had left the pool

environment in an unsafe situation and had failed to address the situation at the time. Mr Sylvester recorded that the claimant saw that there was no lifeguard supervising the pool, yet chose to leave the area in any event. At the time of leaving the pool, the claimant did not know how long the lifeguard had been outside or how long he was likely to remain outside. Mr Sylvester concludes that the claimant had been "grossly negligent in his handling of the incident, particularly as the Senior Manager on Duty". Mr Sylvester was satisfied that the claimant's conduct amounted to gross misconduct and that dismissal was the appropriate sanction "as Mark had witnessed a potentially very serious situation – he chose not to address the risk and merely left the scene as he had found it. Therefore, he failed in his duty to provide a safe environment for members and guests, especially our younger and most vulnerable members".

35. By letter dated 20 August 2018, (page 234) Mr Sylvester confirmed the decision to dismiss the claimant. The letter records the two allegations and records that Mr Sylvester was satisfied that the first allegation was proven as the claimant had failed to comply with his duty as Senior Manager on Duty. However, in relation to the reporting of a near miss, Mr Sylvester accepted that the claimant was unaware that the relevant paperwork needed to be completed in respect of something that had the potential of risk or harm and thus the claimant was acquitted of that allegation.

36. The claimant appealed against his dismissal by letter dated 14 December 2018, (page 224 – 226). The grounds of appeal were as follows:

- "The disparity in treatment between the claimant and two senior managers who were given a warning following an incident with a child, the claimant was dismissed on the basis of a potential incident taking place.

- The lifeguard leaving the pool unattended to go to the shed being deemed acceptable and setting a precedent that if no children are in the pool it is acceptable to leave poolside as all managers including general managers are aware of this and will be on CCTV everyday.

- Employer not suspending claimant, yet accusing the claimant and failing to suspend a lifeguard due to a breach of health and safety whilst the claimant was allowed to complete his shift after his investigation meeting.

- That the claimant had informed the Operations Manager, who was responsible for the lifeguard's health and safety within thirty seconds of noticing the lifeguard was failing to perform.

- The potential reason for his dismissal was linked to a proposed restructure of the Club. There is no policy stating that a near miss form must be filled out if the potential risk is there.

- Reporting the incident as it happened and that the claimant would have been better off not reporting it, setting a precedent that this is acceptable behaviour based on the outcome.

- The emergency response ran out on 20 July and the company putting the employee and members at risk as working and covering lifeguard breaks that week doing open and closes, breaching another health and safety breach.

The appeal letter was acknowledged and the appeal hearing was arranged for the 30 August 2018 and was heard by Michelle Chambers-Cran, the respondent's Regional Manager. Ms Chambers-Cran confirmed that she was known to the claimant and had formed the impression that he was "a motivated and capable individual, who was keen to develop within the company and would regularly take on tasks out with his role to support the business".

37. Ms Chambers-Cran can confirm that she was aware that the claimant was dyslexic.

38. Ms Chambers-Cran acknowledged the claimant's letter of appeal and a subsequent letter containing further information. Ms Chambers-Cran reviewed the minutes of the investigatory meetings, the letter inviting the claimant to the disciplinary hearing, the note of the disciplinary hearing, the outcome letter and the claimant's appeal letter. Ms Chambers-Cran records that the claimant brought with him to the appeal hearing a file of documents, to which he referred regularly throughout the meeting.

39. Again, the claimant does not challenge the fairness of the hearing he received before Ms Chambers-Cran. Whilst disagreeing with the outcome, it is not alleged that he was not given the opportunity to put forward all the arguments which he wished to place before Ms Chambers-Cran. In her witness statement, Ms Chambers-Cran confirms that, as a result of the observations made by the claimant during the appeal hearing, she questioned Leanne Saunders about the claimant's allegation that the Club was to be restructured. Leanne confirmed that the Club was not to be restructured and was unlikely to change for at least two years. Ms Chambers-Cran herself confirmed that she wasn't aware of any intention to restructure the Newcastle Club. She went on to say that, even if there had been such a proposal, it was unlikely that the claimant would have been adversely affected, as the respondent had invested heavily in terms of time and money in putting the claimant through its Step up to Management procedures. Ms Chambers-Cran also spoke to those persons who had been involved in an earlier incident in May 2018, when a child had to be rescued from the pool during a supervised swimming lesson, when no official lifeguard was on duty. It was established that whilst there was no lifeguard on duty, there were at least two employees of the respondent present who were authorised to undertake supervision and if necessary, to rescue any child who got into difficulty. As a result of that incident, two employees were given written warnings and the policy was reinforced that at all times there should be a lifeguard present at poolside. Ms Chambers-Cran was satisfied that these were a different set of circumstances to those which applied to the situation which led to the claimant's dismissal. Ms Chambers-Cran also confirmed that the lifeguard would have been, but could not be, disciplined by the respondent, as he was not an employee, but an agency worker and that Ms Pipitone was to be disciplined, but she had resigned before any proceedings could be brought against her. Thus, the claimant had not been "singled out" for disciplinary action.

