EMPLOYMENT TRIBUNALS

Claimant: Mr H Hidery

Respondent: Johnsons Textile Services Limited t/a Johnsons Hotel, Restaurant & Catering Linen by Stalbridge

Heard at: **Watford Employment Tribunal (Remote hearing via CVP)**

On: 18 and 19 March 2021

Before: Employment Judge Hanning (sitting alone)

Appearances

For the claimant: Mr J Neckles, PTSC Union

For the respondent: Mr D Soanes, Solicitor

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claim for unfair dismissal is not well-founded; the claimant was not unfairly dismissed and the claim is dismissed.

2. The claims for breach of sections 10(2A) & (2B) and 12(1)(a) Employment Rights Act 1999 are not well founded and are dismissed.

3. The claim for compensation for wrongful dismissal is not well founded and is dismissed

4. The claim for unlawful deduction from wages is not well founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from May 2011 until he was summarily dismissed on 19 March 2020. He brought a claim for unfair dismissal and notice pay and also appealed the decision. That appeal succeeded to a limited degree in that on 26 May 2020 the respondent determined that he should be dismissed with notice rather than without.

2. The claimant issued a second claim for unfair dismissal and additional claims arising from the dismissal and appeal procedure. This hearing was concerned with all the claims arising from both cases.

3. At the start the decision was made with the agreement of both parties to limit the hearing to liability only with remedy to follow. That proved prudent as there was time in the 2 days only to hear the evidence and not for the parties to make submissions. I therefore directed that both representatives exchange written submissions and then provide copies to me having had the chance to react to any new points which arose from those primary submissions.

4. I received those submissions promptly as requested and am grateful to both representatives for their industry. In view of the length of the submissions coupled with my limited sitting time, it has taken me longer than I hoped to complete my deliberations and prepare this judgment so I apologise for its delay.

5. There was a further challenge in that in the course of preparing this judgment I belatedly noted that I lacked jurisdiction to determine the claims advanced under ss.11 and 12 of the Employment Relations Act 1999. Such claims are not included in the list of claims in s.4 of the Employment Tribunals Act 1996 and therefore, absent the consent of the parties, a Judge sitting alone has no jurisdiction to deal with the claim. This was raised with the parties on 17 June 2021 and both responded very promptly consenting the claims being determined by a judge sitting alone under s4(3)(e).

Claims and Issues

6. In totality then, this is predominantly a claim for unfair dismissal but with several ancillary claims which arise as a result of events during the dismissal procedure. The issues were helpfully set out in a List prepared by Mr Neckles which was broadly speaking agreed by Mr Soanes subject to some minor points which will be addressed as necessary.

7. The issues as set out by Mr Neckles are:

ISSUE 1:

Unfair Dismissal Pursuant To S.94 Contrary To. S.98(1)(a) & (2)(b) & 104 (1) (a) & (b) ERA 1996

(1) What is the Effective Date of Termination

(2) Did the Respondent genuinely believe the Claimant to be guilty of Misconduct?

(3) *Was that belief on reasonable grounds?*

(4) *At the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?*

(5) *Did the dismissal fall within the range of reasonable responses for the Respondent to take?*

(6) *Was it reasonable for the Respondent to regard that conduct in totality as Gross Misconduct or conduct on the facts of the case warranting dismissal*

(7) *Was the dismissal procedurally fair, if so, what is the chance the Claimant would have been dismissed following a fair procedure having regard to the authority in King v Eaton (No.2) [1998] IRLR 686*

(8) *If the Claimant's dismissal; was unfair, should there be a 'Polkey' reduction in the compensation awarded under section 122 (2) and/or section 123 (6) ERA 1996 because of the Claimant's conduct?*

(9) *[Omitted in error]*

(10) *Did the Claimant contribute to the dismissal and if so, by how much, if any, should any Basic and Compensatory Awards be reduced?*

(11) *Did the Respondent have a potentially fair reason for dismissing the Claimant?*

(12) *Did the Claimant assert a statutory right not to be unfairly dismissed?*

(13) *Was the Claimant dismissed for asserting a statutory right?*

(14) *Did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992?*

ISSUE 2:

Breach of section 10(2A) & (2B) Employment Rights[1] Act 1999 contrary to section 11(1)(a) Employment Rights[1] Act 1999:

- *Did the Claimant assert his statutory rights of accompaniment on the 24th April 2020 to be accompanied by his Trade Union (PTSC Union) at a Grievance Hearing*

- *Did the Claimant's available chosen Trade Union Official John Neckles, meet the criteria of a Trade Union Official laid down under section 10 (3) Employment Relations Act 1999?*

[1] This is a typographical error which should refer to the Employment Relations Act

- *Did the Respondent deny or threatened to deny the Claimant his asserted statutory rights of accompaniment under section 10 ERA between the 24th April 2020 and 26th May 2020*

- *If yes, was the Respondent's denial or threatened denial of the Claimant's statutory rights of accompaniment on or by the 26th May 2020 in breach of section 11 ERA 1999?*

- *Can the Respondent provide reasons legitimate or otherwise against the provisions of section 10 ERA 1999, which would negate their statutory obligation to grant the Claimant his statutory rights of accompaniment by his Trade Union in accordance with s.10 ERA 1999?*

ISSUE 3:
Detriment pursuant to s.12(1)(a) Employment Rights[1] Act 1999:

- *Did the Claimant suffer any detriment on the ground that he exercised or sought to exercise his right to be accompanied by his Trade Union at his Grievance Hearing on the 26th April 2020Disciplinary Hearing on the 27th October 2017?*

- *If the answer to (a) & (b) above is in the affirmative, was the actions of the Respondent contrary to s.12 (3) (a) Employment Relations Act 1999 & s.48 Employment Rights Act 1966 (sic)?*

- *What are the detriments suffered by the Claimant at the hands of the Respondent?*

- *The Claimant claims he suffered the following detriments:*

  i. *Failed to permit the Claimant's Companion to attend and address the Grievance Hearing held on the 26th May 2020 or thereabouts;*

  ii. *Failed to allow the Claimant and/or his Companion to sum up his grievances before a grievance decision was discharged;*

  iii. *Failed to uphold the Claimant's Grievance Complaint;*

  iv. *Denial of a right of appeal*

ISSUE 4:
Wrongful Dismissal Pursuant To S.86 ERA 1996:

- *Did the Claimant's alleged conduct amount to a repudiatory breach of contract entitling the Respondent to dismiss her (sic) without notice?*

- *If no, what notice period is the Claimant entitled to receive under section 86 of the ERA?*

- *The Claimant claims 9 weeks' notice pay (Dates of employment 23/03/2011 – 27/07/2020)*

- *The Claimant claims the Respondent owes him 1 week Net Notice Pay*

ISSUE 5:
Unlawful Deduction From Wages: S. 13 ERA 1996 Claim:

- *Did the Respondent unlawfully withheld wages of the Claimant between the 20th March 2020 and 26th May 2020?*

- *If yes, what is the sum withheld?*

- *The Claimant claims £11,008.50 was deducted between the period of 20th March 2020 and 26th May 2020*

Relevant Law

Unfair Dismissal

8. The respondent bears the burden of proving, on the balance of probabilities, the reason why it dismissed the claimant and that the reason for dismissal was one of the potentially fair reasons stated in s98(1) and (2) Employment Rights Act 1996 ('ERA 1996').

9. The reason for dismissal is a set of facts known to the respondent or a set of beliefs held by it, which caused it to dismiss the claimant. If the respondent fails to persuade the Tribunal that it had a genuine belief in the reason and that it dismissed the claimant for that reason, the dismissal will be unfair.

10. If the respondent does persuade the Tribunal that it held that genuine belief and that it did dismiss the claimant for one of the potentially fair reasons, the dismissal is only potentially fair. Consideration must then be given to the general reasonableness of that dismissal, applying section 98(4) ERA 1996.

11. Section 98 (4) ERA 1996 provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

12. In considering the question of reasonableness of a dismissal, an Employment Tribunal should have regard to the decisions in *British Home Stores v. Burchell* [1980] ICR 303 EAT; *Iceland Frozen Foods Limited v. Jones* [1993] ICR 17 EAT; *Foley v. Post Office*, *Midland Bank plc v. Madden* [2000] IRLR 827 CA and *Sainsbury's Supermarkets v. Hitt* [2003] IRLR 23.

