EMPLOYMENT TRIBUNALS

Claimant: Mr C Watmough

Respondent: Liverpool City Council

Heard at: Manchester **On:** 1 February 2021
12 February 2021
(in Chambers)

Before: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Mr T Kenward, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was fairly dismissed.

2. Deduction of wages fails and is dismissed.

REASONS

1. The claimant brings a claim of unfair dismissal and unlawful deduction of wages. The claimant was dismissed by the respondent on 20 December 2019 for gross misconduct. The claimant also claims that he had been underpaid a shift allowance which the respondent had wrongly calculated.

2. The respondent states that the claimant was fairly dismissed and that he was not eligible for the shift allowance that he is claiming.

The Issues

3. The issues for the Tribunal to determine are as follows:

Unfair Dismissal

(1) What was the reason or principal reason for the dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed the misconduct.

(2) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide in particular whether:

(i) there were reasonable grounds for that belief;

(ii) at the time the belief was formed the respondent had carried out a reasonable investigation;

(iii) the respondent otherwise acted in a procedurally fair manner;

(iv) the dismissal was within the range of reasonable responses.

Remedy for Unfair Dismissal

(3) Does the claimant wish to be reinstated to his previous employment?

(4) Does the claimant to be re-engaged in comparable employment or other suitable employment?

(5) Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and if the claimant caused or contributed to the dismissal whether it would be just.

(6) Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and if the claimant caused or contributed to the dismissal whether it would be just.

(7) What should the terms of the re-engagement order be?

(8) If there is a compensatory award, how much should it be? The Tribunal will decide:

(i) What financial losses has the dismissal caused the claimant?

(ii) Has the claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?

(iii) If not, for what period of loss should the claimant be compensated?

(iv) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

(v) If so, how much should the claimant's compensation be reduced by, if at all?

(vi) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

(vii) Did the respondent or the claimant unreasonably fail to comply with it, and if so, how?

(viii) If so, is it just and equitable to increase or decrease any award payable to the claimant, and by what proportion up to 25%?

(ix) If the claimant was unfairly dismissed, did he cause or contribute to the dismissal by blameworthy conduct?

(x) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

(xi) Does the statutory cap of 52 weeks' pay or £86,444 apply?

(9) What basic award is payable to the claimant, if any?

(10) Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal?

(11) If so, to what extent?

Unauthorised Deductions

(12) Did the respondent make unauthorised deductions from the claimant's wages, and if so, how much was deducted? The Tribunal may consider the following:

(i) Were the wages paid to the claimant less than the wages he should have been paid?

(ii) Was any deduction authorised by statute?

(iii) Was any deduction required or authorised by a written term of the contract?

(iv) Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

(v) Did the claimant agree in writing to the deduction before it was made?

(vi) How much is the claimant owed?

4. The claimant's claim is that he was entitled to a shift allowance which was payable to other members of staff. The respondent states that although the claimant worked flexibly, he worked a set pattern and set hours. The shift allowance was only payable to individuals who had a work pattern that was not permanent although it might be a set pattern for a week or a month or a number of weeks. The respondent says that in addition the claimant was in receipt of irregular hours and weekend working allowance which would not be payable if he was in receipt of shift

allowance. The claimant pointed out, however, that shift allowance was higher overall and therefore if he was eligible for the shift allowance, he would make a net gain. There was a discussion about whether this claim should be postponed as there was some thought that the union (of which the claimant was not a member) was considering bringing similar cases. However there was no definite information about this and the respondent opposed the claims being severed at this late stage given that they had their witnesses on this point present. There were also costs implications to postponing part of the case at this stage. On balance I decided it was not within the overriding objective for the matters to be severed.

Witnesses

5. The Tribunal heard from the following witnesses: for the claimant, the claimant himself and Mr Robert Jardine (co-worker); and for the respondent Mr Ivan Hart (Operation Delivery Group Manager for ICT), and Jill Traynor (Payroll and Pensions Office Lead).

