EMPLOYMENT TRIBUNALS

Claimant: Mr S Mughal

Respondent: Interserve (Facilities Management) Limited

Heard at: East London Hearing Centre

On: 17 March 2020 and 18 March 2020

Before: Employment Judge Russell

Member: Mr M Rowe

Representation

Claimant: In person

Respondent: Ms S Chan (Counsel)

JUDGMENT

The Judgment of the Tribunal is that:-

1. **The Claimant was not a disabled person at the material time. The claim of disability discrimination fails and is dismissed.**

2. **The complaint of unfair dismissal succeeds.**

3. **If a fair procedure had been followed, the Claimant would have been fairly dismissed no later than 19 September 2018.**

4. **The basic award is reduced by 100% pursuant to section 122(2) Employment Rights Act 1996 and there is no award for loss of statutory rights.**

5. **There is no reduction of the compensatory award pursuant to section 123(6) Employment Rights Act 1996. The Respondent shall pay to the Claimant a compensatory award of £1,996.77 (gross) and the Claimant is responsible for deductions for tax and National Insurance.**

REASONS

1 By a claim form presented to the Employment Tribunal on 12 December 2018, the Claimant brought complaints of unfair dismissal, unauthorised deduction from wages, redundancy payment and disability discrimination. The Respondent resisted all claims. At a Preliminary Hearing before Employment Judge Hyde on 25 March 2019, the claim for redundancy payment was dismissed on withdrawal. The claim for "other payments" was confirmed to be for compensation for unfair dismissal or unauthorised deduction from wages in respect of work undertaken at other sites.

2 At the outset of the hearing, the Tribunal made known to the parties that it was not able to sit as a fully constituted three-person Tribunal due to the effects of the developing Covid-19 pandemic. The parties were given a choice of whether to proceed as a two-person Tribunal or to postpone to a later date for a full Tribunal. The Tribunal explained that Mr Rowe, the member who was present, was from the "employee" panel and that if a unanimous decision could not be reached, the Employment Judge would have the deciding vote. We explained that if postponed, the matter would be relisted in due course although that may be some time into the future and that there was no pressure upon either party as to which decision they wished to make. The Tribunal also made clear that if the Claimant or Respondent witnesses were in a risk group identified by Government guidance (as the Claimant appeared to be) or where otherwise concerned about attending Tribunal in the circumstances of the pandemic, the hearing did not have to proceed.

3 The parties were given a short adjournment to decide how they wish to proceed. When they returned, both confirmed that they wished to go ahead with a two-person Tribunal. They were provided with, and signed, a written consent under the Employment Tribunals Act 1996 Section 41B and the hearing proceeded.

4 The issues to be decided on the unfair dismissal case are whether the Respondent had a genuine belief, reasonably held following a reasonable investigation, that the Claimant had committed an act of misconduct. If so, whether dismissal was fair in all of the circumstances of the case, applying section 98(4) Employment Rights Act 1996 and having particular regard to the procedure followed. On the disability discrimination claim, the issues are whether the Claimant is disabled for the purposes of section 6 of the Equality Act 2010? If so, whether the decision to proceed with a disciplinary hearing at a time when he was signed of sick due to breathing difficulties was either unfavourable treatment because of something arising in consequence of disability or a failure to make reasonable adjustments.

5 The Tribunal heard evidence from the Claimant in person. On behalf of the Respondent, we heard evidence from Mr J Saunders and Mr A Stronghill. We were provided with a bundle of agreed documents and we considered those to which we were taken during the course of the evidence. In preparation for the hearing, Ms Chan had caused to be produced a typed version of handwritten notes of an investigation interview. The Claimant identified material inaccuracies in the typed note by comparison to the original handwritten notes. As the dismissing officer and the appeal officer did not have the typed notes available to them at the time of their decision, we disregarded them and relied only upon the handwritten notes as a record of what was said at the investigation meeting.

