CASE Numbers: 2600009/2019 2600043/2019

EMPLOYMENT TRIBUNALS

Claimants: Ms M Tebbutt and Mr A Chapman

Respondent: Leicester City Council

Heard at: Leicester and Nottingham

On: 28 February 2020,
3,4,5 March 2020,
2,3 November 2020

Before: Employment Judge Ahmed (sitting alone)

Representation
Claimants: Mr Nicolas Bidnell-Edwards of Counsel
Respondent: Mr Stephen Butler of Counsel

RESERVED JUDGMENT

The Judgment of the tribunal is that:

1. The Claimants were both unfairly dismissed.

2. The Claimants were both dismissed in breach of contract.

3. The issues as to remedy, including the level of any contributory conduct and any issues arising out of the **Polkey** principle (**Polkey v A E Dayton Services Ltd)** shall be determined at a remedy hearing on a date to be fixed.

REASONS

1. In these two proceedings which were heard together, the Claimants bring complaints of unfair dismissal and breach of contract. The dismissals arise out of the same series of events. Ms Tebbutt who presented her Claim Form to the tribunal on 3 January 2019 was employed as a Duty Officer from 1 January 1979 until the effective date of termination on 20 September 2018. She thus had 39 years of service with the Respondent.

2. Mr Chapman who presented his claim on 14 November 2018 was employed as a Leisure Centre Attendant from 31 January 2008 until his dismissal on 24 July 2018 which was the effective date of termination in his case. He therefore had 10 years of service. Both the claimants were employed at the Leicester Leys Leisure Centre (the "Centre") which is run by the Respondent and is open to members of the public. The Centre contains a large open gym area and employs dedicated gym staff. The Centre has an office for administrative functions away from the gym area. The Facility Manager at the Centre generally is Mr Roy Cole. At the time of the relevant events it was Ms Vicki Allridge.

3. The circumstances of the dismissals concern events which occurred at the Centre on 13 April 2018. Some of the events were captured on CCTV. The relevant parts of the CCTV recording were played to the tribunal during the course of the hearing. The Respondent also provided a copy of the video for use during deliberations.

4. The events primarily concern a former employee of the Respondent referred to throughout as "AG" who was employed by the Respondent as a Gymnastics Coach. A Rule 50 Order applies in relation to AG for the purposes of anonymisation but does not apply in relation to either of the claimants nor is there any order against the open publication of this decision. An application was made at the start of the hearing by Mr Bidnell-Edwards on behalf of the Claimants for anonymisation orders in respect of the publication of the decision for the Claimants. This was considered but refused on the grounds that the Claimants' Convention rights were not engaged and the requirements of open justice prevailed over any right to anonymity.

5. The facts of the events of 13 April 2018 are in considerable dispute. Both Claimants were dismissed following an investigation and disciplinary proceedings after AG had complained that she had been sexually harassed by Mr Chapman. Ms Tebbutt was not alleged to have taken any part in the harassment but as Duty Manager she failed to take any steps to prevent the alleged harassment or subsequently to discipline Mr Chapman. The investigations that resulted in disciplinary proceedings and subsequent dismissals were undertaken by Mr Nick Browning who is employed by the Respondent as a Leisure Facilities Development Manager. The disciplinary hearings were both undertaken by Mr Andrew Beddow who is employed by the Respondent as Head of Sports Services.

6. The events of 13 April 2018 may be conveniently divided into three sections – the 'set-up' incident, the 'take-down' incidents and the 'office' incident. Whilst there is no CCTV of the set-up or the office incidents there is CCTV from two angles in relation to the take-down incidents. This was shown during the tribunal hearing.

7. In arriving at my decision, I have taken into consideration all of the oral and written evidence in this case, which has been quite extensive. I am grateful to Counsel on both sides for their carefully prepared submissions and their assistance throughout.

8. Oral evidence on behalf of the Claimants was given by the Claimants themselves, Miss China Ball-Chapman (daughter of Mr Chapman) and Mr Neil Lowe (Leisure Centre Attendant). In addition, the Claimants submitted written witness statements from Mr Joseph Trolley and Ms Sacha McCarrick (both Leisure Centre

Attendants) who supplied witness statements but did not attend to give sworn evidence for various reasons. The contents of their witness statements are not particularly crucial.

9. On behalf of the Respondent, oral evidence was given by Mr Nick Browning, Mr Andrew Beddow and Councillor Diane Cank, Chair of the appeal panel in respect of Mr Chapman and a member of the appeal panel for Ms Tebbutt.

THE FACTS

10. On 20 April AG told Ms Charlotte Waite, a Climbing Assistant employed at the Centre, of an incident which had occurred on 13 April. AG said that she had been involved in an incident with Mr Chapman of a sexual nature. Neither Ms Waite nor AG reported the incident to any member of management at that point.

11. On 23 April 2018, AG discussed the same incident with Miss Vicki Allridge at a training event. Miss Allridge immediately reported the incident to Mr Browning. Mr Browning asked Ms Allridge to get AG to confirm the incident in writing. AG's note was as follows:

Tony Chapman came into the sports hall with Monica and as he came through the door he was shouting he is not our slave, saying why can't you do it. I responded we normally do it but due to the fire in town buses were delayed meaning we were a bit behind in setting up. He then went to shout at me if you went for a shit would you like me to wipe your pissing arse. As a result of what Tony said to me I swore at him. This resulted in Charlie from the climbing wall shout above down to us, please do not swear and stop the shouting we have customers. I apologised. Tony then said he didn't swear which she had. I feel so disappointed as there was a member of management Team present Monica Tebbutt who did nothing and fully witnessed Tony's actions, they then left the hall

Then after the session had finished at 7:15 pm Tony came back into the hall with Joe [Trolley], Monica and a young girl. He came in all macho and larry (sic). Tony started to pick up the mats, he then went to grab me and I said don't because I have a shoulder injury. He then ran after Joyce and chased and grabbed her and was messing about with her. After this he continued to throw the equipment out the cupboard for the next day of archery.

I was then near the roll of mats and he came behind me and put his arms around me from the back and I said let me go or I will bite you. He didn't let go and I bit him slightly. He then grabbed my head and pushed it towards his groin area and said if you want to bite anything bite this. I was in such shock and cannot remember what then happened, all I remember was all staff around me were laughing at it. I am not sure who was there to witness this but it will be on CCTV.

Then after the session had been put away I went out to the side entrance fire exit where my partner picks me up, but he wasn't there yet.

Tony came again to me and grabbed me again by my coat and said get in here, pulled me by the coat neck and said your old man isn't here he don't want you.

I told him to let go what she did, Joe was there, I asked Joe what is wrong with Tony today he's not right and told Joe I was going out the fire exit would you shut the door and I left.

12. Upon receiving the above note Mr Browning viewed the CCTV footage and discussed the matter with Mr Cole. Mr Browning told Mr Cole that he would be investigating the incidents. Mr Chapman and Ms Tebbutt were then suspended pending an investigation.

13. On 2 May, Mr Browning met with AG and Mr Browning took a statement from her of the events as part of the investigation.

14. On 11 May 2018, Mr Chapman was invited to an investigation meeting to take place on 22 May. This meeting was rescheduled to 8 June 2018 due to the unavailability of Mr Chapman's trade union representative.

15. Ms Tebbutt was also invited to an investigation meeting by letter of 11 May 2018 and her meeting did go ahead on 22 May 2018.

16. Mr Browning completed his investigation by the end of June (the exact date is not known) and completed his report in early July 2018.