Findings of Fact

6. The Tribunal's findings of fact are as follows.

7. The claimant began working for the respondent on 4 November 2013 as a Customer Service Adviser working in a Contact Centre in Liverpool. The claimant had disciplinary proceedings taken against him in 2018 regarding an allegation of gross misconduct which had resulted in a final written warning.

8. On 17 May an anonymous whistleblowing complaint was made about the claimant's conduct. This stated:

> "I want to complain about the conduct and behaviour of Craig Watmough who works in the Contact Centre in Customer Access."

Full details of the concern:

> He has gone too far. Today, Friday 17 May 2019, he was walking around the Contact Centre showing a video to staff of someone being sexually assaulted. He has shown me without warning me of the content. I was really shocked as it showed a man being anally penetrated with a sex toy while asleep (sexually assaulted). I have found this deeply disturbing that he thinks this behaviour is acceptable. He has showed it to at least ten other people and seemed to find it funny. I watched others react with a mixture of shock and disgust. Craig is an intimidating character and I did not feel in a position to be able to challenge him but on reflection I feel something needs to be done about his behaviour. I don't feel this is something I can raise openly for fear or him targeting and victimising me which is I'm raising my concerns this way. Our manager wasn't present when this happened. The HR Manager but close by but I don't think he saw what was going on. This is not a one-off. Craig is always talking about women sexually, his sex life, who he wants to have sex with, in a loud and intimidating manner. Myself and others have had enough and think his general behaviour is unacceptable. When somebody does challenge him he just says we have to accept the way he is."

9. There was also further information:

> "Today, 17 May 2019, in the afternoon, under specific times and dates, but also on other occasions particularly when his manager is not present, which is often.

The evidence was:

> "The evidence is as above and anyone who tells the truth would confirm the content of the video he forced others to watch without their consent."

Further details:

> "I fear him targeting me and trying to find out who reported him so want this treated with confidentiality but also want this investigated and his behaviour challenged."

10. The claimant's manager, Paula Moss, discussed the incident with the claimant on 24 May. The content of this discussion was disputed by the claimant. Paula Moss was interviewed on 9 July in the course of the investigation and stated that following the whistleblowing referral this was sent to her to review as a management issue, and she met with the claimant to see if the allegation had any substance. She went on to say:

> "I asked Craig had he shown sexually explicit videos to colleagues in the Contact Centre, Craig replied 'no'. I asked Craig had he shown a video of a man being anally sexually penetrated while asleep. Craig responded that he had viewed a video in the office and may have shared it with Dan Warburton or one of his colleagues in HR – Craig stated they often send each other 'lads videos'. He didn't recall sharing it with anyone else. He confirmed it was sexually explicit but it wasn't as bad as the allegation was making it out to be. He stated it just implied sexual penetration but you could not actually see it. Craig asked who made the allegation and I explained it was confidential. I read out the allegation to him."

The claimant confirmed he still had the video on his phone:

> "I did not view the video but I asked him to keep it in case it was required as evidence at a later date."

11. Ms Moss said that he would not name the colleagues in HR to he shared the video with, and she had put it to the claimant about previous inappropriate behaviour but he seemed perplexed. She agreed she had never seen him behaving appropriately or being intimidating. She recalled who was in the office on the day in question. She stated that Dan Warburton was not in work that day, and she also said that the claimant became stressed over the situation and requested to take leave rather than go back to the workplace. Ms Moss had advised him to go into the tea room to have a drink and then see how he was feeling. However, he later advised he was not feeling well and went home sick.

12. Apart from the going home sick section the claimant disputed most of this account of what had happened. He said Ms Moss had not read the charge out to

him and that he had not agreed that there was any such video or that he had it on his phone, neither was he told to save it. He did agree that a meeting took place.

13. Ms Viv Wilkinson, Transformation Manager, was asked to undertake an investigation. She interviewed a number of members of staff and produced all her interview records as part of her investigation. She interviewed four members of staff who sat near the claimant. She did not go on to interview every single person who might have seen the video as she felt she had enough evidence.