13. In summary, these decisions require that an Employment Tribunal focuses on whether the respondent held an honest belief that the claimant had carried out the acts of misconduct alleged and whether it had a reasonable basis for that belief, having carried out as much investigation in to the matter as was reasonable.

14. A Tribunal should not however put itself in the position of the respondent and decide the fairness of the dismissal on what the Tribunal itself would have done. It is not for the Tribunal hearing and deciding on the case, to weigh up the evidence and substitute its own conclusion as if the Tribunal was conducting the process afresh. Instead, it is required to take a view of the matter from the standpoint of the reasonable employer.

15. The function of the Tribunal is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses. This band applies not only to the decision to dismiss but also to the procedure (including the investigation) by which that decision was reached.

<u>Effective Date of Termination</u>

16. The Effective Date of Termination has been described as a 'statutory construct' as it is defined by section 97(1) of the ERA 1996 as follows:

    'Subject to the following provisions of this section, in this Part "the effective date of termination" –

    (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

    (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect …'

17. It is settled law that in the case of a summary dismissal, the effective date of termination is the date of actual dismissal whether or not the employer makes a payment in lieu of notice; see *Robert Cort & Son Ltd v Charman* [1981] IRLR 437 affirmed by the Court of Appeal in *Stapp v Shaftesbury Society* [1982] IRLR 326 and *Radecki v Kirklees Metropolitan Borough Council* [2009] IRLR 555

18. That date can be retrospectively altered by the employers' decision on an internal appeal (see *Hawes & Curtis Ltd v Arfan* [2012] ICR 1244) and it is clear that where an internal appeal against dismissal succeeds to the extent of substituting a penalty other than dismissal, the original dismissal is nullified and the contract is revived such that the employee is deemed never to have been out of the employment; see *Roberts v West Coast Trains Ltd* [2004] IRLR 788.

19. Where an internal appeal succeeds to the extent of changing a dismissal without notice to one with notice, the effective date of termination will be a question of fact; see *Rabess v London Fire and Emergency Planning Authority* [2016] EWCA Civ 1017

<u>Statutory Right to be Accompanied</u>

20. Section 10 of the Employment Relations Act 1999 ('ERA 1999') provides that where a worker is required or invited by his employer to attend a disciplinary or grievance hearing, and reasonably requests to be accompanied at the hearing, the employer must permit the worker to be accompanied at the hearing by one companion who is either a Union official or another of the employer's workers.

21. By Section 11 ERA 1999, the Tribunal is required to award compensation of up to 2 weeks' pay if it finds that the employer has failed, or threatened to fail, to comply with section 10.

22. By Section 12 ERA 1999 a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he exercised or sought to exercise the right under section 10.

<u>Unlawful Deduction from Wages</u>

23. Section 13(1) of the ERA 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or/ consent to the making of the deduction.

24. Section 13(3) of the ERA 1996 provides that: "Where the total amount of wages paid 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 for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".

25. This makes it clear that a deduction is treated as being made whenever the amount paid to the employee is less than the amount that is 'properly payable' by the employer to the worker. It follows from this that the wages in question must be due in the first place.

26. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA 1996. The definition of “wages” in section 27 ERA 1996 includes pay and holiday pay.

<u>Evidence</u>

27. A bundle running to 426 pages was provided electronically. Although we all managed to navigate it adequately, I should observe that it did not comply with the directions which have been given for the preparation of electronic bundles and so was far from easy to use. It must have been compiled over several iterations each of which required the insertion of new documents. Instead of repaginating, the parties added letters to existing page numbers. As the last page was notionally page 246, it meant about 180 pages comprised a number and one or more letters so the 'paper' pagination bore no relation to the pagination within the PDF file. I urge both representatives to give more thought to this in the future.

28. Mr Neckles had submitted detailed argument about the admissibility of a transcript of an unauthorised recording of the disciplinary hearing. In fact, I did not discern that any point had been taken about admissibility but the respondent had objected to being asked to read the entire transcript and admit to its accuracy. I do not consider that was an unreasonable stance. The correct approach was for the claimant to identify which parts of the respondent's note of the hearing were being challenged and, where necessary, then to rely on the transcript to clarify the position.