The set-up incident

17. Unfortunately, due to a copying error by the Respondent the CCTV footage was not preserved in relation to the set-up and thus there is only the testimony of those who were present. The events occurred around 3.30pm on 13 April 2018.

18. Ms Charlotte Mills, who was at a climbing wall on a balcony overlooking the sports hall, overheard Mr Chapman shouting in the sports hall below. There were two elderly customers within earshot. Ms Mills could not hear clearly but did discern that Mr Chapman was shouting and swearing. She distinctly heard the words "fucking" and "shit" from Mr Chapman. It was Ms Mills' belief that the customers must have also heard. Ms Mills also heard AG swear but she could not recall precisely what was said but it sounded as though she did 'fuck off'. Ms Mills asked them both to stop swearing. According to Ms Mills, Ms Tebbutt was in the sports hall but did not intervene.

19. AG gave the following account of the incident in her interview:

"I arrived late as there was a fire at St. Georges. Only me and Joyce [Adams] in and Charlotte. I went into the sports hall and Joyce was also late. I ran upstairs, Monica picked up and I said we needed someone to put the badminton nets away. I heard them as soon as they came down. Tony [Chapman] started shouting "Why don't you put these away, I'm not your fucking slave". I explained what I needed and why. He said "If you went for a shit would you expect me to wipe your pissing arse". I told him to 'F' off. He carried on saying that I was lazy. I told him he was a LCA and it is his job to do set up and take downs. He was shouting all the time. I tried to explain. He's like an alpha male in a pack. Charlie shouted down and said stop swearing as there were customers. He said he's not swearing. I said yes you did. Monica did nothing. As they started to walk out, Monica said to Tony "she's the one that puts the complaints in" she was talking about Charlie. As they were walking out, Joyce came in and I heard her say shut up, he must have said something to her. He carried on shouting and said that's what happens on a Friday night."

The take-down incidents

20. The take down incidents *have* been captured on CCTV footage and they show the following events: At around 7:20 pm, several Leisure Centre Attendants, including AG, are seen clearing away equipment in the sports hall. At around 7:24 pm, Mr Chapman, Ms Tebbutt and Mr Trolley arrive in the sports hall. Mr Chapman is then seen chasing Miss Joyce Adams around the hall which involves at one stage him lifting Ms Adams off her feet. There is then physical contact by Mr Chapman with AG. It is described as 'grabbing' by the Respondent. The exchange lasts no

more than a few seconds. The Claimant's head visibly moves downwards at the same time that Mr Chapman has his arm around AG's neck. All the staff including Mr Chapman and Ms Tebbutt are then engaged in setting up. Mr Chapman then once again initiates physical contact with AG near one of the walls. This part of the footage is not clear from either angle. Ms Tebbutt is not seen to be directly involved in any of these interactions. At a slightly later point she is seen using the hula hoops for her own leisure. This is followed by some of the other staff who then also begin hula-hooping. Mr Chapman is then seen throwing an unidentified object at one of the staff members (not AG). Finally, after a short interlude Mr Chapman is seen engaging in a verbal exchange with AG by the fire doors.

21. In the statement for the investigation, AG said this of the take-down incidents:

"We started packing up, then he [Mr Chapman] came in with Monica [Tebbutt], Jo, his daughter. He [Mr Chapman] came in leery and loud, starts packing up. He came over and he tried to grab me. Then all of a sudden he ran after Joyce and grabbed her, grabbed her around the legs to pick her up. Off he trots to pick up mats. He then came behind me and puts her arms around me tight, and I said get off or I'll bite you. I bit him lightly, then he grabbed my head and said if you want to bite something bite this as he shoved my head towards his groin. He then ran off and was chucking things. … My husband picks me up. Tony [Chapman] dragged me back in and said "Your husband is not here yet, he don't want you". I said to Jo, what's wrong with him he isn't right. I feel sexually assaulted, manhandled … It's not normal behaviour, it's not right. And to behave like that in front of his daughter, it isn't right."

22. When Mr Chapman was interviewed by Mr Browning he initially said he could not recall the incident. He admitted using the word 'arsehole' but said he did not regard that as swearing. He denied grabbing anyone. At this stage he had not been shown the CCTV footage. During the middle of the interview Mr Chapman is then shown the CCTV footage. His explanation for his conduct was that it was banter.

23. Ms Tebbutt was interviewed by Mr Browning as part of the investigation on 22 May 2018. She explained that she did not normally work on a Friday night and denied seeing anything inappropriate. Again, she was not shown the CCTV until some way through the course of the interview. Ms Tebbutt denied seeing the incident between Mr Chapman and AG or anything inappropriate. She did admit to hula-hooping which she put down as a 'laugh and a joke' and with the staff which she believed helped to improve morale. She denied hearing or seeing anything improper or of anyone approaching her to say that something improper was happening.

<u>The office incident</u>

24. There is said to be a further incident involving Mr Chapman, Ms Tebbutt and several others in the office. Miss Adams and Ms Mills were in the Leisure Centre office studying for an examination. Mr Chapman, Ms Tebbutt and Mr Trolley entered the same office at around the same time. According to the statement given by Miss Adams, all three of them were "being vile". Miss Adams said that she did not hear what was said fully but it was "horrible". Miss Charlotte Mills said she heard some "vile stuff it was in a dirty sexual manner of conversation". Miss Adams went on to say that: "Monica [Tebbutt] likes the young chaps, she likes the young males, messes about with them and vulgar with them. They are vulgar back and that is why over the last couple of months, they have been high chucking stuff about, showing off. It has been going off for months." When asked in the investigation whether

such behaviour was normal on a Friday night, she replied that they (the group) were the "untouchables", that they had ruled this building with "Miss Tebbutt backing them up". She went on to say: "How can you report something that Miss Tebbutt leads … Just stood there and did nothing. Then abuses us. I am sick of it.".

25. Mr Chapman and Ms Tebbutt were also questioned as to the office incidents at the same time as the other set up and take down incidents. Both of them denied any inappropriate behaviour.

<u>The investigation report</u>

26. In the preliminary investigation, Mr Browning undertook a review of the CCTV footage and on the basis of what he had seen both Claimants were suspended (technically by Mr Cole but it seems on Mr Browning's instigation) on 26 April 2018. The reason given for suspension in the letter to each was:

"You have behaved inappropriately in your role as an employee of Leicester City Council".

27. In the case of Ms Tebbutt, the following was added:

"You have failed in your responsibilities and duty of care to employees of Leicester City Council".

28. Mr Browning held investigation meetings with AG on 2 May 2018, with Miss Adams and Ms Mills on 18 May 2018, an interview with the Centre Receptionist on 20 May and two other Leisure Centre Attendants on 22 May and 18 June 2018. His investigation report is 4 pages in length. After setting out the allegations (which are worded slightly differently to the reasons given for the suspension), he makes a number of observations. In respect of Mr Chapman, he states, inter alia:

A review of the CCTV from Friday 13 April shows clear evidence that TC's behaviour at work is inappropriate.

TC verbally abuses her [AG], shouting across the sports hall "if you went for a shit would you expect me to wipe your pissing arse". AG does admit to reacting and telling TC to fuck off … CW rightly had to lean over the climbing wall barrier to intervene and surprised to see Monica Tebbutt the duty officer not taking action.

Further inappropriate behaviour occurred on Friday 13th April, this is highlighted by JA and CM investigation meetings. JA and CM were subject to a conversation of a graphic and sexual nature in the manager office between MT, TC and Joseph Trolley.