Interview with Scott Clavis

14. Ms Wilkinson interviewed Scott Clavis, who said that he had the claimant had never shown him any sexually explicit videos, and he did not have a friendly relationship with the claimant. He said "a week after the allegation was made I overheard people talking in the office about him. One girl is very loud and she was explaining that someone had grassed him up for sharing videos on his phone". What he recalled of 17 May was that he was working on something very sensitive, he did recall the claimant coming over to the team and that he was showing his phone to Steve Bowman and Gary Wilkinson. He did not know what it was but he assumed it was football related as that was what the claimant tended to chat about with Gary Wilkinson. He had not heard the claimant say anything sexually inappropriate or intimidating, but he had suspended him a while ago and therefore the claimant appeared to stay clear of him.

Interview with Gary Wilkinson

15. Gary Wilkinson said that he did not know the claimant very well. He may have shared a footy video in the past and he had not heard him talk inappropriately about sex but he did not sit near the claimant.

Interview with Steve Bowman

16. Steve Bowman also denied that the claimant had shared sexually explicit videos with him. He said, "I don't really speak to him" and he said he did not know the claimant that well and he had never heard him talking inappropriately about sex.

Interview with Rebecca Gleeson

17. She interviewed Rebecca Gleeson who agreed that the claimant had shown her an inappropriate video. She said:

> "There was one he showed me which was inappropriate and everyone is aware of the no phone policy but I would rather not discuss the content. This is not the first time I've been interviewed about Craig's misconduct and I feel it uncomfortable to be honest.
>
> Q: Do you feel intimidated by Craig?
>
> A: No, I'm not intimidated by him he just doesn't seem to know where to draw the line.
>
> Q: Have you noticed him being intimidating to others?

A: Not intimidation, just immature for a grown man. He gets very excitable and can be inappropriate at times but I don't think he realises what he's doing. There no malice intended, he's just childish.

Q: Was the video of a sexual nature?

A: Yes.

Q: What promoted him to share it?

A: He asked me if I wanted to see something funny, which I replied no, but then he still showed it to me anyway. I responded that I didn't think it was funny so he walked away round the office to show to others.

Q: Do you recall who he showed it to?

A: No, I just remember him walking round with his phone.

Q: Did you report it to any managers?

A: No, I felt I'd dealt with it directly so I didn't feel the need.

Q: Can you give any examples of his inappropriate behaviour? Is it of a sexual nature?

A: Some conversations he has about his experience of dating apps and the images that women have sent him.

Q: Does anyone challenge or comment?

A: I am on the same team as Craig and it predominantly older women, some who will challenge him and tell him some of the discussions are not appropriate so he will apologise.

Q: Has he shown you any inappropriate videos in the past?

A: No.

Q: Are you close enough to hear his conversations?

A: Do you recall what shift you were on, on 17 May?

Q: It would either have been 11.00am to 10.00pm or 9.00am to 8.00pm. I'm on the same shifts as Craig on the out of hours team."

Interview with Lauren Gray

18. Lauren Gray said that the claimant had not shared any sexually explicit videos with her but she knew there was a video he was sharing with others but she did not see it. She was aware because he tried to show it to her but she was busy at the time when he came over so she did not see it properly, she just got a glance and turned away. She said she did not find the claimant intimidating.

Interview with Julie Peters

19. Julie Peters denied that the claimant had shared any inappropriate videos with her, however she had heard him having conversations with others in the office about his sexual experiences with a past girlfriend and inappropriate comments. She said, "He will apologise if anybody challenges him but he doesn't seem to understand the impact of his actions". She did not find the claimant intimidating, she would just tell him to stop. She said she had not seen the claimant share videos with colleagues but was aware there had been an incident as she overheard conversations of him sharing a video and Rebecca Gleeson had explained some people could find it offensive.

Interview with Anita Ross

20. Anita Ross said that she was aware of the incident in May and she was aware that the claimant was sharing videos with other colleagues but he did not show it to her. He was being loud, excitable and laughing and she was conscious of his behaviour "as we deal with customer phone calls and the HR team sit behind us". She did not see the video but overheard others talking about someone being raped using a sex toy. She could not remember who the claimant shared the video with, but possibly Rebecca Gleeson and Lauren Gray. She said:

> "He doesn't tend to share anything with me. He has made inappropriate comments in the past about my age and when I've challenged him he will apologise, but I've explained I've got sons his age and would not accept that behaviour from them so would not accept it from him either. He always defends himself, blaming his behaviour on his poor upbringing."