29. I heard evidence from 3 witnesses for the respondent; Alan Mulholland, an Operations Director, Simon Knatchbull, also an Operations Director, and Avi Kar, the Finance Director. I also heard evidence from the claimant. Witness statements from all of them were taken as read though a very significant proportion of the claimant's statement comprises what I would characterise as submissions rather than being confined to giving evidence.

30. While I do not consider any of them was being deliberately unhelpful, by and large I did not find any of them to be very helpful either. None professed to have any great recall of events which, albeit they took place a little over a year ago, must have been out of the ordinary. Granted, this has been a very strange year for everyone but the lack of recall was sometimes quite striking.

31. For this reason, it is the contemporaneous documents which, for the most part, have provided the most decisive evidence where there has been a genuine conflict.

Findings of Fact

32. The following findings of fact have been reached by me, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account my assessment of the witness evidence.

33. Only findings of fact I consider to be relevant to the issues to be determined, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute or to refer to every document I read or was taken to. That does not mean it was not considered if it was referenced to in the witness statements/evidence.

34. The claimant began working for London Linen in May 2011. In 2015 that employment transferred to the respondent as a result of a purchase or merger of the businesses. The claimant did well. He was promoted from driver to Transport Supervisor and then to Transport Manager.

35. As a Transport Manager, the claimant was eligible for the respondent's 'Middle Managers Incentive Scheme'. This scheme offered a bonus of up to a maximum of £2,000 payable in April 2020 subject to certain targets being met. The scheme was also subject to some qualifications the material parts of which were set out under the heading of 'Scheme Rules' as:

> Bonuses are non contractual. Entitlement to the scheme is subject to the participant remaining an employee of the company. To be eligible for any payment you must still be employed at the date the bonus is paid.

36. The claimant had no disciplinary issues and there has been no suggestion of any deficiency in the performance of his duties.

37. From January 2018 the claimant was managed by a Diane Lee. On 2 March 2020 Ms Lee reported to the respondent's HR Director, Joy Amory, that she was concerned about the claimant's conduct. She reported that on 26 February 2020 the claimant had spoken to her and told her that his cousin had suggested the claimant was in love with her and that somebody might come to the workplace to tell her this.

38. There was an issue about whether the claimant had himself told Ms Lee that he was in love with her but there is nothing to suggest that was case nor that Ms Lee was even suggesting it. It is clear from her contemporaneous statement that she was reporting that the claimant had told her it was his cousin who had made the remark.

39. Ms Lee was at that time arranging a night out for her team which was to take place on 28 February 2020 and would require her to stay overnight away from home. She reported too that later on 26 February 2020 the claimant had asked her which hotel she was staying at. She reported that the claimant asked her again on the morning of 28 February 2020 itself.

40. Her report to HR explained that she was troubled by these questions because she had had cause in the past to ask the claimant to refrain from what she had considered to be inappropriate comments. It was clear that this provided a contextual background to his remark about his cousin and subsequent questions.

41. That led to the final straw for her which was that at the end of night out, at about half past midnight on 29 February 2020, the claimant messaged asking for her room number. This, she said, put her in fear that he was going to try to come to her room.

42. Ms Amory took the issue seriously and reported the matter to an Operations Director, Alan Mulholland. They had a conversation in which a decision was made to investigate and to suspend the claimant during that investigation.

43. In doing so, the respondent was operating by reference to its Disciplinary and Dismissal Procedure a copy of which was in the bundle and could be identified by the footnote 'D&G 2019'. This is introduced as follows:

> Please note that these Disciplinary and Dismissal Procedures do not form part of your contract of employment. The procedure may be amended from time to time and the Company may depart from it depending on the circumstances of any case

44. It has been suggested that Mr Mulholland's actions were being directed by Ms Amory but I find that is reading too much into it. I find that she was, quite properly, advising Mr Mulholland of the possible significance of the complaint, the consequences which might follow and the procedure that should be adopted. Mr Mulholland openly conceded he did not handle many disciplinary matters and so it is natural he relied heavily on Ms Amory's advice. That does not detract from the fact he had to make the final decisions and take responsibility for those.