It is important to recognise that with in the leisure centre attendant job description that TC is required to set out sporting and other equipment, to meet the needs of the centre programme …. It is evident that the behaviour at work from TC is inappropriate and a clear breach of Leicester City Council Code of Conduct … and dignity at work.

TC arrives and starts the behaviour, immediately chasing JA across the sports hall and picking her up. In addition, the CCTV shows TC throwing objects at other staff members in the sports hall and rolling a hula-hoop across the sports hall. It is likely that without MT, TC and JT leading the inappropriate behaviour, the leisure centre attendants would carry on their duties effectively with setting down the gymnastics equipment.

TC clearly does not see the behaviour as an issue, sniggering while watching the CCTV at staff behaviour with the investigation meeting. TC passes off the behaviour as a laugh or a joke, something that happens everywhere and it is just having banter.

In the investigation meeting TC initially denies grabbing AG and denies grabbing AG's head and shoving it to his groin, stating "if you want to bite something, bite this". The CCTV clearly shows that TC is not being honest, grabbing AG on a number of occasions and there is a movement of grabbing AG head and pulling downwards. CCTV footage shows that AG is visibly shaken.

There is a further alleged incident at the sports hall fire exit …… TC grabs AG, dragging AG back and saying to AG your husband isn't here yet, he don't want you.

AG is clearly very upset by the incident, crying during her investigation meeting and highlighting the effect the incidents has had on her as an individual.

TG was not concerned by the grabbing of AG and how she looked intimidated.

TC's behaviour has lost the trust and confidence that has been placed in him as an employee of LCC. Furthermore, TC has been dishonest throughout the investigation process and failed to show remorse or compassion for his actions. It is also evident from the investigation meeting that TC did not understand how his behaviour effected a fellow employee and continued to pass the behaviour off as "banter" or "having a laugh". It is quite concerning that TC does not appear to understand the severity of his actions. I believe that it is no longer feasible for TC to continue in the role of leisure centre attendant at LCC.".

In relation to the investigation report for Miss Tebbutt, the allegation was that:

That MT …. behaved inappropriately and failed in her management responsibilities and duty of care to employees of Leicester City Council.

In relation to inappropriate behaviour at work, Mr Browning refers to Miss Tebbutt hula-hooping in front of staff members, doing so in a customer facing area, taking part in vulgar and graphic conversations and leading the inappropriate behaviour of an employee.

It is clear from the evidence that TC verbally abuses AG during the setup of gymnastics, shouting across the sports hall "If you went for a shit would you like me to wipe your pissing arse". This is confirmed by investigation meetings with AG, CM and CW that MT witnessed this and did not act. Furthermore, AG alleges that MT actually warned TC to be careful as CW is the one that puts complaints in. MT and TC denied these items with MT stating that she was not there. It is clear from the evidence that on the balance of probability that MT was there, and would have heard and seen this take place. This leads me to believe that MT has been dishonest throughout the investigation process.

In addition that evening TC physically grabs AG on a number of occasions in the sports hall and on one occasion shoves AG head toward his groin. TC says to AG "If you want to bite something bite this as he shoved my head towards his groin". The CCTV shows that MT was present during this and from the CCTV footage shows that MT has witnessed this incident. MT denies that she was aware of or witnessed the incident. AG states that TC was loud when saying this statement and it is likely that MT would have heard.

It is clear that MT has failed in her duty of care to AG; MT has failed to address either incident with TC, and has not reported either incident to her line manager. It is clear that MT had breached the dignity at work policy. MT has failed to control TC's behaviour, this is a very serious incident where an employee has been physically assaulted and sexually harassed; CCTV is clear that MT would have been aware of the incident and as a manager in the service should of interviewed (sic).

It is clear from the CCTV that there was poor practice from members of staff and MT failed to intervene or challenge this. MT's behaviour has lost the trust and confidence that has been placed in her as an employee of LCC and as manager within sport services. I believe that it is no longer feasible for MT to continue in the role of duty officer at LCC.

MT is an experienced duty officer whose behaviour at work has been inappropriate and has demonstrated a complete failure in management responsibility and duty of care for employees.

Due to the very serious nature of the above, MT's actions may constitute gross misconduct if substantiated.

29. On 16 July 2018 Mr Browning confirmed that the cases of both Claimants would proceed to disciplinary hearings.

30. In the case of Mr Chapman, the notice of the disciplinary hearing set out the following allegations:

"Has behaved inappropriately in the work place, to include verbal abuse, aggression, physical assault and sexual harassment. This is a breach of the LCC's Code of Conduct and Dignity at Work Policies.

His actions have lost the trust and confidence that has been placed in him as an employee of Leicester City Council.

His actions have the potential to bring the Council in to disrepute."

31. In respect of Ms Tebbutt, the allegations were:

"In your role as Duty Officer at Leicester Leys Leisure Centre you behaved inappropriately and failed in your management responsibility and duty of care to employees of Leicester City Council."

32. At disciplinary hearings on 24 July 2018 (for Mr Chapman) and 20 September 2018 (for Ms Tebbutt) the allegations were aired at some length before Mr Beddows. Notes of the disciplinary hearing which appear in the bundle are agreed as an accurate record.

33. By letters dated 1 August 2018 in the case of Mr Chapman and 27 September 2018 in the case of Ms Tebbutt, both Claimants were dismissed. In the case of Mr Chapman the dismissal letter contains the following relevant passages:

Allegation 1 – You behaved inappropriately within the workplace, to include verbal abuse, aggression, physical assault and sexual harassment. This is a breach of Leicester City Council Code of Conduct and Dignity at Work policies.

It was evident at the investigation meeting that you were not able to remember the incident and when questioned said that you couldn't remember any grabbing or shoving of the head down to your groin and what you said to AG at this time. Upon viewing the CCTV footage at the investigation meeting, your view is AG is not distressed and that it was just banter and couldn't understand why she would do this?

Although after viewing the CCTV footage you were able to recall the incident you are unable to remember what you said when you grabbed and shoved (AG's) head, I do believe on the balance of the evidence presented that you did say what was reported by (AG). What you said at this time along with the physical contact is a degrading and humiliating act. Beyond this appalling act it is my view that you continued to humiliate (AG) by dragging her back and saying what you did, as she waits being picked up by her husband.

My assessment of the evidence is that you have physically assaulted a fellow employee and have sexually harassed and verbally abused (AG) causing significant emotional and physical distress to the employee who has had to encounter your extremely offensive behaviour and conduct.

As an experienced Leisure Centre Attendant there is a level of trust and confidence placed in you to go about your duties in a respectful and dignified way. The Leisure Centre Attendant, Job Description states that the role 'is to provide a working environment free of harassment and discrimination'. It is my view that you failed to uphold a fundamental objective of the Leisure Centre Attendant role.

The Council's Dignity at Work Policy states harassment is unwanted physical, verbal or nonverbal conduct, which has the purpose or effect of violating someone's dignity, or which creates a hostile, degrading, humiliating or offensive environment. I have no doubt that your behaviour on the 13 April when you grabbed (AG) amounted to serious physical and sexual harassment.

The Investigating Officer stated in the Management Statement of Case that 'it was evident from the investigation meeting that TC did not understand how the behaviour affected a fellow employee and continued to pass the behaviour off as 'banter' or 'having a laugh'. It is quite concerning that TC does not appear to understand the severity of his actions. I believe that it is no longer feasible for TC to continue in the role of Leisure Centre Attendant at Leicester City Council. Based on the evidence presented at the hearing I fully agree with this statement.