21. Ms Ross was asked if that was the first time he shared videos and she was not sure: she felt he had his phone out a lot.

22. Regarding inappropriate discussion she said there had been any with her directly but she had overheard conversations, including some inappropriate sexual discussions about what he has viewed or what he has been up to. She said that when he goes too far the younger ones will tell him to go away. She said he was not intimidating to her as she would just tell him if she was not happy. She said he was "very immature at times and struggles to sit still, like he's hyperactive". She did not think the Contact Centre was the right environment for him, although he was very knowledgeable and dealt with customers well: he just tends to wander. She felt his conversations were inappropriate sometimes in the workplace and also for the environment when they were taking calls, and she was aware he had been suspended in the past for his behaviour but he did not seem able to adapt.

23. The claimant was interviewed on Monday 21 October. He explained that Paula Moss' evidence that she had discussed the allegation with him and asked him to keep a copy of the video was not true. He said, "she only explained that there had been an allegation made" that he had shared a sex video showing penetration and that he had said something inappropriate. However, Paula Moss did not have a copy of the video or know that the claimant was supposed to have said that. The claimant had replied to Paula Moss that he had not shared a video. Paula Moss had said, "do you really want me to go and have to ask everyone?" and he had said "yes, if that's what you need to do".

24. The claimant denied he had shared a sexually explicit video and he denied that he had said anything sexual to offend anybody. He said that when that was mentioned he had stormed off and went off sick as he suffered from anxiety.

25. The claimant was asked about whether he had shown videos to people at work which were not sex related i.e. football ones, and he said why was she asking questions not related to the allegation. Ms Wilkinson said it was relevant because of the no phone policy and to validate other colleagues' witness statements. He stated that he may need to see advice and she said she would be making a note that he did not respond to the question. He explained he shared videos during work in the canteen area whilst on his break: he could not recall showing any during working hours. He said that Paula Moss had not read the allegation out and so he did not know what it was, so Ms Wilkinson read out the allegations. The claimant said it was the first time he had been made aware of the content of the allegation or of the video other than "sexual penetration", and he did not know what he was supposed to have said. He said this was a lot more serious than he thought. He said he was not intimidating and his behaviour was not inappropriate.

26. In relation to conversations in the office regarding sex, the claimant said:

> "When the allegation was made I was with my girlfriend so why would I be discussing online dating or what I would like to do to others? I do not want to sound harsh but there is no-one in work I would like to sleep with. They are either miserable or twice my age."

27. The claimant denied he had discussed his sex life with his girlfriend. He would not give the names of anybody who he had shared his videos with.

28. The claimant amended this to deny that he had said that he had suffered from anxiety and he said that the question regarding the phone policy was not put in that way.

29. Ms Wilkinson recommended that a disciplinary hearing be convened to consider the allegation in accordance with the respondent's disciplinary procedure.

30. The conclusion was that Rebecca Gleeson confirmed the claimant had shared an inappropriate sexual video. Lauren Gray confirmed he had tried to show it her but she said she was busy. Julie Peters stated she had heard Craig having inappropriate conversations but had not seen him sharing videos. Anita Ross witnessed the claimant sharing a video but had not personally seen it, and had overheard others describing it as someone being raped with a sex toy. Paula Moss had said that the claimant had admitted that he might have shared a sexually explicit video with Dan Warburton or one of his colleagues in HR, although it was not as bad as the allegation was making out: it just implied sexual penetration but you could not actually see it, and that she had told the claimant to keep the video for evidence later.

31. The claimant, Ms Wilkinson recorded, had denied that he had said this and that Ms Moss' comments were untrue.

32. It was Ms Wilkinson's view that the allegation had been substantiated and that a disciplinary hearing be convened to consider the allegation that the claimant had

behaved inappropriately by sharing sexually explicit images with colleagues during work time.