Findings of Fact

6 The Claimant's case is that he has the physical impairment of asthma and that it amounts to a disability. By a letter from the Tribunal dated 15 April 2019, the Claimant was required to give particulars of the date of diagnosis, how the Respondent did or should have known about it, why it had lasted or would last for at least 12 months and the effect upon his ability to carry out normal day-to-day activities at the relevant time, giving examples. The Claimant was required to provide these particulars by 26 April 2019 and to disclose his all medical records relevant to asthma to the Respondent by 24 May 2019.

7 On 17 May 2019, solicitors for the Respondent wrote to the Claimant reminding him of the need to provide the required information and stating that no response had yet been received. On 22 May 2019, the Claimant emailed the Respondent in respect of disability as follows asserting that it "would have known" that he was asthmatic and that during his suspension he had been diagnosed with COPD and had informed the Respondent. The Claimant did not provide answers to the Tribunal's questions about the date of diagnosis, its duration or effect upon normal day-to-day activities or medication taken. The Claimant provided no further information until he sent an email on 12 March 2020 in which he referred to being asthmatic since the age of 13, said that his medical records were available, that he relied upon Salamol and Symbicort asthma pumps and that the Respondent was aware of his asthma.

8 As for medical records, the Claimant disclosed:

- a single page showing prescriptions of Salbutamol and Beclometasone inhalers on 2 January 2001; an entry for "**a wheezy chest on and off 3yrs"**, an asthma annual review on 13 September 2004 and diagnosis of asthma on 1 October 2004.

- A GP attendance record on 13 August 2018 which said that spirometry showed an obstruction and "**long discussion re. smoking and COPD. Has element of asthma as well – likely overlap in diagnosis".** The Claimant was prescribed a change of inhaler from Symbicort to DuoResp and a Salbutamol inhaler.

- A GP attendance record on 24 August 2018 describing problems with the new inhaler and a reference to a "**similar issue with previous inhaler in the past**".

- GP attendance records dated 19 September 2018, 10, 11 and 17 December 2018 which refer to other medical issues with only reference to the diagnosis of COPD and no mention of asthma.

The medical evidence did not address any effect upon day to day activities nor give any information about the extent of the Claimant's need to use medication to control asthma (for example, repeat prescriptions, asthma clinic reviews).

9 The Tribunal agreed to allow the Claimant to give further evidence orally. The Claimant said that he had asthma using pumps twice a day and that he had done so for years. He had previously understood his asthma to be a medical condition and only recently when diagnosed with COPD did he realise that it was a disability. When asked

further about the effects of his asthma, the Claimant gave no example of effect upon day-to-day activities but relied again on a diagnosis at age 13 and his use of pumps. The Tribunal accepts this oral evidence as credible and reliable.

10 The Respondent is a national facilities management company providing, amongst other things, security services at Galleons Reach shopping centre.

11 The Claimant commenced employment on 22 June 2011 and was TUPE transferred to the Respondent's employment in approximately January 2014. From 7 March 2016 he was responsible for managing a team of 17 security guards at Galleons Reach. Following his promotion, the Claimant was contractually entitled to be paid an annual salary but in practice he continued to be paid an hourly rate based upon hours in fact worked. It is not necessary to decide the issues for the Tribunal to resolve the dispute as to whether the Claimant wanted an annual salary or had refused to do so.

12 Although the Claimant should not have been responsible for inputting his own hours into the electronic Timegate system, in practice he did so. The Respondent produces advance rotas showing the hours due to be worked by the Claimant and other security guards. These hours varied in practice and a paper record was kept of hours actually worked. At the end of every month, the Claimant input onto Timegate the actual hours worked by himself and the security guards whom he managed and their pay was calculated accordingly. To do this, the Claimant would compare the scheduled hours on the rota against the start and finish times recorded in the signing in and out documents.

13 On 3 July 2018, a security guard based at Galleons Reach contacted Ms Annie Brazel (Account Manager) to complain about the Claimant's behaviour. In summary, the allegations were that the Claimant was dishonest, abused his authority and used his position to target, intimidate and control employees. It gave specific examples which, if true, were very serious cause for concern and which included an allegation that the Claimant claimed pay for hours which he had not in fact worked. In her preliminary investigation of the complaint, Ms Brazel looked at hours recorded on Timegate which appeared to show that the Claimant had claimed for 84.65 hours which he had not in fact worked during June 2018, including three full ten-hour shifts when CCTV footage suggested that he had not attended the site at all. The print-outs are time stamped 8.27am on 12 July 2018. The same day, Ms Brazel suspended the Claimant pending a full investigation of his conduct.