It is my view that you have endeavoured to downplay your actions and behaviour as leisure centre banter with (AG) and deflect attention from, or justify what is actually appalling targeted behaviour that clearly constitutes physical and sexual harassment of a fellow employee. Your behaviour and conduct has no place within Leicester City Council.

Although I took on board that you apologised for your behaviour and that you state that it shouldn't have happened I feel that your position on this has changed due to the evidence that has been presented against you at the hearing.

Allegation 2 - your actions and lost trust and confidence that has been placed in you as an employee of Leicester City Council

I find you blameworthy of this allegation. I have taken in to account my decision against the first allegation, which in itself has resulted in a lack of trust and confidence in you to perform your role with Leicester City Council. However, it's also evident to me from the CCTV footage that your attendance in the Sports Hall when staff were correctly undertaking the 'set down' of the gymnastics that the situation dramatically changed because of your behaviour when you arrived in the Sports Hall.

As an experienced Centre Attendant that works with less experienced colleagues there is a level of trust and confidence placed in you that you will lead by example and show colleagues on how to act professionally as a key member of the leisure centre team.

After observing the CCTV footage I can only describe your general behaviour as erratic and at times out of control. Although, you state that you were not in attendance at the set-up, there is evidence from various witnesses that state that you were present and that you did use the derogatory language that was overheard by Charlotte Waite who was on the balcony supervising customers on the climbing wall. On the balance of probability I believe that you were present and that you did shout the comments to (AG) during the 'set-up' of the gymnastics equipment.

The public who use our Leisure Centres need to be reassured that all staff conducts themselves in a professional and courteous manner. In addition to your conduct with (AG), your overall conduct during the set up and set down has resulted in a complete loss of trust and confidence in you to perform your role with Leicester City Council.

Allegation 3 – Your actions have the potential to bring the Council in to disrepute.

Following the evidence presented at the hearing I find you blameworthy of this allegation.

Although it was established at the hearing that the Council did not receive any complaints from customers, that may have observed the behaviour or overheard the swearing and derogatory language, there was a significantly high level of risk that customers could have made a formal complaint.

The behaviour and conduct shown on the CCTV has the potential to result in formal complaints and comments via social media platforms on the behaviour shown by Council staff. As a Council service we have a responsibility to protect the reputation of the Council to members of the public. The behaviour and conduct of yourself has the potential to create reputational harm both to the service and the Council as a whole.

Therefore, given the above evidence, I have concluded that the evidence and findings do amount to gross misconduct warranting summary dismissal under the Council's Disciplinary Procedure. Given the serious nature of your behaviour and conduct I did not consider a final warning as an appropriate sanction. Dismissal takes effect from the 24 July 2018 and you will not be entitled to any notice pay."

34. The dismissal letter to Ms Tebbutt contains the following relevant passages:

It was established that you are an experienced Duty Officer, familiar with the requirements of the role and had undergone training on the appropriate employee policies and processes. Therefore, I feel confident that you are aware of your responsibility as a Duty Officer on the 13 April 2018.

It was evident on the 'set up' that your recollection was that you were either not present or that you couldn't remember the 'set up'. It's my view from the witness statements that confirmed that you were present in the Sports Hall assisting the 'set up' and that you would have heard the derogatory and vulgar language being used by Anthony Chapman (AC) towards (AG) but did not intervene. The only intervention to stop the shouting and language was from Charlotte Waite (CW), Climbing Assistant, who could over hear from the adjacent climbing wall situated next to the Sports Hall. CW was concerned that the language being used could be over heard by customers who were using the climbing wall at the time and rightly was concerned about how this would look with customers. I believe your lack of action and not intervening at this point was a failure on your part and I would have expected a Duty Officer to have taken fast and immediate action in response to the derogatory language and humiliating words direct at AG by AC and also being used by AG in response to the verbal provocation.

In CW's witness interview she states that she was surprised when she looked down in to the Sports Hall to see the Duty Officer present when this was taking place and I can understand why given that you are the shift manager in charge of the Leisure Centre that evening. I do believe that the behaviour of AC escalates over the course of the evening and it would seem that you simply failed to act and deal with his behaviour and conduct at any point and I will refer further to this in my findings.

It was evident that staff commenced the 'take down' of the gymnastics equipment without management supervision and are clearly going about their work appropriately and professionally. There has been a considerable amount of references to banter but it is evident from the witnesses when questioned that leisure centre staff are aware of what is appropriate and inappropriate banter. It was also evident that staff who attended the hearing did express that it is not appropriate to be messing around in front of customers or when customers are in the building.

It was therefore very disappointing to witness the impact of your presence as the Duty Officer, in the process of the take down. It was evident that yours and AC's presence changed the work environment in the sports hall. AC's presence immediately resulted in him chasing after Joyce Adams and trying to pick her up. I find it hard to believe that you didn't witness this and therefore didn't intervene or act in your management capacity and role as would be expected.

Ultimately, it can be seen on the CCTV footage that it was only when you and AC arrive in the Sports Hall that we could see how this had an adverse and negative affect on the staff working on the take down and we observed the following:

AC what seems to be shouting and pointing/gesticulating with his hands as he walks into the sports hall with you.

AC running after and chasing Joyce Adams and then trying to pick her up.

AC persistently grabbing (AG) over the course of the take down.

Both you and the staff hula hooping and throwing things at one another and chasing one another around the Sports Hall.

It is my contention that if you hadn't attended the 'take down' that staff would have continued to carry out the work appropriately and professionally and completed it without incident. I find it shocking and

unacceptable to see how a Manager's presence has such an adverse impact on the conduct and behaviour on a number of centre attendants.

At the Hearing you apologised for using the hula hoop and that it was wrong to do so, however you don't seem to recognise your management responsibility for maintaining standards and intervening when behaviour and conduct is not appropriate. You have a duty of care to ensure the work environment is a safe and caring environment at work for staff and by not stopping and acting on the behaviour of AC this has escalated in to more serious inappropriate behaviour that has had a significant emotional and physical impact on AG.

In terms of the physical and verbal abuse and sexual harassment that took place you indicated that you didn't see the incident, although on the CCTV your body position is facing towards AG at the time of the physical and verbal abuse and sexual harassment incident. In addition to not seeing the incident you also stated that you can't remember what was said by AC to you after he is seen jogging across to you and points his finger towards where the incident took place immediately afterwards. On the balance of evidence I do believe that you did see the incident and that AC did share with you what he had just done and said to AG.

After the hearing you stressed that if AG has reported this to you then you would have been able to do something about it. It was clear from AG when questioned that she felt she was not able to report this to you as she felt disappointed that you were present at the set up when AC shouted at her the derogatory and vulgar comments and you did nothing even though you witnessed these actions. CW, Climbing Assistant was also surprised to see that you were present and therefore I can understand fully why staff wouldn't have the confidence and trust to raise this with you. Quite rightly, they are looking to you as the Manager to act and intervene when behaviour and conduct is not appropriate and we are not providing a good level of service.

I do believe that the escalation of AV's behaviour with AG resulted in a serious physical and verbal abuse and sexual harassment. Your response to the incidents involving the set-up, the behaviour at the start of the take down and subsequently the physical assault that took place has been that you can't remember or that you didn't see or hear what happened. I think there is sufficient evidence that leads me to believe that you failed to take action in your responsibility to provide a safe environment for employees and your duty of care for staff under your supervision. I do not accept from all the evidence presented including statements, interview notes and the CCTV footage that you didn't see, hear or remember the incidents that took place during the set up or the take down.