33. The disciplinary hearing was held on 2 December 2019, although I did not see an invitation to this meeting. The claimant had received the investigation report and at the meeting Viv Wilkinson summed it up. The claimant made the point that he did not admit showing the video in the conversation with Paula Moss. He said she asked him if he had any explicit videos on his phone and he said to the panel:

> "There are personal videos and images of myself on my phone. Paula Moss did not specify the content of the video during the meeting."

34. The claimant confirmed that the meeting was cut short as he became anxious. Ms Wilkinson explained that Dan Warburton was not in the office that day so was not interviewed. She interviewed eight members of staff and decided there was sufficient evidence to go ahead without interviewing further witnesses. The actual witnesses were to some extent invited to the disciplinary hearing, and the claimant was allowed to cross examine them.

35. Paula Moss attended. She confirmed her evidence and she said she did read out the whole allegation. She did ask about a video rather than just images. She was adamant she read out the allegation word for word.

36. Anita Ross then attended. Anita Ross at the hearing agreed with the details of her statement and she also added:

> "I could hear CW getting excited and loud but I was dealing with a call at the time. I overheard CW saying, 'basically rape by dildo' and aware of something going on."

37. The claimant commented that Ms Moss had not seen the video, she was on a call. Ms Moss agreed she did not see who saw it but it was discussed by staff afterwards.

38. Mr Clavis gave evidence and said he recalled the claimant coming over to speak to him at one point but that was all: he had no recollection of what it was about.

39. Gary Wilkinson stated that he had been shown a video but he thinks it was a football video, and that he was just shown it on screen. The claimant did not ask him any questions.

40. Steve Bowman gave evidence. The claimant had no questions for him. He did confirm that there was some football competition going on and he assumed that was what it was about, when videos had been shown before this and there had been chatting and laughing but he did not see it.

41. Lauren Gray confirmed her statement. There were no questions from the claimant for her.

42. There were two further witnesses, Rebecca Gleeson and Julie Peters, who were currently on sick leave, and the claimant needed to question Ms Gleeson as

she had said she saw the video. He wanted her to be there face to face and he alleged that Julie Peters was not in that day, or if she was she was not on his floor.

43. The meeting was adjourned to see when the other two witnesses were going to be back in work, but the claimant was advised if not written questions would be submitted to them.

44. This process took place before the next hearing but Rebecca Gleeson did not want to add anything to her statement and Ms Wilkinson said that she was happy with the statement.

45. Julie Peters was invited to the meeting. She was asked whether she was in the office on 17 May and she said she was not. She said she had overheard a conversation about what had happened, and that on the day the claimant was asked to go and see Paula Moss and he gave back from the meeting and said, "They are all fucking grasses". She said, "I was then told that it was about an explicit by Rebecca Gleeson and Dan Warburton". She was asked whether they said they had seen the video. She said, "Dan Warburton said he had seen it and Rebecca Gleeson had seen it", and she was asked:

> Q: What was the video showing?
>
> A: Julie Peters said it was a stag do. There was a man asleep. Another man was putting something up the fella's bum.

46. Julie Peters confirmed it was what other people had said about it. She said she had heard Dan Warburton talking about it and that he and Rebecca Gleeson had seen it, and that she would not know anything other than what she was told as she was not in on the actual day. A couple of others said they knew about it also.

47. The claimant said it was just Rebecca Gleeson who said she had seen the video, it was only her, and he had never shown her anything.

48. The claimant asked why was Dan Warburton not called as a witness? Ms Wilkinson explained that he was not in on the day of the incident. The claimant was adamant he wanted to question Dan Warburton. He said that it was hearsay and no-one had seen the video other than Rebecca Gleeson and he could not challenge her, "she can't prove it".

49. Paula Moss' statement was not sound as she assumed Dan Warburton was working that day but his shift was changed with someone else. Here the claimant was implying that she had made this up and chosen Dan Warburton as a likely person the claimant would have said he had shared it with, but that this was undermined by the fact that he was not in work that day unbeknownst to her. The claimant had not signed anything to agree to what was said in the meeting. She had lied about it. The first time he knew about the fill details was at the investigation interview. The whistleblowing complaint said the claimant had shown the video to at least ten people but only one stated that they had seen the video.

