



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr AB Izod

v Peterborough Milton Golf Club Ltd

Heard at: Cambridge

On: 5&6 September 2022

Before: Employment Judge Forde

Appearances

For the Claimant: Mr Bloom, Solicitor

For the Respondent: Ms Walker, Counsel

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is not well founded and is dismissed.
2. The claimant's claim of breach of contract is not well founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as its club secretary from 25 September 2000 until his dismissal on 15 October 2021.
2. The claimant claims that his dismissal was unfair within s.98 of the Employment Rights Act 1996. He also claims the respondent breached his contract of employment by failing to give him the required notice of termination of his employment.
3. The respondent resists the claim. The respondent is a golf club. It says that the claimant was fairly dismissed for misconduct in the form of inappropriate behaviour and sexual harassment in contravention of its staff handbook and its disciplinary policy. As will be seen in the course of this judgment, the

question as to which policy applied to the claimant's dismissal was a matter of contention between the parties.

4. The claimant was represented by Mr Bloom, solicitor, and gave sworn evidence as did Mr Charles Gunn who gave sworn evidence in support of the claimant's case and was a former director of the respondent. The respondent was represented by Ms E Walker, counsel, who called sworn evidence from Mr Stuart Frith, Mr Mark Wilson, Mr Peter Horstead, and Mr Nathan Holt, all of whom are either current or past directors of the respondent and were involved at various stages of the process that led to the claimant's dismissal. I considered the documents from an agreed 287 page bundle of documents which the parties introduced into evidence.

Preliminary matters

5. At the beginning of the hearing Mr Bloom submitted that the evidence of a further witness on behalf of the claimant, Mr David Fear, was an issue. Specifically, Mr Fear had travelled to Turkey at the beginning of the month and was therefore not in a position to attend the Tribunal in person. Mr Bloom submitted that in the absence of approval from the Foreign, Commonwealth and Development Office (FCDO) Taking of Evidence Office (TOE), that I could exercise judicial discretion and allow for Mr Fear to give evidence via video to the Tribunal. Mr Bloom explained that unbeknown to him, Mr Fear had left the country and travelled to Turkey for a family holiday but was willing and prepared to give evidence by video link to the Tribunal notwithstanding.
6. Ms Walker opposed the application pointing out that the respondent's witnesses had all attended the Tribunal and were ready to give evidence.
7. The claimant's application in respect of Mr Fear was made at the beginning of the hearing and I communicated my position with regard to this we were asked the application shortly after the lunch time break.
8. In short and having reviewed the Presidential Guidance with regards to the taking of oral evidence by video from overseas, it was clear that because Turkey opposed evidence being taken for court proceedings in England and Wales without its permission, and in the absence of express permission from TOE, the tribunal was unable to allow Mr Fear to give evidence in the case. The guidance makes it clear that the decision to allow evidence is an administrative and not judicial decision and as such there was no discretion for me to exercise.

Issues for the Tribunal to decide

Unfair dismissal

9. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under s.98(1) and (2) of the Employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct.

10. If so, was the dismissal fair or unfair within s.98(4), and in particular, did the respondent in all respects act within the band of reasonable responses? The claimant stated that the dismissal was unfair because the respondent followed an unfair process asserting that the respondent failed to inform him of the exact nature of the allegations against him as exemplified by the letters sent to him prior to the disciplinary hearing and the invitation to the disciplinary hearing, that there was an absence of statements from the complainants (known within the proceedings as A and B respectively) and that these alleged failures reflected a fundamental flaw in the procedure which led to the claimant's dismissal.
11. In addition, the claimant points to the absence of notes in the investigation, the complete absence of B at the dismissal and appeal hearings preventing the claimant of asking her any questions, the withholding of the identities of both complainants in circumstances where it was considered by the claimant not to be necessary and thus, it was alleged, placing the claimant at a substantial disadvantage. A further issue was raised as to the involvement or influence of a third party namely Mr James Day, an HR adviser in the respondent's decision making process as well as the reliance of the dismissal and appeal officers on findings of fact reached by the investigation officer.
12. Further, the claimant alleged that the respondent had been unreasonable in refusing the claimant access to CCTV footage central to allegation made by B until the day before the appeal hearing. Lastly, the claimant asserted that the failure of both the dismissing and appeal officers to speak with complainant B about the allegations that she made was a significant issue which of itself was said to be in contravention of the guidelines set out in the EAT decision of Lindford Cash & Carry Ltd v Tomson [1989] ICR 518.
13. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant was to have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in Polkey v AE Dayton Services Ltd [1987] UK HL8. The respondent said the claimant would have been dismissed in any event, therefore any award should be reduced by 100%. The claimant contended that he would not have been dismissed.
14. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal as set out in s.122(2) of the 1996 Act, and if so to what extent? The respondent said that if I decided that the claimant was unfairly dismissed, the award should be reduced by 100%.
15. Did the claimant, by way of his blameworthy or culpable conduct, cause or contribute to his dismissal to any extent, and if so by which proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under s.123(6)? The respondents say that the compensation should be reduced 100%.