Although I took on board that you apologise for your behaviour in using the hula hoop, it is my view that you have not been fully open on the incidents that have taken place and that you haven't fully understood how you have failed in your management responsibilities to intervene and act on inappropriate behaviour of staff members, The most serious being that you failed to act on behaviour that escalated in to a physical and verbal abuse of a fellow employee under your care and supervision. Furthermore, all of this took place in a customer facing area where bad language, bad behaviour and inappropriate messing around was taking place. This is not how I expect a member of my management team to conduct themselves.

I did take into account your long-standing record and the evidence you provided on your absence record and overall commitment and loyalty to the service. However, I have had to counter balance this with the serious management failings you have shown and that has been evidenced over the Hearing. It also concerns me that you don't fully seem to understand the consequences of how your behaviour, as a Manager, has had a detrimental impact on staff and the standards of service we provide to our customers.

The loss of confidence and trust that was shown by the affected staff is also shared by me as your Head of Service. The Duty Officer is an important management role as they set the tone and the standards by which all staff on shift work to and the evidence presented against you leaves me with no confidence that you can continue in your post going forward.

Therefore, given the above evidence, I have concluded that the evidence and findings do amount to gross misconduct warranting summary dismissal under the Council's Disciplinary Procedure. Given the serious nature of your management failings I did not consider a lesser sanction was appropriate. Dismissal takes effect from 20 September 208 and you will not be entitled to any notice pay."

35. Both Claimants appealed against the decision to dismiss. Mr Chapman lodged his appeal on 17 August 2018. Ms Tebbutt appealed by letter dated 3 October 2018.

36. Appeals against decisions at Leicester City Council go to an Appeals Committee which is comprised of elected Councillors. It is not clear whether that is a statutory requirement or whether it is something that Leicester City Council have chosen to introduce of their own accord.

37. The appeal hearing for Mr Chapman was convened for 19 November 2018 but during the course of the appeal an allegation of bias was made by the Claimant's trade union representative. The appeal hearing was then halted and it was decided that a new panel would be convened. It was not reconvened until 14 January 2019. Councillor Cank, who gave evidence in these proceedings on the Respondent's behalf, was Chair of the reconvened appeal panel. Her witness statement does not set out in any detail the circumstances of the abandoned appeal hearing.

38. The appeal hearing for Ms Tebbutt was arranged for 24 January 2019 but was adjourned at the last minute due to a failure by a courier to deliver the papers to one of the appeal members. It was not reconvened until 22 May 2019.

39. Following the dismissal of the appeal Councillor Cank sets out the reasons for dismissing the appeal by Mr Chapman:

"The appeal panel felt that the decision taken by Andrew Beddow to summarily dismiss the Claimant was correct. The appeal panel was satisfied that the sanction was appropriate in the circumstances and that the Claimant's actions was gross misconduct. The appeal panel did take into account the representations submitted on behalf of the Claimant but felt that they were not sufficient grounds of negating his individual responsibility for his actions."

40. In relation to Ms Tebbutt's appeal, Councillor Cank's witness statement does on this occasion explain why the earlier hearing was abandoned. The reasons given for dismissing the appeal are set out at paragraph 28 of Councillor Cank's witness statement. The first part of the paragraph is worded in identical terms to the reasons for dismissing the appeal by Mr Chapman. In addition for Ms Tebbutt, Councillor Cank goes on to say:

"The appeal panel did take into account the representations submitted on behalf of the Claimant including the character references submitted by her, as well as other mitigating circumstances relating to her health and age but felt that dismissal was the correct sanction in the circumstances."

THE LAW

41. Section 98 of the Employment Rights Act 1996 ["ERA 1996"] (so far as is relevant) states:

"(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—

(b) relates to the conduct of the employee,

(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."

42. In **HSBC Bank plc v Madden** [2000] ICR 1283, the Court of Appeal confirmed that the correct approach to applying what is now section 98 (4) of ERA1996 should be as follows:

"(1) The starting point should always be the words of section [98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute its decision as to what was the right course to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment 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."

43. The Court of Appeal in **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220 reminded tribunals of the importance of not substituting their views for that of the employer. I have been conscious of the importance of not doing so.

44. It is now well-established that the range of reasonable responses test applies equally to the investigation as it does to the decision to dismiss (see **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23).

45. In **British Home Stores v Burchell** [1980] ICR 383, the Court of Appeal set out the criteria to be applied in cases of dismissal by reason of alleged misconduct. Firstly, the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the misconduct in question. Secondly, the tribunal must consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly, at the stage at which the employer formed its belief, whether it had carried out as much as investigation of the matter as was reasonable in all of the circumstances. Although **Burchell** was decided before changes were made to the burden of proof, the three-step process is still helpful in determining cases involving dismissal for misconduct.

46. In the course of his submissions Mr Bidnell-Edwards refers to the following passage at paragraph 60 from the EAT decision in **A v B** [2003] IRLR 405:

"Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

47. Although not referred to in submissions, I also consider the following passages (at paragraphs 58 and 63) of the same case to be relevant:

"We accept the submission…….that the relevant circumstances do in fact include a consideration of the gravity of the charges and their potential effect upon the employee."

…the standard of reasonableness required will always be high where the employee faces loss of his employment. The wider effect upon future employment, and the fact that charges which are criminal in nature have been made, all reinforce the need for a careful and conscientious enquiry but in practice they will not be likely to alter that standard."

48. In addition to might be described as a heightened standard expected in a case where the effect of dismissal on an employee is particularly significant, the EAT also set out the importance of an even-handed approach to investigation:

"This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances."[1]

49. Mr Bidnell-Edwards also refers me to the following passage from **Salford Royal NHS Foundation Trust v. Roldan** [2010] IRLR 721 where the Court of Appeal (at paragraph 73) said this:

"Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and to disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant. For example, they may tend to believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of on one side or the other.

50. In relation to wrongful dismissal cases the legal test is somewhat different. Here it is the common law rather than section 98(4) ERA that is applicable. For dismissal to be justified at common law the employee must commit a repudiatory breach. The employer must accept the breach and dismiss in consequence of the repudiatory breach. The breach may be of an express or an implied term

[1] The concept of a 'heightened standard' has been acknowledged most recently by the EAT in **Uddin v London Borough of Ealing** (UKEAT/0165/19/RN).

51. The classic test as to what constitutes conduct by an employee justifying summary dismissal for gross misconduct was set out in **Laws v London Chronicle** [1959] 1 WLR 698. There it was held that in order to justify summary dismissal at common law the employee's behaviour must disclose 'a deliberate intention to disregard the essential requirements of the contract'.

THE ISSUES

52. In respect of unfair dismissal it is agreed that the issues for both Claimants are the same and are as follows:

52.1 What was the principal reason for dismissal?

52.2 Is the **Burchell** test satisfied, namely did the Respondent hold a genuine belief in the alleged misconduct, was that belief based on reasonable grounds and at the time of forming the belief, had the Respondent completed such investigation as was reasonable in the circumstances?

52.3 If the dismissal was for conduct (as relied on by the Respondent) was it within the range of reasonable responses open to a reasonable employer?

52.4 In relation to the breach of contract claims did the Respondent wrongfully terminate their contracts of employment?

53. The parties were agreed that this hearing should deal with liability only and any issues in relation to contributory conduct and/or **Polkey** should be deferred until later if necessary.

CONCLUSIONS

54. The law in this case is uncontroversial. The starting point in all unfair dismissal cases is of course the words of the statute - section 98(4) ERA 1996. In doing so, I have been careful not to substitute my views for that of the Respondent. I have considered the range of reasonable responses test and the guidance in **Burchell v British Home Stores.** I have also considered the passages from the cases cited. In relation to the breach of contract claims I have in mind the test at common law.