14 A letter dated 16 July 2018 confirmed the suspension and set out two allegations: (1) acting in a manner intimidating others; and (2) dishonesty; falsification of documentation, theft of colleague/company monies. The Claimant was advised that there would be a disciplinary investigation into potential gross misconduct and he was instructed that during the suspension he must "**refrain from entering the company premises and from contacting any of your fellow employees to discuss work related matters (including matters related to the alleged conduct) other than for the sole purpose of exercising the statutory right to be accompanied at any disciplinary meeting**."

15 The Claimant attended an investigation meeting with Ms Brazel on 24 July 2018. Handwritten notes were taken. In the investigation meeting, the Claimant was asked about matters which were not included in the suspension letter. The additional questions related to allegations that he had contacted a member of staff by text whilst suspended and had engaged in potential sexual impropriety whilst at work. The Claimant strenuously

denied that there had been any sexual impropriety. Ms Brazel replied "**I don't believe you**". The allegation of sexual impropriety was not included in the original complaint, no details had been given to the Claimant nor does the evidence before the Tribunal show how it arose or why Ms Brazel felt able to reject the Claimant's denial outright. The Claimant denied the allegations of misconduct; he accepted that on occasion he asked colleagues to buy food or items for him, with one exception, he always repaid them and he strongly refuted the allegations of bullying or sexual impropriety. The Claimant accepted that he occasionally arrived later or left earlier than the hours shown on Timegate, but maintained that he would always make up the hours. Considering the content of the handwritten notes, the Tribunal found that the tone adopted by Ms Brazel and her expressed doubt about the truthfulness of the Claimant's explanations, tends to suggest that she had already decided that the Claimant was guilty of the alleged misconduct and did not listen to his explanations with an open mind.

16 Following the investigation interview, Ms Brazel interviewed and obtained five further statements from security guards managed by the Claimant (four anonymous, one named). The content of the statements was consistent with the original complaint that the Claimant abused his authority by requiring them to purchase food and cigarettes for him, favouritism of some guards above others and misreporting his hours worked. None of the statements referred to the alleged sexual impropriety that Ms Brazel had raised in the investigation meeting. The Tribunal accepts on balance that there was sufficient evidence before the Respondent to require the Claimant to attend a disciplinary hearing.

17 By letter dated 31 July 2018, the Claimant was required to attend a disciplinary meeting on 8 August 2018 to consider three allegations of misconduct which, if proven, may amount to gross misconduct resulting in dismissal without notice, namely: dishonest and falsification of documents relating to his hours claimed for pay, unprofessional and intimidating behaviour towards employees and failure to follow a reasonable management request not to contact colleagues whilst suspended.

18 The Claimant was provided with copies of the handwritten notes of the investigation meeting, the witness statements, Timegate records and Excel spreadsheet analysing actual hours against those claimed. The letter referred to evidence of contact with employees during suspension but did not provide the same. The Claimant was advised that CCTV footage would be available to view during the disciplinary meeting. He was told that he could be accompanied by a colleague or trade union official and that he should take all reasonable steps to attend the meeting as failure to attend without good reason could result in the meeting being held and a decision being made in his absence. This reflects the contents of paragraph 11.1.4 of the Respondent's disciplinary policy which also provides that "**where an employee fails to attend without good reason, or is persistently unable to do so (for example for health reasons), the Company may have to take a decision based on the available evidence.**"

19 On 7 August 2018, the Claimant advised HR and Ms Brazel that he was having difficulties with his asthma and would be unable to attend the disciplinary meeting scheduled for the following day. On 9 August 2018, he provided evidence of a medical appointment and on 13 August 2018 provided a GP Statement of Fitness to Work signing him off work until 25 August 2018 by reason of breathing symptoms.