40. The claimant also raised a tragic incident which had occurred at the Leeds Club in early 2018, when a young child had drowned. The claimant's description of what happened was that a child's father and the lifeguard were stood beside the pool talking, whilst the child was in the pool and neither realised that the child was in difficulty. The claimant insisted that this was a case where a death had occurred and yet no employee of the respondent had been dismissed as a result. Whilst the respondent's witnesses were aware of that incident (which had been well publicised), none were able to comment upon the nature of any investigation, the outcome of that investigation or whether any disciplinary sanctions had been imposed.

41. The Tribunal found Ms Chambers-Cran to be entirely honest, credible and reliable witness, whose recollection of all of these matters was both clear and accurate. The Tribunal was satisfied that Ms Chambers-Cran carried out a thoroughly fair and reasonable process in dealing with the claimant's appeal. Having done so, Ms Chambers-Cran concluded that as the Senior Manager on Duty, it was the claimant's responsibility to "take ownership of the operation of the Club". Ms Chambers-Cran was satisfied that the claimant's failure to deal with this incident in an appropriate manner, was a breach of his duty, which amounted to gross misconduct justifying summary dismissal. Ms Chambers-Cran upheld the decision to dismiss and dismissed the claimant's appeal.

42. The claimant issued his claim to the Employment Tribunal on 26 October 2018.

The Law

43. The statutory provisions engaged by the claim brought by the claimant are contained in the Employment Rights Act 1996.

44. Insert Section 94 and Section 98

Section 94

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 98
(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 the dismissal, and
>
> (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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) 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.

(5). . . . . .

(6) Subsection (4) is subject to—

(a) sections 98A to 107 of this Act, and

(b)sections 152, 153, 238 and 238A**]** of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

45. Where the employers reason for dismissing the employee relates to the employee's conduct, the Tribunal must first consider whether the respondent has established that its reason (or if more than one its principal reason) for dismissing the employee was for a reason related to his conduct. The

Tribunal then goes on to consider the fairness of the dismissal for that reason. The guidance in such matters was set out in the well-known authority of **British Home Stores Ltd v Burchell [1980] ICR 303.** In a case where an employee is dismissed because the employer suspects or believes that he has committed an act of misconduct, in determining whether that dismissal is unfair, the Tribunal has to decide whether the employer entertained a reasonable suspicion amounting to a belief in the employee of that misconduct at that time.

46. This involves three elements. First, there must be established by the employer the fact of that belief – that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief and third, the employer at the stage in which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

47. In **Weddell and Company Ltd v Tepper [1980] IRLR 1996** the Court of Appeal reiterated that an employer suspecting an employee of misconduct justifying dismissal, cannot justify that dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular, if they do not give the employee a fair opportunity of explaining before dismissing him. Employers do not have regard to equity or the substantial merits of the case if they jumped to conclusions which it would have been reasonable to postpone in all the circumstances until they had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. That means that they must act reasonably in all the circumstances and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, there belief is not based on reasonable grounds and they are not acting reasonably.

48. It is now accepted that the Tribunal has to apply a band of reasonable responses test as laid down in **Iceland Frozen Foods v Jones [1983] ICR 17**. At paragraph 24:

    (1) The starting point should always be the words of **section 98** themselves.

    (2) In applying this section, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the Tribunal) consider the dismissal to be fair.

    (3) In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right cause to adopt, for that of the employer.

    (4) In many (though not all) cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another.

(5) The function of the Tribunal as an industrial jury, is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair – if the dismissal falls outside the band, it is unfair.