The investigation

55. Mr Bidnell-Edwards criticises the investigation on a number of fronts – the delay, the failure to interview relevant witnesses such as Miss Allridge and Mr Trolley, keeping Mr Chapman in the dark as to the accusations against him until the formal investigation meeting which was some way down the line and the delay overall in the disciplinary and appeal processes.

56. Whilst I do not consider much turns on the failure to obtain a witness statement from Miss Allridge, it is part of a series of failings. There is no good reason why Miss Allridge should not have been interviewed particularly as she was the first person from management to hear of the account and the circumstances as to why AG had not chosen to raise this matter with a responsible officer until several days after the incident was a reasonable line of enquiry. It is also possible that

inconsistencies may have been identified between the initial accounts given to Miss Allridge by AG and by AG herself to avoid the risk of subsequent embellishment. Given that both Mr Browning and Mr Beddow place considerable emphasis on inconsistency as a possible reason for not believing Mr Chapman this would have helped to ensure there was a fair process.

57. The question of delay in the investigation is however a different matter. The relevant incident occurred on 13 April 2018. There was therefore a gap of 10 days until Mr Browning became aware of the incident so the need to expedite must already have been apparent from the outset. Mr Chapman was suspended on 26 April but had not been told that he was accused of an incident as serious as an allegation of sexual harassment. Mr Chapman received a letter of suspension which did not provide any useful information other than that he had "behaved inappropriately". He was not at that stage shown the CCTV footage or offered an opportunity to view it.

58. Mr Chapman was invited to an investigation meeting by letter dated 11 May 2018, when once again he was not provided with adequate details of the allegations, for a meeting on 22 May. The next delay is down to the Claimant as his trade union representative was unavailable. The investigation meeting did not take place until 8 June by which time some 8 weeks had passed since the date of the incidents. It was not until 8 July or thereabouts when Mr Browning's investigation report, which at 4 pages is a long report by any standards, is finalised.

59. It was at the investigation meeting on 8 June that Mr Chapman was shown the CCTV footage for the first time. The manner in which it was done perhaps more in common with a criminal investigation rather than an investigative workplace interview. Mr Browning began by asking Mr Chapman a number of questions to elicit what he did that day. As it was some time ago Mr Chapman could not unsurprisingly remember. So far as he was concerned nothing exceptional had happened because no-one had mentioned anything to him about it. He was then shown CCTV footage midway through the interview. The way in which the investigation interview is conducted is therefore seemingly designed to catch out Mr Chapman rather than to ascertain the facts in a fair and open-ended way. At one stage Mr Browning puts it Mr Chapman: "You're telling me that didn't happen?"

60. The role of an investigating officer is, broadly, to establish facts rather than to draw conclusions. Whilst it is unrealistic to expect an employer to remain scrupulously neutral throughout, Mr Browning's approach was redolent of a predetermined view. The whole of the investigation is therefore marred by a partial and biased approach. The following extracts from his investigation report illustrate the point:

A review of the CCTV … shows clear evidence that TC's behaviour at work is inappropriate.

It is evident that the behaviour at work from TC is inappropriate and a clear breach of Leicester City Council's Code of Conduct.

TC clearly does not see the behaviour as an issue, sniggering while watching the CCTV footage at staff behaviour within the investigation meeting. TC passes off the behaviour as a laugh or joke, something that happens everywhere and it is just having banter.

The CCTV clearly shows that TC is not being honest, grabbing AG on a number of occasions and there is movement of grabbing AG head and pulling downwards.

AG is clearly very upset by the incident, crying during her investigation meeting.

TC was not concerned by the grabbing of AG, and how she looked intimidated.

TC's behaviour has lost trust and confidence that has been placed in him as an employee of LCC. Furthermore, TC has been dishonest throughout the investigation process and failed to show remorse or compassion for his actions."

61. Moreover, Mr Browning reaches conclusions that could not possibly have been based on the evidence before him. The CCTV evidence does not have any sound. It is therefore difficult to see how Mr Browning was able to draw the conclusion that Mr Chapman said to AG: "Your husband isn't here yet, he don't want you". That was a disputed remark and in the role of an impartial investigating officer, Mr Browning was duty bound to set out that it was disputed rather than give the impression that it was said.

62. Mr Browning also appears to conclude that AG must be telling the truth because she is "clearly upset by the incident, crying during her investigation meeting". Even if AG was crying that cannot be detected on the CCTV footage. At no point in her investigatory interview on 2 May did AG say she was crying nor does she ever say that she was crying. If she was crying during the investigation meeting it does not establish any relevant fact.

63. Mr Browning accepted under cross-examination that on viewing the CCTV it was not possible to identify AG biting Mr Chapman even though that was accepted by AG yet he fails to give that any prominence in his report. Mr Browning accepted under cross-examination that the CCTV footage did not show Mr Chapman pulling AG's head near the groin but only that it was pulled in that direction.

64. Mr Browning uses impartial and at times emotive language in describing Mr Chapman's actions. Mr Chapman is said to have 'sniggered', he was 'not honest', he 'grabs' rather than makes contact or places his arms round, the behaviour is 'inappropriate'. In the case of Ms Tebbutt instead of setting out what words were alleged he refers to 'vulgar and graphic conversations'. He describes Ms Tebbutt as 'dishonest during the investigation process' presumably a reference to the fact that he did not believe her. He goes on to add:

"What MT fails to understand is the perception that this behaviour gives customers of the staff at the leisure centre and the reputation of Leicester City Council."

"It is clear from the evidence that TC verbally abuses AG during the set-up…"

65. Mr Browning fails to mention matters which could have assisted the Claimants. He fails to mention that AG swore back at Mr Chapman in the set-up. If there was damage caused to the reputation of the Council then both Mr Chapman and AG had caused it, not just Mr Chapman. He places little weight on the admission that AG had bitten Mr Chapman (or attempted to bite him) which might well lend credence to the explanation that it was part of horseplay. He found no independent evidence to support his belief that Ms Tebbutt saw and heard the interactions between Mr Chapman and AG. It is clear from the CCTV that Ms Tebbutt was

engaged in undertaking her own work in setting up mats and in arranging gym equipment. It was entirely possible that she did not hear the interactions between Mr Chapman and AG. Had Ms Tebbutt been in very close proximity that might have added credence to his belief that she must have seen the incidents but Ms Tebbutt explained was getting on with her work and was some distance away from the events. AG has said that others were laughing yet no witness was found who reported any laughing.

66. Mr Browning appears to have formed a negative view of Mr Chapman as is clear from the following passages in interviews:

That footage of the incident is consistent with the allegation. It shows you physically grabbing AG, assaulting her at work, grabbing her head and forcing her head down to your chest, she looks distressed.

…………

Obviously you sniggered, so you find this behaviour with a member of staff funny?

……………

The messing around starts when you, MT and JT come in. Seems like you are the ring leaders?

…………..

So yourself, JT and MT seem to be ringleaders of the inappropriate behaviour at LLLC?

67. Mr Browning fails to interview Mr Joe Trolley who was clearly a material witness both for the sports hall and for the office incidents. It was left to the Claimants to call Mr Trolley to give his version of events in the disciplinary hearing.

68. For the reasons given above, I do not find that the investigation fell within the band of reasonable responses. The investigation was not the even-handed and fair process it should have been.