20 The disciplinary hearing was rescheduled to be heard by Mr Saunders on 29 August 2018. In advance of the hearing, Ms Brazel sent an email setting out "some

key points" for the disciplinary hearing. These included relevant documents but also Ms Brazel's comments upon the evidence including the inaccurate hours recorded for the entire month of June, her view that the Claimant had "made up hours" and note that more than one individual was saying the same thing.

21 The letter dated 23 August 2018 requiring the Claimant to attend a rescheduled hearing stated that the Claimant had "failed to attend" the original meeting. The Tribunal do not accept that that is a fair description of what in fact occurred as the Claimant had notified them of his inability to attend on health grounds. The letter went on to say that if the Claimant failed to attend the rearranged meeting without good reason, the Respondent may make a decision in his absence based upon the information available. The Claimant was told that he could send in a written statement in advance of the rescheduled hearing if he was unable to attend.

22 The Claimant was again assessed as unfit to work by his GP on 24 August 2018 for a further period of two weeks by reason of breathing problems. He provided a copy of the Statement of Fitness to work to the Respondent on 24 August 2018.

23 On 24 August 2018, the Claimant informed Ms Brazel and HR that he was unable to return her calls as his breathing was so bad that he could not hold telephone conversations. In response, Ms Brazel asked the Claimant to confirm that he would attend the disciplinary hearing and, if unable to do so, that he could dial in by telephone, have a trade union representative attend on his behalf or provide a written statement. After being chased for a response, at 7.40pm, the Claimant said that he was unable to attend due to ill health, could not speak on the telephone due to his breathing problems and did not have a trade union representative. The Claimant said that he wanted to attend the meeting but only when his health allowed him to do so. The Claimant did not provide written representations. The explanation given in oral evidence, that he was unable to do so due to domestic pressures, was not communicated to the Respondent at the time. On balance, the Tribunal find that the Claimant believed that the hearing would be again rescheduled given his sick certificate and did not consider it necessary to provide written representations.

24 In an email on 28 August 2018, Ms Brazel told Mr Saunders that the disciplinary hearing could go ahead in the Claimant's absence and that the Claimant had failed to provide a written statement. The Claimant did not attend the hearing on 29 August 2018 and Mr Saunders decided to proceed in his absence. In his witness statement, Mr Saunders stated that the Claimant had not shown up at the hearing, had not asked for the meeting to be rescheduled, had failed to engage with Ms Brazel and had not explained why it was not possible to attend the meeting. In cross-examination, Mr Saunders maintained that the Claimant had no good reason for his failure to attend. The Tribunal accepts that Mr Saunders genuinely believed that the Claimant was deliberate trying to frustrate the disciplinary process from taking place, that the evidence against the Claimant was overwhelming and that it was reasonable to proceed in his absence.

25 Mr Saunders reviewed the documents and considered them overwhelming evidence proving each of the three allegations which amounted to gross misconduct. The decision to dismiss summarily was confirmed by letter dated 31 August 2018. The letter acknowledge that the Claimant had been unable to attend the first disciplinary hearing due to ill-health but made no such acknowledgement in respect of the second hearing. Mr Saunders set out his reasons for deciding that the allegations were proved and that the

gravity of the misconduct was such that trust and confidence had been completely undermined. As it was not part of the allegations and there was no evidence before him, Mr Saunders made no finding as to whether or not there had been sexual impropriety. The Tribunal accepts that Mr Saunders genuinely concluded that the Claimant had intentionally falsified the information on Timegate for personal financial gain, that he had caused huge distress and unrest to some of the security guards by behaving in an intimidating and unprofessional manner and that he ought not to have contacted a colleague whilst on suspension.

26 Upon receipt of the dismissal letter, the Claimant contacted the Respondent to explain that he had been unable to attend the disciplinary hearing due to his health and asked for it to be reschedule. The Claimant informed the Respondent that, whilst suspended, he had been diagnosed with Chronic Obstructive Pulmonary Disease which combined with his asthma aggravated his breathing difficulties. Ms Brazel replied by telling the Claimant of his right to appeal.