50. The claimant agreed that Paula Moss had asked him if he had any sexual images on his phone and that she had said to keep them. He said it was not like how she had put it in her statement.

51. Ms Wilkinson summed up and stated there was sufficient evidence that the claimant had shared a sexually explicit video. She relied on Paula Moss' evidence; Lauren Gray's account that the claimant had tried to show her a video; Anita Ross that the claimant was trying to show people a video, that he was being loud and excitable and laughing and that she heard him say, "basically it's rape with a dildo". Julie Peters had given evidence of other conversations and had been told by Rebecca Gleeson and Dan Warburton that Rebecca Gleeson had commented "some people would find the video offensive". Although these conversations had been later they were of corroborative value. Rebecca Gleeson had confirmed that the claimant had shown her a sex video and she had said it was inappropriate and she said she did not want to see it but he still showed it to her. She confirmed that he walked around the office to show it to others.

52. The claimant said:

> "The whole thing is fictional. You have picked and chosen who you've listened to. There is one person who said she saw it. It's all hearsay, he said/she said. There are more people who have asked and they said 'no'. I have asked her to prove it and she couldn't. Sometimes my …. things past and lifestyle, I have no filter, but if someone says stop I will. It's all over the Contact Centre. We are all adults. In PM's statement she only half-heartedly explained and changed the answers to suit her conclusions. She picked and chose. No-one has shown or told me about what was in the video. I have sexual images on my phone. JP has explained more today than anyone else has. I don't know what the video is."

53. The meeting was then ended and Mr Hart said he would consider the position and write to the claimant with an outcome.

54. Mr Hart wrote to the claimant dismissing him on 20 December 2019, and he stated that he was satisfied there was sufficient evidence to believe that the claimant had shared a video with colleagues on 17 May, that it was of a sexually explicit nature and that the whistleblowing referral describes a true reflection of events on 17 May. He was satisfied the allegation was proven and that it amounted to gross misconduct, and accordingly the appropriate sanction, having regard to all of the matters raised including any mitigation, was dismissal. He added:

> "While the sanction to summarily dismiss is based on the current allegation of gross misconduct I must advise you that notwithstanding this decision the finding of the allegation being proven would have led to your dismissal in any event given a sanction of final written warning was already live on your personnel file at the time of the current misconduct."

55. The claimant was advised of his right to appeal.

56. The claimant complained that Mr Hart sent his conclusions letter to the wrong email address and therefore he did not receive it for some time, by which time he was out of time to bring an appeal. The claimant's evidence was he spoke to somebody in HR who had simply told him it was too late and he did not pursue the matter further. Mr Hart explained that this was simply the email given to him by Human Resources. There was some evidence that Human Resources had used that email in communicating with the claimant.

57. In relation to the claimant's claim for shift allowance, it was the respondent's case that the claimant was not eligible for shift allowance as he worked a permanent pattern of hours, although the days might be different as it was four days on/four days off, and to be eligible for shift allowance whilst you might have brief repetitive patterns of hours or days, overall there was no permanence to those hours.

58. Jill Traynor explained that irregular hours, which the claimant received, were paid at 10% of hours worked multiplied by the hourly rate where, as part of normal working week, the employee's hours during Monday to Friday fall outside the Authority's normal hours and were paid for the hours worked outside of normal office hours (normal office hours being 8.00am until 6.00pm). The claimant was assessed as eligible for irregular hours payment and weekend allowance when he worked weekends. She advised that from 1 July 2015 to 17 January 2016 the claimant worked five days out of seven starting at 12.00pm and finishing at 8.00pm. He received an irregular hours' payment for hours worked between 6.00-8.00pm and weekend working for days worked on Saturday and Sunday. Between 8 January 2016 and 3 February 2019 he worked four days on and four days off. The pattern was set hours starting at 11.00am and finishing at 10.00pm. He received an irregular hours' payment for hours between 6-10 and weekend working allowance for days worked on Saturday and Sunday. From 4 February 2019 to 20 December 2019 the claimant worked four days on and four days off pattern, and was set hours starting at 9.00am and finishing at 8.00pm. He received an irregular hours' payment for hours between 6 and 8 and weekend working allowance when the days fell on Saturday and Sunday. It was explained that he had wished to change his hours in order to be more available to see his son following a separation from his partner, and that this was all recorded in emails particularly that he was advised he would be receiving less irregular hours' payments because he was working less hours outside of normal hours than he had previously been doing.