Breach of contract

16. How much notice was the claimant entitled to receive? This was not in dispute: it was 12 weeks' notice.
17. Did the claimant fundamentally breach his contract of employment by committing an act of gross misconduct? This required the respondent to prove that the claimant committed an act of gross misconduct.
18. For the claimant's claim of unfair dismissal, the focus under s.98(4) was on the reasonableness of the management's decisions, and it was immaterial what decision I would myself have made about the claimant's conduct. But for the breach of contract claim, I had to decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

Findings of fact

19. The relevant findings of fact are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.
20. The claimant, Mr Izod, was employed by the respondent, Peterborough Milton Golf Club Ltd, as club secretary from 25 September 2000 until 15 October 2021, for a period of just over 20 years.
21. The claimant was a senior employee within the respondent.
22. On 25 September 2021 allegations came to light regarding the claimant's conduct. It was reported to the respondent that on 22 September 2021, the claimant alleged patted Employee A on the bottom and on 24 September 2021, it was alleged that the claimant touched Employee B in the groin area and in so doing, he had wriggled his fingers.
23. It should be noted that at all times during the course of the disciplinary and appeal process and in these proceedings, the respondent did not reveal the identities of Employees A or B on the basis that both employees had asserted they were reluctant to have their identities informed to the claimant in order to protect their ongoing relationships with members of the respondent. The respondent considered these requests seriously and determined that in order to avoid undue public attention, harassment of the complainants as a consequence of the allegations raised by them that it would be appropriate to protect their identities.
24. On 27 September 2021, Employee A was interviewed concerning the alleged incident of 24 September 2021 by Mr Stuart Frith, a director of the respondent since February 2021. During the course of her interview, Employee A stated that the incident with the claimant occurred around midday to early afternoon on 22 September 2021. She said that she had been working in the food preparation room and during that time the claimant had emerged through a door that connected that room to the administration office. It was whilst travelling between these two points that the claimant is alleged to have patted Employee A on the bottom as he passed by while saying the words to the

effect “is all okay?”. Further, Employee A stated the claimant was an “touchy feely” kind of person. Employee A said there were several incidents in which he would run his fingers down her back. Employee A reported the incident to Richard Berry, her line manager on 22 September 2021. Employee A said that she could work with the claimant again provided that the touching stopped.

25. On 27 September 2021, Employee B was interviewed by Mr Frith also. Employee B says that the incident with the claimant occurred on 24 September 2021 at 11:40am or thereabouts. Employee B was working behind the bar and was very close to the exit of the bar into the lounge. The claimant walked into the bar by the kitchen route. Whilst his back was to Employee B, he thrust out his left arm backwards towards Employee B. It is Employee’s B contention that in doing so, the claimant’s hand came into contact with her groin area and at the point of contact, the claimant wriggled his fingers. Employee B said that she was incredibly distressed by the incident and that she found that the claimant’s hand movement towards her was deliberate, but she did not know whether he meant to touch her in the groin area intentionally. Employee B said that she was unable to sleep that night and reported the incident the next day to Mr Berry.
26. On 28 September 2021 the claimant was informed of his suspension by letter. That letter refers to a meeting having taken place earlier that day and refers to the claimant being informed of his suspension during the course of that meeting. He was suspended on full pay. The investigation concerning the allegations raised by A and B were summarised as follows:

- “a. behaviour deemed by the Company to be grossly indecent or unacceptable.
- b. sexual harassment of colleagues in connection with work and during work hours.