27 The Claimant lodged an appeal on 2 September 2018, setting out his substantive defence of the allegations of misconduct. He strongly denied any sexual impropriety, complained that Ms Brazel had shown bias and prejudgment in her investigation, denied dishonesty and falsification in respect of his hours on Timegate as he had told Ms Brazel before the disciplinary process started that he been "**paid a few extra hours**" in June and that he would offset the overpayment against additional hours worked in July, he had simply exercised flexibility and should not have been paid hourly in any event. The Claimant said that the security guards' complaints had not been properly investigated as only negative comments about him had been provided, they arose from the resignation of a member of staff and some others who were trying to cause disruption as they did not like his management style. Finally, the contact during suspension was simply a text asking a colleague, who was also a friend, how his holiday had been.

28 Mr Stronghill was appointed to hear the appeal. The Claimant attended the appeal hearing on 16 October 2018. Each of the four principle grounds of appeal was addressed but the appeal was not a rehearing of the original disciplinary allegations. Mr Stronghill explained that he did not consider it necessary to reach any conclusion on the allegation of sexual impropriety as it formed no part of the decision to dismiss. Following the conclusion of the appeal hearing, Mr Stronghill undertook some additional investigation from which he ascertained that 10 security guards had been interviewed by Ms Brazel, of whom 4 had not consented to their statement being used. By letter dated 23 October 2018, Mr Stronghill informed the Claimant that his appeal was not upheld and gave detailed reasons for his decision. The Tribunal finds that the reasons demonstrate that Mr Stronghill understood and fully considered the Claimant's arguments on appeal, albeit that he did not accept them. Even though the Claimant should not have been responsible for inputting his own payroll hours, this did not remove the expectation that he would do so honestly and accurately.

The Law

Disability

29 Section 6(1) of the Equality Act 2010 provides that a person has a disability for the purposes of the Act if they have a physical or mental impairment which has a *substantial* and long term *adverse effect* on that person's ability to carry out *normal day-to-day*

activities. The Claimant bears the burden of proving disability.

30 Appendix A of the Equality and Human Rights Commission's Employment Statutory Code of Practice provides guidance on the meaning of disability, which includes the following:

> **"What is a substantial adverse effect?**
>
> **8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.**
>
> **…**
>
> **10. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse long-term effect on how they carry out those activities.**
>
> **…**
>
> **What are normal day-to-day activities?**
>
> **14. They are activities which are carried out by most men or women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people such as playing a musical instrument, or participating in sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition.**
>
> **15. Day-to-day activities thus include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one self. Normal day-to-day activities also encompass the activities which are relevant to working life."**

The Code makes it clear that in deciding or determining substantial effect one should disregard treatment or coping strategies.

31 The Government Office for Disability Issues has issued "Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability". The Guidance does not impose any legal obligation in itself nor is it an authoritative statement of law but must be taken into account when deciding whether a person is disabled for any purpose of the Act. Part 2, Section B considers what is meant by a "substantial" effect on normal day-to-day activities, including the following:

> **"B1. The requirement that an adverse effect on normal day-to day activities should be a substantial one reflects the general understanding of a disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1). This section looks in more detail at what 'substantial' means. It should be read in conjunction with Section D which considers what is meant by 'normal day-to-day activities'."**

32 Relevant matters in considering "substantial" include the time taken to carry out an activity by comparison to the time required by a person without the impairment and the way in which an activity is carried out with the same comparison with the person who does not have the impairment.

Unfair Dismissal

33 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

> (1) did the employer genuinely believe that the employee had committed the act of misconduct?
>
> (2) was such a belief held on reasonable grounds? And
>
> (3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

34 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

35 In an unfair dismissal case, it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

36 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA.

37 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the band of reasonable responses is not infinitely wide and it is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

38 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall, the conduct of the employee in the disciplinary process, consistency and mitigating factors such as length of service and disciplinary record.