59. Ms Traynor said:

> "As there was no variation to the start and end times within each individual rota the set pattern would not guarantee a shift allowance payment. It was assessed as being an entitlement to irregular and weekend hours' allowance payment. In each rota the start and end times are defined and there is no variation within each pattern to the starting and finishing times either."

60. Shift working is paid at 15% of salary for hours worked. The definition of shift working is:

> "(1) A work activity scheduled outside standard working hours where there may be a handover of duty from one individual or work group to another;
>
> (2) A pattern of work where one employee replaces another on the same job within 24 hour period; or
>
> (3) Individuals whose working pattern does not vary do not qualify for shift payment."

61. The process was that managers submitted up-to-date working patterns directly to Payroll and Pensions, who then assessed them and paid what they fell into.

62. The claimant had no evidence to show that the shift allowance workers were improperly receiving that allowance or that he met the definition for shift allowance. His hours had changed but the respondnet showed from the email correspondence that they were agreed changes for various reason, in particular at one point because the claimant wanted to spend more time with his son so wanted to finish at 6 rather than 8 pm.

The Law

Unfair Dismissal

63. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

> "A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee."

64. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

> "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 sufficient reason for dismissing the employee; and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

65. In relation to a conduct dismissal **British Home Stores Limited v Burchell [1980] EAT** sets out the test to be applied where the reason relied on is conduct. This is:

> (1) did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?
>
> (2) were there reasonable grounds on which to base that belief?
>
> (3) was a reasonable investigation carried out?

66. In relation to a professional job subject to a regulatory body where a finding may affect the individual's ability to continue in their chosen career the employer must be particularly careful in its investigation and in reaching its conclusions **A vs B EAT (2003**) and **Salford Royal NHS Foundation Trust v Roldan CA (2010)**

67. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982] EAT** states that the function of the Tribunal:

> "…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."

68. The Tribunal must not substitute its own view for the range of reasonable responses test.

69. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure. In **Sainsbury's PLC v Hitt [2003]** the court established that:

> "The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."

70. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

Polkey

71. The House of Lords in a decision of **Polkey v A E Dayton Services Limited [1988]** decided that where a case is procedurally unfair a decision would still be of unfair dismissal even if there was a strong argument the procedural irregularity made no difference to the outcome unless the procedural irregularity would have been utterly useless of futile. Rather the question of the irregularity making no difference would be addressed in terms of remedy. This principle has also been extended to cases where dismissal is substantively unfair, although it is most likely to apply to procedural irregularity cases. The outcome can be that it would have made no difference and the claimant, although unfair dismissed, would be entitled to no compensation or the rectification of the problem would have resulted in a delay in the claimant being dismissed and therefore the claimant receives compensation for that delayed period.

Contributory conduct

72. The Tribunal must always consider whether it would be just and equitable to reduce the amount of the compensatory award pursuant to section 123(6) of the Employment Rights Act 1996, where an employee by blameworthy or culpable actions, caused or contributed to his dismissal. If the claimant did so do the Tribunal will have to assess by what proportion it would be just and equitable to reduce any compensatory award, usually expressed in percentage terms. The three principles are:

(1) That the relevant action must be culpable or blameworthy;

(2) It must have actually caused or contributed to the dismissal; and

(3) It must be just and equitable to reduce the award by the proportionate specified.