45. Mr Mulholland met the claimant later that day. There is some difference between them about exactly what transpired but importantly the claimant acknowledged he had asked Ms Lee about where she was staying and had asked for her room number. There is a conflict between them about whether the claimant gave any explanation for that. Mr Mulholland says he did not but in his statement and oral evidence the claimant insisted he did explain.

46. On balance I prefer the evidence of Mr Mulholland on this point. The reason for that is that the claimant deals with his meeting with Mr Mulholland in his internal statement made on 11 March and says nothing about explaining his reasons. He

says only that Ms Lee was making something up and Mr Mulholland told him to go away and write it up in detail.

47. I also consider that if the claimant had given a full explanation at that time, the respondent would have asked another witness Vahid Vukalic about it. This is because, at the disciplinary hearing stage, the claimant said it was Mr Vukalic who had suggested the claimant ask Ms Lee for her room number. On learning this, not at all surprisingly, the respondent made enquiries of Mr Vukalic to see if he would verify this explanation from the claimant. I consider that then that if the claimant had said this earlier, then the respondent would have asked Mr Vukalic there and then rather than waiting.

48. A second difference here is what Mr Mulholland told him would happen next. the claimant says he was expecting a formal investigation meeting but Mr Mulholland in fact set up what he described as a disciplinary meeting. Again, I consider the claimant's internal statement to be telling here. There is no reference there to what further meeting there might be. He simply says that Mr Mulholland asked him to prepare a statement and that he would be in touch later.

49. In my judgment by the end of that meeting Mr Mulholland had not decided exactly what would happen. He had received two statements and now had the claimant's admission he had sent the room number message. I find that he then consulted JA and having had advice considered there was enough to warrant a disciplinary process without further enquiries being needed.

50. That led to a meeting which had first been scheduled for Thursday 5 March being put back and rearranged with another Operations Director, Simon Knatchbull, as a formal disciplinary hearing to take place on 9 March. The statements of Ms Lee and a Sylwia Wieladek were provided to him on 5 March. At the claimant's request, that meeting was postponed to 13 March.

51. Prior to the meeting on 13 March, Mr Knatchbull asked both other persons present on the night of 28 February 2020 to comment and they, Joao Almeida and Mr Vukalic, gave some information in emails.

52. The disciplinary hearing took place on 13 March 2020 when the claimant was represented by Mr Neckles as he was before me. Present for the respondent were Mr Knatchbull and Ms Amory. As part of his case, the claimant has objected to the role played by Ms Amory. In particular it has been suggested she was controlling the meeting.

53. I accept the respondent's evidence that Mr Knatchbull was in charge of the meeting and was the decision maker. Ms Amory's role was to advise him on matters of procedure and to keep a note. The claimant is right that she took an active role in the meeting but the reason for that was that the claimant's approach was predominantly to challenge and/or object to the process being adopted by the respondent. A great deal of time was spent dealing with those issues and, as they were procedural issues, it naturally fell to Ms Amory to take the lead in dealing with them.

54. In terms of the actual issue, the claimant accepted he had sent the message but explained his reason for doing so was that he wanted to give the number to the

hotel staff in order that they would let him into the hotel to get out of the cold while he waited for his lift home.

55. He denied he had any intention or desire to visit Ms Lee's room and explained he had already arranged a lift from his wife before asking for the room number. He acknowledged he had told Ms Lee that someone had said he was in love with her but said she had not seemed remotely offended or upset. He acknowledged asking about her hotel but only so that he could recommend a place to eat in the vicinity

56. Mr Knatchbull did not permit the claimant to cross-examine those who had given statements. He agreed to receive from Mr Neckles questions which he wanted to ask and to put those he considered relevant. It was also agreed that Mr Neckles could make written submissions.

57. There was a difference between the parties about precisely when those submissions were to be provided. Drawing from the transcript of the meeting it is clear that Mr Knatchbull was intending to make his decision by 5pm on 19 March. Mr Neckles agreed to provide the questions and points to be investigated by 10am on Monday 16 March.

58. That seems to have been interpreted by the Respondent as meaning the submissions would be made by then too but it seems to me Mr Neckles reasonably expected to hear about answers to the questions and the results of the further investigations before completing his submissions.