39 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

40 The Tribunal must also have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

Conclusions

Disability

41 Having considered the evidence provided, the Tribunal finds on the balance of probability that the Claimant has had a physical impairment of respiratory problems since at least 1 October 2004, initially diagnosed as asthma and with a supplementary diagnosis of COPD in August 2018. We find that the Claimant intermittently used medication to control the effects of this respiratory impairment and accept his evidence that this was twice a day, although there is insufficient evidence to make a finding as to whether this was every day, most days or on occasional days when experiencing symptoms.

42 The diagnosis of asthma and/or COPD is not sufficient to support a finding of disability as the severity of each condition will vary and the Equality Act requires a substantial adverse effect upon normal day to day activities. There was scarce evidence before the Tribunal on this essential element of the statutory definition of disability. At most that for a four-week period from 9 August 2018 the Claimant was unable to work and that for part of this period he was unable to use the telephone. There is no evidence that this effect continued after the relevant period. In failing to answer the questions posed by the Tribunal in April 2019, even when reminded by the Respondent, and even in oral evidence, the Claimant has not adduced evidence to demonstrate that his respiratory impairment met the statutory threshold for a disability. As the Claimant has not proved that he was disabled, all disability discrimination claims fail and are dismissed.

Unfair Dismissal

43 The Tribunal accepts the Respondent's case that conduct was the genuine reason for dismissal. This is consistent with the contemporaneous documents which gave rise to a prima facie case against the Claimant and the Claimant has not challenged the reason relied upon.

44 The contemporaneous Timegate records and CCTV analysis of actual hours worked support a belief that the Claimant had claimed pay for hours not in fact worked. This evidence demonstrated an overpayment by 84.65 hours in a single calendar month. As Ms Chan submitted, even if the Claimant were right that there was a degree of

flexibility and he could offset the additional hours by claiming fewer hours the following month, the total number of hours represented about half of a normal working month. The evidence from six of the security guards managed by the Claimant supported the allegations of misconduct, both in terms of hours and improper behaviour towards them. That there were only six statements out of a total of 17 guards managed by the Claimant does not undermine the reasonableness of the Respondent relying upon them. In the Tribunal's experience in cases alleging bullying by a manager, it is rare for all subordinate employees to want to get involved by providing evidence. That a third of those managed by the Claimant agreed to do so is significant, even if four of the ten interviewed declined to disclose their statements. Moreover, part of the allegation was the Claimant demonstrated favouritism to some of the security guards he managed. Inevitably, there would have been some guards who would have made positive statements. Given the nature of the complaints made against the Claimant, the Tribunal finds that the original complaint and corroborating evidence from five more security guards provided a reasonable basis for the belief that the conduct had occurred.

45 As for the extent of the investigation, the Tribunal accept that the Respondent conducted an investigation which was reasonable in scope insofar as it obtained documentary evidence relevant to the hours claimed, statements from security guards and afforded the Claimant the opportunity to comment in a disciplinary investigation. The Tribunal did, however, take into account when deciding the fairness of the dismissal overall the attitude demonstrated by Ms Brazel both at the investigation meeting and in the subsequent email sending documents to Mr Saunders. Both lead the Tribunal to conclude that Ms Brazel was working from an assumption that the Claimant was guilty of the conduct alleged before the disciplinary hearing had taken place. Whilst this is a case in which the evidence in support of the allegations was significant and weighty, it is nevertheless necessary as part of a fair procedure that an investigation be approached with an open independent and impartial mind. Whilst the allegation of sexual impropriety was not one for which the Claimant was subsequently dismissed, it was inappropriate for Ms Brazel to raise it and reject the Claimant's denial without any apparent evidence in support. It demonstrates a biased mindset on the part of Ms Brazel.

46 This assumption that the Claimant had committed the acts of misconduct fed into the decision to hold the disciplinary hearing in his absence. The Claimant had been certified by his GP as unfit to work and had explained why he could not take part in a telephone hearing. Despite this evidence, Mr Saunders concluded that there was no good reason for his failure to attend the disciplinary hearing and proceeded in his absence. Mr Saunders accepted that this was because the evidence against the Claimant was overwhelming and, we conclude, this was in part because of the tone and content of Ms Brazel's email on 23 August 2018. Even if the evidence did at face value appear overwhelming, it is a fundamental requirement of a fair disciplinary process that the employee has an opportunity to address that evidence and provide an explanation if possible. It is particularly important in cases, as this, where the evidence in support has not been provided to the Claimant before the investigation meeting. The disciplinary hearing would have been the first opportunity for the Claimant to provide an informed response to the alleged misconduct.