73. These principles were set out in **Nelson v BBC No. 2 [1980]** Court of Appeal.

Unlawful Deductions of Wages

74. The claimant brings a claim of unlawful deduction of wages i.e. under Part II of the Employment Rights Act 1996.

75. Part 2 of the Employment Rights Act 1996 sets out the statutory requirements for an unlawful deduction of wages claim. Section 27(1) defines wages as "any sum payable to the worker in connection with his employment". Wages includes commission payments. Expenses, however are excluded but these can be recovered as a breach of contract.

76. Under section 13(1) of the 1996 Act, "A worker has the right not to suffer unauthorised deductions". A deduction is defined in the following terms:

> "Where the total amount of wages payable on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated…as a deduction made by the employer from the worker's wages on that occasion."

77. The deduction referred to in "after deductions" refers to the statutory deductions such as tax and national insurance.

78. The question of what is properly payable has to be determined by the Tribunal on normal contractual principles.

79. In addition, the payment in question must be capable of quantification in order to constitute wages properly payable under section 13(3).

Unfair Dismissal

80. I find that the respondent does meet the test in the **BHS v Burchell** case. There was sufficient investigation. I understand the claimant's point that only one person in fact said she had seen the video, but there was sufficient corroborating evidence to believe the claimant had tried to show it or shown it to other members of staff. These include Lauren Gray's evidence and Anita Ross's evidence. Further Julie Peters' added to her evidence at the disciplinary hearing which reinforced and supported the whistleblowing description . All the 'hearsay' evidence was remarkably consistent in how it described the contents of the video.

81. Although the claimant challenges what Paula Moss said he does agree with some of what she recounts, and on the balance of probabilities it appears highly

unlikely that she would include some information and not other information. It is much more likely that she gives a complete record. As to whether the fact that Dan Warburton was not in that day ought to undermine her testimony, Ms Moss is just recording what the claimant said and given that I have accept it was reasonable of the respondent to rely on her evidence. it may well be that the claimant thought Dan Warburton was in that day and he was not.

82. The test for the investigation and the level of proof required to form a genuine belief is set out in **Sainsbury's v Hitt**. It is within the range of responses, and I find that this investigation comes within that. Whilst it would have been towards the higher end of that range had the respondent been able to identify more than one person who said they had seen the video, there was sufficient overall evidence to come to the conclusions that they drew.

83. The procedural issues raised were (1) not interviewing Dan Warburton and (2) not allowing an appeal. Regarding Dan Warburton as he was not in that day he had nothing to add regarding the primary issues, accordingly it was not a procedural defect or otherwise unresonable. Regarding whether the claimant's failure to appeal was the responsibility of the respondent, the claimant never properly tested whether in the circumstances he could appeal out of time. He only rang HR, he did not have the name of the person he spoke to; in this situation most employees would have at least made a written request to appeal out of time. Mr Hart had legitimate reason to send the outcome letter to that address. On balance I find that the claimant was not preventing from appealing ; he should have pursued the matter further if there was evidence of a definite refusal in circumstances where the outcome letter had been sent to the 'wrong' email address then I would have found a procedural defect.

84. Even if it was a procedural defect I would have found that the claimant contributed 100% to his dismissal relying on a finding that he did indeed show a sexual explicit video to colleagues including at least one who told him she did not want to see it. this would be culpable and blameworthy and there is nothing to suggest it would not be just and equitable to reduce compensation in these circumstances.

85. Following that I have considered whether it was within the range of reasonable responses to dismiss. I find it was within the range of reasonable responses to dismiss, for showing a sexually explicit graphic unpleasant video to colleagues at work, particular where at least one of them had said they did not want to see it.

86. In addition, even if this was not within the range of reasonable responses, given that the claimant had already received a final written warning and that was still live it would have come within the range of reasonable responses on that basis also.

<u>Unlawful deduction of wages</u>

87. Having considered the definition within the respondent's documentation of when a shift allowance was payable, and when irregular hours and weekend working was payable, and in the absence of more evidence from the claimant as to how similar the working patterns were of those colleagues who received the shift allowance to his own working pattern, I find that the respondent was correct in its payments to the claimant and there was no unlawful deduction of wages.

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Employment Judge Feeney

Date: 18 February 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
23 February 2021

FOR THE TRIBUNAL OFFICE

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