The incidents that have been reported are as follows:

On Wednesday 22 September 2021 you patted a female member of staff on the bottom.

On Friday 24 September 2021 you made a deliberate hand movement backwards and touched a female member of staff in the groin area with a wriggle of your fingers.

The female members of staff have exercised their right to remain anonymous and not disclosed to you during the period of investigation.”

27. And further:

“I must remind you that although you are suspended from duty you remain bound by the terms of your contract of employment and the general policies applicable to company employees.”

28. The letter was signed by Mr Russell Laxton, club chairman.
29. On 29 September, the claimant made two statements in respect of the allegations brought against him by the respondent. In both, the claimant unequivocally refuted the allegations and requested CCTV footage in respect of both incidents. In respect of the incident with Employee A, the claimant

denied all knowledge of the event. He explained that in the bar area space is very tight and that unintentional contact does tend to happen there from time to time. He also denied that he had ever patted any member of staff on the bottom at any time during the course of his employment.

30. In respect of Employee B, the claimant stated the following:

“On that day I clearly recall moving quickly to intercept a club member who had brought a visitor to meet me. This meant I had to proceed via the back of the bar area which is certainly the area where it is tightest and where staff are working behind it. I was rushing, which I accept I should not.

I recall staff being there and I recall moving past someone to gain access to the “bar-hatch” to reach the lounge. I am going to say it again, because it is so important: when passing this other member of staff, it is evident to me I made to “dig them in the ribs” as I passed with my back to them. If it is the member of staff who I believe it is to be, this should not be unusual, as we have jokingly done this many times over the years. The result of this action is why we are here today and whilst I have absolutely no intention of achieving the stated consequences of that arm movement, it was not a premeditated action to touch the person in an extremely inappropriate area and I am so sorry it caused the obvious upset to that person.”

31. On 30 September 2021 the claimant was interviewed by Mr Mark Wilson and Ms Anne Nicholls. The claimant was accompanied by Mr Charles Gunn. The document described variously in evidence by the respondent’s witnesses as A’s statement but in point of fact was a record of what she had reported to the investigator was read to the claimant. The notes of that meeting can be found at pages 166 of the bundle. The notes record that Mr Wilson, who led the meeting, assured A that she would remain anonymous but that they could not guarantee that her anonymity would remain throughout the matter if legal reasons required the disclosure of her name. A was read a copy of the claimant’s written statement. She confirmed that in the past the claimant made physical contact with her but felt on the occasion that she had reported his conduct, ie when he had patted her on the bottom, that this was an incident too far. She identified previous examples of his conduct in this regard, expressed her disappointment that no CCTV footage was available of the incident. She went on to explain that she wanted to continue to work within a safe environment, that no other member of staff had touched her in this manner before and that she was shocked by the actions of the claimant.
32. In response to the allegations raised by A, the claimant set out in two statements dated 29 September 2021 and 1 October 2021 an apology and rebuttal. Specifically, the claimant denied ever patting any member of staff on the bottom and that the alleged incident may have taken place in the tight space where people brush past each other easily. He explained that he was not the type of person who would undertake such activity but accepted that he was a gregarious and tactile person albeit one with an awareness of what amounted to right and wrong. In response to questions put to him by Mr Wilson, the claimant described his conduct as two way and mutual. Further, he described his conduct as being consistent with someone trying to dig someone in the ribs or tickle them but he had no recollection of the incident.

33. As regards B, the claimant described the incident as something he would not do. In his written statement dated 1 October 2021 and in response to having had the incident described to him during the course of his meeting with Mr Wilson and Ms Nicholls, the claimant stated the following:

“Having been made aware of the fact that at the time of this incident I was behind the bar and hurrying to meet a David Fear who had brought a Visitor to see me, knocking on the Office door, which, whilst closed, I noticed him on the CCTV screen and felt I needed to see him. I do recall moving past the other members of staff in the slightly confined area at the end of the bar and as I passed and, without looking behind me, I believed I tried to dig my colleague in the ribs. I can state to anyone reading this statement that I am so shocked and embarrassed that my action resulted in my hand going near the member of staff’s groin.”