47 The Tribunal does not consider that a reasonable employer could have reached Mr Saunders' conclusion that the Claimant had no good reason for failure to attend the second disciplinary hearing and was trying to frustrate the process. The Claimant had provided a fit note which said that he was unable to work for the period within which the

rescheduled disciplinary hearing fell and he had engaged with Ms Brazel's suggested alternatives to an in-person disciplinary hearing. The failure to make written representations in the circumstances of a medically certified reason for not attending could not reasonably be considered a failure to engage or an attempt to frustrate the process.

48 The Respondent's case is that the Claimant failed to attend the rescheduled disciplinary hearing without good reason and that it was within the range of a reasonable procedure as envisaged by section 98(4) to proceed in his absence. The Tribunal disagrees.

49 The Respondent's own disciplinary procedure distinguishes between a failure to attend with or without a good reason. The policy warns that a hearing may proceed in an employee's absence where there is no good reason **or** where there is a persistent inability to do so. Health reasons are expressly envisaged as an example of such a persistent inability to attend. On the evidence available to it, and for reasons set out above, a reasonable employer could not have concluded that the Claimant did not have a good reason for failing to attend the rescheduled disciplinary hearing. The rescheduled date was notified to the Claimant on 23 August 2018, received on 25 August 2018 some four days before the hearing, and at a time when he was still medically certified as unfit to work. The Claimant could reasonably expect a further rescheduled hearing after the sick note expired and that he would not have to provide written representations (for which he had been given little time).

50 An employer cannot be expected to wait indefinitely for an employee to return to work following sickness absence. It may be necessary to require the employee to attend a hearing even whilst signed off sick or at some point proceed in their absence. The Respondent's disciplinary procedure recognised this possibility by its reference to "persistent" inability to attend. On the facts of this case, however, the Claimant had been invited to two disciplinary hearings, within 21 days of each other, whilst certified unfit for work. The second sick note was for a defined two-week period and the length of the Claimant's absence had not reached the point where the Respondent could reasonably conclude that it was likely to be a long-term absence. The nature of the allegations was such that, if proved, they would almost certainly (and ultimately did) lead to dismissal of an employee with seven years' service and a previously clean disciplinary record.

51 In the circumstances, and having regard to the equity and substantial merits of the case and the size and resources of the Respondent, the Tribunal concluded that it fell outside of the range of reasonable responses to proceed with the disciplinary in the Claimant's absence rather than offer a further rescheduled date. This is not to say that a hearing could never have been held in the Claimant's absence, simply that it was premature and unfair to do so on 29 August 2018.

52 In considering section 98(4), we must look at the fairness of the procedure overall. Ms Chan submitted that any unfairness in proceeding in the Claimant's absence was remedied by the detailed and comprehensive appeal hearing which subsequently took place. Mr Stronghill was an impressive witness who, the Tribunal accepts, handled the appeal in an open and fair way. Even if the appeal hearing and decision, impressive and detailed as they are, did effectively provide a full and fair hearing to decide dismissal, this was in lieu of a fair disciplinary hearing and with no further right of appeal. Looked at overall, the procedure adopted by the Respondent offered the Claimant a single fair hearing to set out his case, rather than the two-stage process envisaged by the ACAS

Code and fair industrial practice. Looked at overall, the dismissal was procedurally unfair.