49. It is now trite law that the range of reasonable responses test applies is much to the question of whether an investigation into the suspected misconduct was reasonable in all the circumstances, as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason (**Sainsbury`s Supermarkets Ltd v Hitt** [**2003] IRLR 23).** Furthermore, in determining whether an employer carried out such investigation as was reasonable in the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations of misbehaviour, where disputed, must always be the subject of the most careful and most conscientious investigation and the investigator carrying out the enquiries should focus more less on any potential evidence that may pay or at least point towards the innocence of the employee, as on the evidence directed towards proving the charges. (**A v B – [2003] IRLR 405).**

50. In dealing with a claim of unfair dismissal, the issue before the Tribunal is not whether the claimant did the alleged act of misconduct, but did the respondent have reasonable grounds for believing that he did. There cannot be reasonable grounds unless there has been a reasonable investigation. In deciding whether alleged conduct is capable as a matter of law amounting to gross misconduct, the Tribunal must consider whether that misconduct justified dismissal without notice. It is sufficient for the employer if he could in all the circumstances regard what the employee did as being something which was seriously inconsistent or incompatible with his duties in the business in which he was engaged **(Sinclair v Nayber – [1967] 2QB 279).** The question is therefore whether the employee's conduct is so "grave and weighty" as to amount to a justification for summary dismissal. That involves an evaluation of the primary facts and an exercise of judgment. It ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or to undermine the employer's policy, constitutes such a grave act of misconduct as to justify summary dismissal.

51. The word "equity" in the phrase, "having regard to equity and the substantial merits of the case" in **section 98(4**) comprehends the concept that employees who behave in much the same way, should have sent out to them the same punishments. The Employment Tribunal is entitled to say that where that is not done and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offense is as is sufficient reason for dismissal. **(Post Office v Fennel – [1981] 221).**

52. In **Hadjioannou v Coral Casinos Limited ([1981] IRLR 352)**, the Employment Appeal Tribunal said that the emphasis in **section 98(4)** is on the particular circumstances of the individual employee's case. An argument

by a dismissed employee that the treatment he received was not on a par with that in other cases is relevant in determining the fairness of the dismissal in only three sets of circumstance. First, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least not dealt with by the sanction of dismissal. Second, there may be cases where evidence in relation to other cases supports an inference that the purported reason stated by the employer is not the real or genuine reason for the dismissal. Third, evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances.

53. Employment Tribunals should scrutinise arguments based upon disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar or sufficiently similar, to afford an adequate basis for argument. It is of the highest importance that flexibility should be retained and employers and Tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.

54. In the present case, the Tribunal was satisfied that the investigation undertaken by the respondent was fair and reasonable in all the circumstances. The evidence relating to the specific incident where the claimant attended the swimming pool, noticed the lifeguard outside, but did nothing about it other than report it to his manager, was not denied.

55. The claimant accepted that the investigation officer, dismissing officer and appeal officer investigated those matters which the claimant asked to be investigated. The claimant accepted under cross examination that he could and should have made an enquiry of the lifeguard at the time to ascertain why he was outside and whether it was necessary for someone to be at the poolside if the lifeguard was taking a break. The Tribunal found it reasonable for the respondent to be genuinely concerned that young children may have had access to the pool. The Tribunal found it reasonable for the respondent to take into account the claimant's training, experience and knowledge of its relevant policies and procedures. The Tribunal was satisfied that Mr Sylvester and Ms Chambers-Cran genuinely believed that the claimant had committed an act of serious misconduct. There was an abundance of evidence which showed that there were reasonable grounds for that belief, such grounds having come from fair and reasonable investigations.

56. The three stage testing Burchell v British Home Stores Limited is satisfied.

57. The Tribunal found that the claimant's argument of unfairness based upon inconsistences was without merit. If inconsistency means treating people differently when their circumstances are the same, or treating them the same when their circumstances are different, the claimant was unable to show any of those situations applied to him. The fact that a tragic accident took place at the Leeds Club does not of itself mean that someone would have to be disciplined or indeed dismissed. The incident where the child was rescued from the pool at Newcastle was again entirely different, in that there were

persons at poolside who were in a position to react should something go wrong. There was no inconsistency in the way the lifeguard or Ms Pipitone were dealt with, for the reasons set out above.

58. The Tribunal then had to consider on a neutral basis, whether the respondent's decision to dismiss the claimant was one which fell within the range of reasonable response open to a reasonable employer in all the circumstances. Of particular concern to the respondent, was the claimant's insistence throughout the entire disciplinary process that he had done nothing wrong. The claimant did little to help his position when insisting at the appeal hearing that, because of the way things had turned out, he would have been better off not informing Caterina that he had seen the lifeguard sitting outside pool area. The Tribunal found it reasonable for the respondent to categorise that as a further refusal by the claimant to acknowledge the seriousness of his actions and to conclude that he could not be trusted to undertake a supervisory or management role in the future.

59. The dismissal therefore fell within the range of reasonable responses in all the circumstances. For those reasons, the claimant's complaint of unfair dismissal is not well founded and is dismissed.

Employment Judge Johnson

Date 2 April 2020