<u>The dismissals</u>

<u>Mr Chapman</u>

69. The three allegations against Mr Chapman were of (1) behaving inappropriately, verbal abuse, aggression, physical assault and sexual harassment (2) loss of trust and confidence and (3) bringing or actions which could potentially bring the Council’s name in to disrepute. All of those relate to ‘conduct’ within the meaning of section 98 ERA. I am satisfied that the reason for the dismissals was conduct which is a potentially fair reason. I have gone on to consider whether the dismissals were fair having regard to the reason and having regard to the provisions of section 98(4) ERA 1996.

70. I shall deal with the last one of those issues first. It is agreed that there was no complaint lodged by any member or the public in relation to any of the three incidents. It is unlikely that the footage could be shown on social media unless the Respondents themselves chose to do so. There is no evidence that it has appeared

on social media or given the absence of release of the CCTV to others that there was any realistic prospect of this happening.

71. There is no evidence of actual reputational damage. Whilst officers of Leicester City Council may, perhaps justifiably, be very proud of their reputation it is of course important for them not to be too precious about it. There is nothing to suggest that any of the actions in relation to the take down incidents were specifically seen by any members of the public and the swearing in the set-up would not justify dismissal on its own. A certain amount of industrial language in a gym would not be anything exceptional.

72. Similarly, loss of trust and confidence is broad and unspecific. Loss of trust and confidence is usually more a by-product of misconduct rather than misconduct in itself. Practically every dismissal means loss of trust and confidence so this allegation adds very little. Why it is included is not clear as there are no separate facts or allegations relied in support of it. The reasons given for dismissal appear to be a continuation of findings concerning the main allegation. Curiously, it does not appear as an allegation in Ms Tebbutt's case. Accordingly, insofar as it is relied upon, I would find that the dismissal was unfair in respect of that allegation.

73. The primary allegations against Mr Chapman are of course of verbal abuse, aggression, physical assault and sexual harassment. I propose to deal with the three scenarios (the set-up, take-down and office) separately as it seems to me that all them need to be considered separately. I propose to deal with the set-up and office incidents first.

74. It is of course essential that if an employer is considering dismissing an employee where there is CCTV evidence that all reasonable steps are taken to ensure that such evidence is preserved. To lose the CCTV evidence, as the Respondent does on the set-up not only adds to the difficulties but creates an element of doubt. As the allegations are primarily of words spoken (which would not be captured on CCTV) thankfully it makes little practical difference in the end.

75. I am satisfied that no employer acting reasonably would have dismissed either or both of the Claimants for the set-up incident alone. The Respondent chose not to issue any disciplinary proceedings against AG who had also admitted to swearing within earshot of members of the public. It does not feature very strongly in the reasons for the dismissal of Ms Tebbutt.

76. In relation to the office incident this was clearly not properly investigated by Mr Browning. I am also satisfied that it was not of such seriousness to dismiss alone. Mr Beddow gives no reason as to why he believed the accounts of others as against the accounts of the Claimants. To have dismissed for the office incident alone would clearly have been disproportionate, falling outside the band of reasonable responses.

77. It is of course in relation to the take-down incidents that the case against Mr Chapman is made for dismissal and in reality it is the alleged failure to act or manage the take-down incidents that Ms Tebbutt is also dismissed. It is in relation to the second limb of **Burchell,** namely the reasonableness of Mr Beddow's belief, that is at the heart of these cases.

78. In relation to Mr Chapman and the take-down incidents there are two aspects to consider: there is firstly the physical behaviour of Mr Chapman as viewed on the footage and secondly, his remarks that are said to accompany the behaviour. Absent the latter, I am satisfied that the Respondent would not have regarded the incident as one of sexual harassment. In that respect therefore Mr Beddow has to decide on the basis of what he sees and what he believes Mr Chapman is alleged to have said.

79. Mr Beddow faced a serious conflict of accounts. As in most cases, the CCTV evidence was largely inconclusive and was of no value on the alleged comments. Despite the footage from two different angles, it remains relatively unclear.

80. It is self-evident that for an employer to have a reasonable belief there must be a reason for that belief. Mr Beddow evidently considered his task was to decide who to believe in relation to the disputed remarks. Mr Chapman consistently denied that he made them – other than some swearing which does not appear to have been critical in Mr Beddow's thinking - or could not recall making them.

81. There were no direct witnesses who confirmed or supported AG's account or that of Mr Chapman. The only two independent relevant witnesses were Ms Mills and Ms Adams. Ms Mills had said that whilst she saw Mr Chapman 'grab her [AG's] head' and believed that 'they did speak', she 'did not hear what was said'.

82. Ms Adams was the only other person in close proximity. Her account was as follows:

"Because it happened so quick, I saw him near her but I cannot remember it fully, I know he was close but don't think I seen it, as I was doing the lifting. Must have just had my head down and missed it."

83. The witnesses in closest proximity therefore did not adequately hear to give a definitive account of the events or could not be certain of what they saw or heard. It is possible that Mr Beddow could have concluded that the act of pushing AG's head down towards his groin or in that direction was consistent with Mr Chapman saying that 'if you want to bite something bite this'. That might provide a possible link. But Mr Beddow does not say that nor does he draw any such conclusion or inference. What he ultimately says is: "I do believe on the balance of the evidence presented that you did what was reported by AG". That was merely restating a conclusion not a reason.

84. The *only* reason that Mr Beddow gives in deciding to believe the account of AG is in the following passage of the dismissal letter:

It was evident at the investigation meeting that you were not able to remember the incident and when questioned said that you couldn't remember any grabbing or shoving of the head down to your groin and what you said to AG at this time. Upon viewing the CCTV footage at the investigation meeting, your view is AG is not distressed and that it was just banter and couldn't understand why she would do this?

Although after viewing the CCTV footage you were able to recall the incident you are unable to remember what you said when you grabbed and shoved (AG's) head…..

85. That passage, appearing as it does at the beginning of the reasons for dismissal letter sets out the only rationale for deciding the conflicting accounts. In other words, Mr Chapman was not believed because when questioned he could not remember the incident but when shown the CCTV he was able to do so. It is essentially that Mr Chapman has not been consistent or that he has shifted his position. That was unfair and unreasonable because when Mr Chapman was initially asked of the incident, prior to being shown the CCTV footage, he had not placed any significance on the events of the day and so it was hardly surprising he could not remember. The fact that nothing had been said to him about for two weeks thereafter no doubt confirmed his view that there was nothing exceptional about the events of 13 April. Had the CCTV footage been shown at the very beginning of the interview Mr Chapman may have given a different answer. Mr Beddow knew from the investigation interview notes that this is how the process had been conducted but he fails to take these matters into account. A reasonable employer would have done so. A reasonable employer would have recognised the dangers of the interview being conducted in the manner that it was.

86. Mr Chapman accepts that he swore but that of itself would not be dismissible as AG had also sworn but was not subject to any disciplinary action. What was clearly regarded as more heinous was the language used combined with the relevant words. In relation to the latter Mr Beddow disbelieved the Claimant but without giving a proper or valid reason or explanation. In short, he may have held an honest belief but it was not based on reasonable grounds.

87. In relation to the physical assault, this refers to the same event where Mr Chapman puts his arm around AG's neck. There is clear movement of AG's head downwards though nowhere near the groin region. Mr Beddow does not explain why he elevates that to an act of physical assault worthy of dismissal when he did reach the same conclusion for Mr Chapman lifting Miss Adams off her feet. He may have regarded the latter as banter but again he does not say so.