59. In the event Mr Neckles provided his questions and investigation points in the evening of 17 March 2020. He did not ask for more time to make submissions. Mr Knatchbull took those questions on board and made further enquiries on 18 March 2020. He did not put all Mr Neckles's questions as he considered some to be irrelevant. He did not send Mr Neckles or the claimant the account of those enquiries because he considered that the responses did not add anything and so did not influence his decision.

60. Instead, he reached his decision and decided to dismiss the claimant for gross misconduct. He did so because he considered the conduct of the claimant in asking for Ms Lee's hotel room number was inappropriate. He did not accept the claimant's explanation for the message and felt the claimant had been untruthful with that explanation. In the circumstances and in the context of the claimant's earlier conversations with her, Mr Knatchbull believed Ms Lee had felt frightened and upset and he considered the claimant's conduct to have been "utterly inappropriate".

61. He considered giving the claimant a final written warning but owing to the impact of the claimant's actions, the fact that he changed his account of events, and the nature of his working relationship with Ms Lee, he concluded this would not be appropriate. He believed the claimant had committed an act of gross misconduct and that the appropriate sanction was dismissal without notice. He sent the claimant confirmation of that decision on 19 March 2020.

62. The claimant appealed that same evening. The appeal was referred to a more senior person, the Finance Director, Mr Avi Kar. On 24 March 2020 the claimant amended his appeal. The substantive grounds of the appeal were that the

evidence relied on by Mr Knatchbull was disputed, that the process had been procedurally flawed, the dismissal was legally unfair and/or discriminatory (and also unlawful for breach of the claimant's right to be represented) and the penalty was too severe.

63. On 28 March 2020, by which time the country was in what would become the first lockdown, Mr Neckles asked that the appeal be determined on paper. That was a sensible request given that a face to face meeting was not permitted at that time and the request was agreed on 6 April 2020.

64. Mr Kar undertook further enquiries of all those who had made statements before. He sent the results of those enquiries to the claimant and Mr Neckles on 22 April 2020. That evidence was acknowledged on 24 April 2020.

65. On 26 April 2020 the claimant submitted a grievance. It is a feature of the grievance that it was directed almost entirely to the disciplinary process. For the first time it produced the claimant's records of text messages with his wife to verify that he had made arrangements to be collected at the time he sent the hotel room message.

66. the claimant's grievance adduced new evidence about the misconduct allegations, complained about the extent of the respondent's investigation and attacked Ms Lee, claiming she had manufactured the allegations against him and that they amounted to harassment of him. He explicitly asked that the grievance be investigated in conjunction with the appeal.

67. There was discussion about the provision of submissions on behalf of the claimant. On 5 May Mr Kar reminded Mr Neckles that the appeal would be determined on paper and asked for submissions by 6 May. They were in fact supplied on 10 May and ran to 46 pages.

68. Mr Kar gave his decision on 26 May. He endorsed Mr Knatchbull's assessment of the evidence and found that the claimant's conduct had been inappropriate and related to Ms Lee's gender. He considered the request for her room number to have had sexual overtones and that it had had the effect of creating an intimidating and offensive environment for her.

69. He rejected all the procedural complaints noting that the claimant had been represented throughout the process and given every opportunity to state his case. He did however agreed that the sanction was too severe and reduced it from dismissal for gross misconduct without notice to dismissal for misconduct with notice. The material part of his appeal decision reads as follows:

> Based on my findings, I consider that the sanction of dismissal on the grounds of gross misconduct was too severe. I consider that the appropriate sanction is dismissal on the grounds of misconduct.
>
> On the basis that I have made the decision to reduce the sanction to dismissal with notice. Accordingly, you will be entitled to your contractual notice pay which will be paid into your bank account by 8 June 2020. Your date of dismissal remains unchanged.

70. On 27 May 2020, Mr Neckles, on behalf of the claimant, emailed Mr Kar asserting that as the dismissal for gross misconduct had been changed to a dismissal for

misconduct, it followed that the date of the claimant's dismissal had been changed to 26 May 2020. Mr Kar replied on 29 May 2020 confirming that the date of the claimant's dismissal remained unchanged.

71. the claimant had issued a claim for unfair dismissal before the appeal was determined. Following the appeal a second claim was issued founded on the appeal decision and making further claims as recorded above.