53 Having decided that the Claimant was unfairly dismissed, the Tribunal considered whether the Claimant could and would have been fairly dismissed if a fair procedure had been followed. The unfairness was proceeding in the Claimant's absence on 29 August 2018, when he was signed off work, and assumption of Ms Bezel when investigating and Mr Saunders in proceeding that the Claimant had committed the acts of misconduct. As set out above, the Respondent was not required to postpone the disciplinary hearing indefinitely, the second hearing was rescheduled three weeks after the first and the Claimant's last sick note expired on 6 September 2018. In the circumstances, the Tribunal finds that if the hearing on 29 August 2018 had been rescheduled, it could and would have taken place by no later than 19 September 2018. Even if the Claimant had continued to be signed off sick at that date, his inability to attend would then reasonably be considered "persistent" and it would have been fair to proceed in his absence.

54 The Tribunal then considered what the outcome would have been had the disciplinary hearing taken place on 19 September 2018. Even allowing from the improper assumption of guilt on the part of Ms Brazel and Mr Saunders, the evidence in support of the allegations as included in the bundle at this hearing is compelling. The Tribunal concludes that a fair and impartial manager conducting an attended disciplinary hearing on 19 September 2018 could, and would, fairly have concluded that the allegations were established and that the Claimant would have been summarily dismissed for gross misconduct at the end of such a hearing.

55 The Claimant's explanations of the overpayment of hours in his evidence to this Tribunal were unconvincing. The error was not a couple of hours to be made up the following month, but 86.54 hours comprising half a working month. The Claimant's evidence was that he had noticed an overpayment (but not realised its extent), raised it with Ms Brazel and agreed that he would rectify in by recording fewer hours in July. The Tribunal did not accept this evidence as plausible: the amount of the overpayment was approximately £1,000, the Claimant could not genuinely have thought that this was a minor error to be rectified by an amendment in his hours the following month and, as submitted by Ms Chan, would have required him to input incorrect hours of work in July. The Tribunal accepted her submissions as the importance of accurate record keeping and conclude that a fair and impartial manager would also have rejected the Claimant's explanation.

56 At Tribunal, a significant part of the Claimant's case was that he should not have been dismissed as he ought not to have been required to submit his own hours. The Tribunal considered whether or not that was sufficient mitigation to take dismissal outside of the range of reasonable responses. We conclude that it was not and that a fair and impartial manager hearing the disciplinary would have reached the same conclusion. Even if the Claimant ought not to have been inputting his own hours, and perhaps even more importantly when he was in fact required to do so, it was necessary that he behave in a way that was honest and accurate. Overall, the Tribunal concludes that even taking into account the Claimant's further explanations and case on mitigation, the decision would have been the same following a fair process and his employment would have ended no later than 19 September 2018.

57 Having succeeded in his unfair dismissal claim, the Claimant would be entitled to a basic award subject to the provisions of section 122(2) of the Employment Rights Act

1996 which permit a reduction where it would be just and equitable to do so. The Tribunal has concluded that the Claimant would have been fairly dismissed after only three weeks had a fair procedure been followed. The Tribunal has concluded that the Claimant's explanations were not plausible; dismissal would have been for dishonesty based upon compelling evidence. In such circumstances, we conclude that it would not be just and equitable for the Claimant to receive any basic award. The reduction under s.122(2) is 100%. For the same reason, we make no award for loss of statutory rights.

58 Section 123(6) ERA provides for a reduction of the compensatory award to reflect any foolish, culpable or otherwise blameworthy conduct of the Claimant which caused or contributed to the dismissal. In this case, the dismissal was unfair by reason of the Respondent's failure to conduct a fair procedure. Whilst the Claimant's conduct gave rise to the need for a disciplinary procedure and his ultimate dismissal, there was no blameworthy conduct by the Claimant which caused the Respondent to hold the disciplinary hearing in his absence. The Tribunal does not consider in such circumstances that it would be just and equitable to reduce the compensatory award by reason of contributory conduct by the Claimant. The Claimant is entitled to a compensatory award of three weeks' pay.

59 In calculating the amount of pay for the three-week period awarded, the Tribunal did not have net figures available. The Respondent's ET3 gives the Claimant's gross pay as £665.59 per week. The amount of the compensatory award is therefore £1,996.77 and, as the award is calculated without deduction for tax or National Insurance, the Claimant is responsible for the proper accounting to the revenue.

Employment Judge Russell
Date: 11 May 2020