88. In relation to the issue of sexual harassment, Mr Butler submits that this is not a case of banter and that this is simply a red herring. I do not entirely agree. It is sometimes said that context is everything. In isolation, and without any reciprocal act from AG, this would have greater force. However, in this case AG, whilst not in any way encouraging Mr Chapman's behaviour, admits to warning Mr Chapman that she is going to bite him and possibly does so. It is in the context of that the statement as to 'if you want to bite something bite this' has to be viewed.

89. Mr Beddow also falls into the trap of thinking that he *has* to decide whom to believe and by implication who is to be disbelieved. If he could not fairly conclude who to believe on the evidence, such as it was, it was open to him (as **Roldan** suggests), to say the evidence was inconclusive. There is nothing to suggest that such a possibility was contemplated.

90. Mr Butler submits that the Mr Beddow gave genuine and adequate consideration to the allegations. Again, I disagree and I do so for two reasons. Firstly, there is more than a sense of indignation in Mr Beddow's language which is a continuation of the predetermination mindset introduced by Mr Browning:

It is quite concerning that TC does not appear to understand the severity of his actions

…. appalling targeted behaviour that constitutes physical and sexual harassment of a fellow employee.

your extremely offensive behaviour and conduct.

91. The second is the relatively short amount of time that Mr Beddow took to decide. The disciplinary hearing began at 9.37am and lasted until 3.17pm when Mr Beddow retired for deliberations. At 4.15pm, less than an hour later, Mr Beddow was able to reach his decision. The relatively short amount of time spent in deliberation could not have meant that Mr Beddow gave this matter the genuine and careful consideration as suggested on his behalf.

Ms Tebbutt

92. Ms Tebbutt is essentially dismissed for a failure of management to spot and stop harassment and/or to do something about it after it happened. That of course presupposes that Ms Tebbutt had seen what had gone on between AG and Mr Chapman, something which Ms Tebbutt has steadfastly denied throughout the whole process.

93. In relation to Ms Tebbutt I conclude that the decision to dismiss fell outside the band of reasonable responses for the following reasons:

93.1. There was no evidence whatsoever for the Respondent to form a reasonable belief that Ms Tebbutt did hear or see what was going on. There is not a single witness interviewed who could say definitively say (other than AG) that Miss Tebbutt had seen what had gone on but turned a blind eye. From the CCTV footage, there is nothing to suggest that AG approaches Ms Tebbutt to tell her what has happened. She is some distance away in all of the relevant scenes.

93.2. The Respondent failed to adequately take into account Ms Tebbutt's very long service of 39 years. Indeed, her length of service is almost seen as a disadvantage by Mr Beddow who seems to think that given her long period of service Ms Tebbutt ought to have performed better. No reasonable employer would regard length of service as a disadvantage but rather a mitigating circumstance.

93.3. Mr Beddow did not believe Ms Tebbutt's explanation that she did not see or hear what had happened. However, he gives no reason as to why he does not believe her even though there are good reasons why he *could* have believed her, such as the fact that she is seen getting on with her own work, she is some distance away and there is the wholesale absence of any witness testimony that she did hear. He dismisses an employee of very long service on an assumption which given the circumstances was not a belief that could have been based on reasonable grounds. His dismissal letter fails to explain why he does not accept Ms Tebbutt's consistent and repeated assertion that she did not hear or see the take down incident.

The appeals

94. The earlier delays in the investigation are sadly eclipsed by the delays in the appeals processes. An appeal is an important part of the disciplinary process. In

order to ensure that any appeal realistically gives an opportunity of reinstatement the appeal must be conducted without reasonable delay.

95. There are very significant delays in relation to both appeals. Whilst it is unfortunate and impossible to predict in advance that an allegation of bias might be raised, there was no great urgency in reconvening the appeal meeting in the case of Mr Chapman from 19 November 2018 to 14 January 2019. By that stage of course tribunal proceedings had already been issued to protect the Claimant's position on time limits.

96. In the case of Ms Tebbutt, the reason for the adjournment was because of the unfortunate failure by the Respondent's officers to ensure that the appeal members were sent their papers in time. One might assume that in such circumstances the wheels of restoring the appeal hearing might move more quickly but that was not the case. The appeal hearing was not reconvened until 22 March 2019, almost two months later. As in the case of Mr Chapman, tribunal proceedings had already been issued by this stage.

97. The appeal panel fails to give any reasoned view for its conclusions appearing instead to use a formulaic explanation for its conclusions on both decisions. Furthermore, Councillor Cank's witness statement does not entirely reflect the deliberations of the panel in Ms Tebbutt's case. In fact the letter dismissing the appeal in the case of Ms Tebbutt shows that there was some doubt entertained about her knowledge:

"Whilst the Committee took a view that it cannot be definitively established whether or not you fully observed the incident of assault that took place on AG, they did not consider that this in itself was the sole factor under consideration. Overall, they felt that there was sufficient evidence to satisfy them that your lack of control and intervention on that day, resulted in the poor behaviour from an employee under your direction escalating to a more serious incident and physical assault on AG."

98. If Ms Tebbutt did not see the incidents, and it could not be established fully that she did, then that *had* to be the deciding or sole factor. The absence of personal knowledge removes culpability. It has not been suggested at any point in these proceedings that, in the absence of knowledge of the events, Ms Tebbutt should still have been dismissed.

99. There is reference to Ms Tebbutt's long service in the appeal decision and previous good record and whilst it is said that both were taken into account, it is not clear what weight, if any, was attached to length of service.

Wrongful dismissal

100. The Respondent relies upon a breach of the implied duty of mutual trust and confidence and, somewhat tentatively, a breach of an express term as to the Respondent's Code of Conduct to justify dismissal.

101. The Respondent has failed in my judgment to establish that the misconduct did as a matter of fact occur. It has not called any relevant evidence to discharge the burden other than the CCTV evidence which of course has no audio. The Respondent has fallen into the trap of thinking that the only relevant witnesses would be the dismissing officer and an appeal panel member. Whilst that is ordinarily sufficient for unfair dismissal purposes it is not generally sufficient for the wrongful dismissal claims. Absent proof of misconduct (on a balance of probabilities) then the Code of Conduct becomes irrelevant. It may have been difficult to call AG but not impossible. At best, the Respondent is able to establish physical contact by Mr Chapman from the CCTV evidence but the physical contact of itself does not establish sufficient evidence of a repudiatory breach, let alone physical assault or sexual harassment.

102. In relation to Ms Tebbutt I am referred to the case of **Adesokan v Sainsburys [2017] EWCA Civ 22**, which is generally authority for the proposition that negligence can also amount to conduct and also that the tribunal should consider whether the breach, if any, was sufficiently grave and weighty to justify summary dismissal.

103. Whilst it is possible for inaction to amount to gross misconduct, as it was in **Adesokan**, such instances are rare. This case is not on all fours with **Adesokan**, which arose out of its own special circumstances. In any event on a breach of contract claim the Respondent must show on a balance of probabilities evidence to establish the fact that Ms Tebbutt did see or hear the events and failed to act, which they are unable to do. The **Adesokan** case is of course irrelevant to the circumstances of Mr Chapman.

104. I am not satisfied that on the facts the Respondent has, on a balance of probabilities established any repudiatory breach, either of an express term or of the implied term of trust and confidence. The complaints of wrongful dismissal in both cases therefore succeed.

105. The issue of remedy is adjourned to include the issues of **Polkey** and contribution.

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Employment Judge Ahmed

Date: 7 December 2020

JUDGMENT SENT TO THE PARTIES ON
8 December 2020

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FOR THE TRIBUNAL OFFICE

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.