34. Mr Wilson prepared an investigation report which is described as having been compiled by both him and Ms Nicholls. That report runs between pages 170-173 of the bundle. The investigation summarises the evidence reviewed, facts established and facts which could not be established. Within its conclusion, the report makes the following recommendation:

“Having gathered the evidence and interviewed the relevant parties the investigating panel recommend a disciplinary hearing is held to discuss these matters further, and due process is followed.

Given the serious nature of the allegations and range of potential outcomes whatever the hearing finds it is recommended the club’s HR Employment Law advisers continue to be consulted to ensure correct procedures are followed at all times.”

35. On 7 October 2021 the respondent wrote to the claimant and invited him to attend a disciplinary hearing. The letter identifies that the purpose of the hearing was to discuss and consider appropriate action with regards to two concerns, namely behaviour deemed by the company to be grossly indecent or unacceptable and sexual harassment of colleagues in connection with work and during work hours. The letter goes on to describe (PP174-175) in short form the allegations raised against the claimant, the fact that the complainants had exercised their right to anonymity, and inter alia the claimant’s right to be accompanied.
36. On 11 October 2021 the claimant attended the hearing conducted by Mr Peter Horstead, director, with Ms Sandra Stout who is described as deputy chair. Ms Stout was not a director of the respondent at the material time. James Day, HR consultant, took notes. Mr Gunn attended as the claimant’s companion.
37. The disciplinary hearing notes are at pages 179-183 of the bundle and detail questions put to and responses provided by the claimant. The claimant was consistent in his oral answers to the with the content of his written statements. In respect of the allegation concerning A, he denied what was said to have happened and had no recollection of it taking place. In respect of B, he confirmed that he was rushing to his member of the club and in so doing he moved to give B a “dig in the ribs” something that he had done jokingly over the years. At that time and having not viewed the CCTV which became

available alter, the claimant admitted that he thought the allegation was not unfounded as B felt it had happened.

38. The disciplinary panel adjourned the meeting by stating that they would require time to consider their position before reaching a decision.
39. At page 184 of the bundle is an email sent by Mr Day to Mr Horstead and Ms Stout dated 12 October 2021. The email starts by confirming that attached to the email are Mr Day's notes of the meeting. Thereafter, Mr Day provides some commentary which appears to be his own reflections on the content covered in the meeting and meeting notes and next steps that could be taken by Mr Horstead and Ms Stout. Mr Day's thoughts are set out in a series of bullet points. Amongst those bullet points is Mr Day's commentary that the claimant "...had a different and better option in relation to the incident with employee B, that was to simply walk past her, not make an unnatural movement backwards and touch her in an inappropriate part of her body although the intention was in Andy's words to give her "a dig in the ribs" – extremely difficult to reach reasonable belief if this was the intention or not" and "sexual harassment or harassment of any type can be both intentional and unintentional in its nature. Harassment can be substantiated in relation to employee B."
40. Further, Mr Day opines "like I said, I think reviewing the CCTV once again will be revealing and important in reaching your final decision. There could also be other things to consider which I haven't mentioned but hopefully gives food for thought.". The claimant takes issue with what Mr Day has to say here and points to what is said as being indicative of either his involvement in the decision to dismiss the claimant or of his undue influence on Mr Horstead and Ms Stout.
41. The claimant was informed by letter of his dismissal by way of letter dated 14 October 2021. That letter was followed by a further letter dated 15 October 2021 entitled "Outcome Disciplinary Hearing". In that letter, the allegations which formed part of the disciplinary hearing were repeated. Further, the disciplinary panel had determined that there was insufficient evidence to reach a reasonable belief in relation to the allegation concerning A. In respect of B, it sets out within a series of bullet points a progression through the evidence it has reviewed which in turn underpinned its findings of fact which in turn led Mr Horstead, the writer of the letter, to form the view that he had reasonable grounds to believe that the allegations concerning B were capable of being substantiated. The consequence effect of the substantiation of those concerns was that trust and confidence had been lost in the claimant by the respondent and that led to his dismissal.
42. The claimant appealed his dismissal and that appeal was heard by Mr Holt, together with Ms Brown. Like the disciplinary hearing, Mr Holt was a director of the club and Ms Brown a female member of the club. In the course of his appeal, the claimant raised concerns with regards to the availability of CCTV footage concerning the allegations raised by B. Mr Holt provided a copy of footage concerning the incident with B which was reduced so as to enable B

to remain anonymous. That footage was subsequently available before the Tribunal.