Conclusions

72. Both representatives provided me with helpful submissions. Those of the respondent, presented in the form of a Skeleton Argument, ran to 14 pages and those of the claimant, labelled as the Claimant's Amended Legal Submission to 36 pages. While I may not refer to every point contained in those documents, I have read and considered them.

Unfair Dismissal

73. The first question posed in the List of Issues is that of the Effective Date of Termination which I find to be the date of the original dismissal, 19 March 2020. Had the respondent decided on appeal not to dismiss the claimant, the dismissal would have fallen away and his employment would have continued uninterrupted. But as the respondent maintained the decision to dismiss and changed only the notice provisions, the question becomes one of fact.

74. While it was plausibly open to the respondent to change the dismissal date, it is clear from the unequivocal terms of Mr Kar's correspondence that this did not happen. He was explicit in his letter of 26 May 2020 that the date of dismissal remained the same and he repeated this in his email 29 May 2020.

75. Turning to the constituent parts of the decision to dismiss, it is clear the respondent believed the claimant to be guilty of misconduct. The claimant has not challenged that belief which was clearly expressed by both Mr Knatchbull and Mr Kar.

76. In my judgment there were reasonable grounds to hold that view. The claimant admitted to the conduct and while he disputed Ms Lee's reaction to it, her evidence of her personal reaction to that conduct was obviously going to be more persuasive than that of a third party.

77. The claimant has argued at length that the respondent did not carry out an adequate investigation but I reject that submission. The only material issues to investigate before proceeding to a disciplinary process were how Ms Lee had been made to feel and whether there was enough evidence to suggest the claimant had acted as alleged. As he admitted his actions there was nothing else that an investigation could sensibly achieve.

78. While Mr Mulholland may have given the claimant the impression that more might be done before there was a disciplinary hearing and some employers might have gone further than he did, I consider that his approach was squarely within the range of reasonable responses.

79. It is also important to note that further investigations were carried out during the ensuing process. Mr Knatchbull made further enquiries and, at the claimant's

requests, put additional questions to witnesses. Mr Kar also made further enquiries so that taken as a whole, I consider that every stone which the claimant could reasonably have expected to have turned, was turned.

80. Finally, I find the decision to dismiss was within the range of reasonable responses. That Mr Kar took a slightly different view from Mr Knatchbull evidences that there was room for differing views on the severity of conduct and the sanction to be applied. It follows that some employers might have taken a different approach and, had the claimant demonstrated some insight and remorse, perhaps felt a warning would have been appropriate.

81. However, it is clear both decision makers considered alternatives but were persuaded by the nature of the conduct and the claimant's reaction to the process that dismissal was appropriate. Even if some employers might have taken a different approach, that is not a lawful reason to subvert that reached by this employer which was squarely within the range of reasonable responses.

82. The claimant also attacked the respondent's procedure. He submits the respondent failed to apply its own policy and failed to comply with the ACAS Code of Conduct. He also alleges that the decision is tainted by the fact Ms Amory interfered with the decisions.

83. I reject the claimant's submissions concerning the respondent's policy for the simple reason that they are founded on trying to apply a rigidly strict interpretation to each relevant provision. The policy itself makes it clear that this is not justified as its introduction explains its provisions may be departed from.

84. The same point arises from the allegations of breach of the ACAS Code of Conduct. The claimant seeks to apply its provisions slavishly and without recognising that it is guidance.

85. In both cases, the overarching position is that the procedure should be fair. This means ensuring the employee knows what is being alleged, understands the possible implications of an adverse finding and has every opportunity to put his case.

86. As is clear from my findings, that test was met by the respondent. The conduct was clearly identified and the reason it was considered inappropriate explained. The claimant was given every opportunity to explain himself. He was robustly represented throughout by an experienced union representative who was in turn rightly permitted to make extensive representations on behalf of the claimant.

87. In my judgment, Mr Knatchbull should really have given Mr Neckles the opportunity to make submissions after knowing the answers to those questions which were put to witnesses but insofar as that was a minor defect in the original procedure it was remedied by the appeal procedure. Mr Kar made everything available to the claimant including the result of his own enquiries and the claimant was allowed to respond to it and, through Mr Neckles, he did so.

88. Turning to the involvement of Ms Amory, as I have recorded, I find that her involvement was not improper. This was a serious situation with which the

managers involved had limited experience. They would rightly rely on advice from Ms Amory in their dealing with it.

89. That Ms Amory found herself involved to a greater degree than might sometimes be the case was the result of the claimant's wide-ranging attack on the respondent's procedures. She was the person tasked with ensuring the procedures were followed so she naturally was required to answer the extensive points raised.

90. While noting the authorities kindly provided by Mr Neckles, those deal with the very different situation of where there was evidence that an HR officer interfered in the decision making process. There is no such evidence here and I am satisfied those concerned made the decisions themselves albeit with the help of proper advice from Ms Amory.

91. The remaining questions under this part of the List of Issues relate to remedy except for questions (12) and (13) which pose the question of the claimant asserting a statutory right.

92. The claimant's case here is that, having asserted his statutory right not to be unfairly dismissed by starting his first ET claim, the respondent dismissed him for having done; that is to say the reason for Mr Kar's decision was because he made that claim.

93. That is an ingenious argument but it falls down on two grounds. First, as I have found that the effective date of termination was always 19 March 2020 there can be no question of it being influenced by the claimant's claim which was not made until after that date.

94. Secondly, even if Mr Kar's decision were somehow a fresh dismissal there is no evidence to suggest his decision was influenced by the claimant's ET claim. Even though he accepted he was aware of it, the existence of the ET claim is not mentioned anywhere in the lengthy appeal outcome letter. It was put to him in cross-examination that he dismissed the claimant because of the ET claim but I accept his evidence that this was not so.

Breach of sections 10(2A) & (2B) and 12(1)(a) Employment Rights Act 1999

95. It is convenient to deal with all this together. Substantively they amount to a complaint that, first, the claimant was not allowed to be accompanied to the appeal hearing and/or that he was denied a hearing of his grievance and so, again, was denied the right to be accompanied at such a hearing.

96. Dealing the grievance first, I do not consider the respondent had any obligation to deal with it all. The claimant had been dismissed by the time he submitted it and was no longer an employee. The claimant's stance that the appeal decision served to reinstate him does not help him as there had not yet been an appeal decision at the time he lodged the grievance.

97. That the respondent did nevertheless consider it is understandable given that, in truth, its terms were not a new grievance at all but representations about the disciplinary action. It provided new evidence about the events in the early hours

of 29 February 2020, complained that sufficient investigations had not been carried out and accused Ms Lee of lying and thereby harassing the claimant in making the allegations.

98. Even if the claimant had still been employed, in my judgment the respondent would have been fully entitled to deal with the grievance as part of the dismissal appeal and not to have set up an additional meeting to deal with it. The claimant must have felt the same as it was precisely what he asked the respondent to do.

99. As for being denied the right to be accompanied, I find this to be a specious complaint. Both the claimant and the respondent were faced with the unprecedented situation of meetings being prohibited because of the pandemic. It was early days when alternative procedures were often unknown and almost certainly untested but it was the claimant's representative himself who asked for the appeal to be determined on paper.

100. I do not consider that the respondent acceding to the claimant's own request amounts to denial of the right to be accompanied. In practice the claimant was comprehensively represented in the appeal (and the written consideration of the grievance) and any 'denial' was no more than agreeing to the claimant's own unprompted waiver of a meeting.

Wrongful Dismissal

101. This claim falls away given the substitution of dismissal without notice by dismissal with notice (unworked but paid in lieu).

Unlawful Deduction From Wages

102. This claim relies on the respondent having 'withheld' the claimant's salary for the period from 20 March to 26 May 2020 as well as the bonus payable under the Incentive Scheme.

103. I have found that the claimant's effective date of termination was unchanged so the claim for salary between 20 March and 26 May cannot be sustained.

104. This also applies to the claim for the bonus. Even assuming all the targets had been achieved (and it was not suggested they had not been), it is plain from the terms of the scheme that it was only payable to Managers employed at the time it was payable, which was April 2020. As the claimant was not employed then, he had no entitlement to be paid the bonus.

105. It is a precondition of any claim for an unlawful deduction that the amount which has been deducted or unpaid was actually due to the employee. Given my findings, that was not the case and so the claim fails.

Employment Judge Hanning

25/06/2021

Sent to the parties on:

……………………………
For the Tribunal Office:

……..……………………..

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.