43. In respect of what could be seen from the CCTV footage, the claimant described that his action was an involuntary one and not one that he was capable of explaining. In addition, the claimant raised the point that because the CCTV footage had not been disclosed to him previously that he was not in a position to fully investigate and consider the allegation raised against him. Further, and for the first time, the claimant raised the concern that he was of the belief that the decision to dismiss him was predetermined.
44. The outcome of the appeal was communicated to the claimant by way of letter dated 23 November 2021. In that letter 13 “heads” of appeal are addressed. However, in summary, the panel upheld the claimant’s dismissal.
45. In evidence, Mr Frith explained that he was the first of the respondent’s directors to investigate the issues raised in respect of the claimant’s conduct in respect of A and B. He prepared notes of his meeting with A and they are at pages 156-157 of the bundle. He explained that a number of changes to the notes which he explained were for the purposes of ensuring anonymity. He confirmed that A had not signed the notes as being an accurate reflection of what she was alleging against the claimant. He confirmed that he handed his notes to Mr Wilson and Ms Nicholls as part of their investigation.
46. Mr Wilson gave evidence in respect of the investigation that he conducted together with Ms Nicholls. Mr Wilson gave his evidence in a straightforward and honest way and that he made an attempt to answer questions wherever possible. At times, during his cross-examination, he was challenged as to the findings contained within his investigation report. Specifically, he stated under the heading “Facts established” the claimant had caused distress to two female members of staff due to inappropriate touching parts of their body which Mr Wilson describes as having taken place over a long period of time. When I asked Mr Wilson what he meant by a long period of time and to which allegations he was referring he was describing the claimant’s habit of being tactile across the shoulders and because the claimant admitted to being tactile with co-workers over a period of time that preceded the allegations raised by A and B in September 2021. It was put to him by Mr Bloom that this was an unfair conclusion to have reached. Mr Wilson did not accept that. The basis of Mr Bloom’s contention to Mr Wilson was that the allegation was one which was a finding which had the potential to be prejudicial insofar as it could have influenced the findings of the disciplinary panel and appeal panel.
47. During the course of Mr Wilson’s cross-examination discussions centred on two of the respondent’s employee handbooks, one dated February 2014 (bundle: 43-100) and a document described as the respondent’s “Draft” dated March 2019 (bundle: 101-146). Specifically, and in response to a question in re-examination as to which was the operative handbook in place at the time of the claimant’s disciplinary process, Mr Wilson identified the 2019 document as being the relevant and applicable document. The relevance of this is that the 2014 document requires that two directors at all times sit on disciplinary and appeal panels whereas the 2019 document does not require panels to

be constituted solely of directors and allows for the secondment of members of the club on these panels.

48. Mr Horstead was asked questions relating to the disciplinary and specifically the decision to dismiss the claimant. He was asked questions about the involvement of Mr Day in that decision. He was taken through Mr Day's email to him dated 12 October 2021. In evidence, Mr Horstead was clear that the Mr Day's involvement was limited to an advisory role only and that Mr Day had not formed part of the cohort who decided to terminate the claimant's employment. I considered Mr Horstead to be a careful and honest witness who answered questions as directly as possible.
49. Mr Holt gave evidence in relation to the appeal. He rebutted the contention put to him that it was inappropriate to appoint Ms Brown, a paying member of the club and not a director, as a member of the panel. He made clear that his decision to uphold the claimant's dismissal was consistent with the evidence presented to him and not by way of any other influence. I consider Mr Holt to be an honest and reliable witness.
50. The claimant gave evidence at the start of the second day of the hearing. He was cross-examined by Ms Walker. I would describe the nature of that cross-examination as being combative. I would not describe the claimant as being a difficult witness as I was asked to by Ms Walker. Nonetheless, it is right to say that in a number of areas I had difficulty in the accepting his evidence. For example, during he course of his cross examination, he had to be challenged a number of times in order to arrive at the answers to the questions that had been posed to him and that in some instances he was unable to directly answer questions or simply chose not to answer the question he had been asked.
51. He was cross-examined at some length in respect of the content of the CCTV which was played repeatedly during the course of his evidence. He was asked to address a number differences in evidence between his written prepared statements that he provided during the course of his disciplinary and thereafter, his account of the incident with B once he had seen the CCTV. In short, the claimant asserted that he had been given a misleading or dishonest account of what had happened by Mr Wilson on the basis that Mr Wilson had told him during the investigation that could be seen to be touching B and wiggling his fingers whereas it was clear from the CCTV that he had not touched B. As to the allegation that his hand movement was unusual and involuntary he explained that this was as a result of him rushing to leave the bar in order to meet Mr Fear.
52. The claimant went on to confirm that he understood that the meaning of harassment within s.26 of the Equality Act and harassment as touching, whether or intentional or not, was unwanted. in evidence, the claimant justified his touching of A and B in the following way:

“I have known one for 20 plus years and the other for 12 years. Tactile was normal. I do not believe that they were concerned about the behaviour until this time.”

53. There was an exchange between Ms Walker and the claimant with regards to his understanding and appreciation of the ACAS guidelines. Here, I found the claimant's evidence somewhat difficult to believe. He started by saying that he was unfamiliar with the ACAS guidance. When questioned about the contents of his schedule of loss which highlighted a number of breaches of the ACAS guidance justifying an uplift in damages if his claim were to be successful. However, he then went on to identify his familiarity with the guidance undermining his previous answer. While this is not the sole example, and while I consider the claimant generally to have provided straightforward answers to questions put to him, it also is an exemplar of the claimant's tendency at times to fashion answers which suited him.
54. The claimant's cross-examination moved into what he considered to be the main reason for his dismissal, namely the desire of the club to re-organise its staff would have required him to have left his post. It was his positive case that the respondent had set in train a process by which his role would be moved into an alternative role and that others were to be hired in order to work around him or remove him altogether. This point was raised in submissions supported by evidence within the bundle. For reasons that I shall set out, I find difficulty in reaching a finding that supports this contention.
55. Lastly, the claimant gave evidence about the relevant handbook. In short, he set out the position that the 2014 bundle applied and consequently the claimant had acted in breach of its own procedures by engaging non-directors at the disciplinary and appeal stage. In answer to a question that I put to him, the claimant confirmed that he was the person responsible for the preparation of the new handbook, albeit with concert with others. However, he confirmed that he was for all intents and purposes the "document holder" and that he was familiar with the contents having read them.
56. In submissions, Mr Bloom addressed the Tribunal first in respect of the wrongful dismissal or breach of contract claim. He made the point, which I accept, that the issue concerning B was the only issue to be considered and that the Tribunal had on the balance of probability to find that the claimant had made a deliberate hand movement backwards to touch B. In other words, in order to deny the claim, the respondent has to prove that the claimant intentionally intended to touch B in the groin area.
57. In respect of the unfair dismissal claim, and after citing the relevant law, Mr Bloom set out nine reasons why dismissal was unfair on the basis that dismissal within the range of reasonable responses. I have set out those reasons at the top of this judgment and do not repeat them here.
58. Ms Walker, on behalf of the respondent, stated that it was a straightforward matter for the Tribunal to consider. The matter concerning B was one which fell to be considered within s.26 of the Equality Act 2010 which deals with the legal elements of harassment and that makes clear that intention was irrelevant. further, the overarching law superseded the stated intention of the disciplinary and appeal panels to determine who appeared to have included intention as part of their reasoning and rationale for dismissing the claimant but in any event that policies of 2014 and 2019 covered the meaning of

harassment and did not include an intention requirement within its formulation.

Relevant law and conclusions

Unfair dismissal

59. S.94 of the Employment Rights Act 1996 confers an employee has the right not to be unfairly dismissed. Enforcement of that right is by way of a complaint to the Tribunal under s.111. The employee must show that he was dismissed by the respondent under s.95, but in this case the respondent admits that it dismissed the claimant (within s.95(1)(a) of the 1996 Act).
60. S.98 of the 1996 Act deals with the fairness of dismissals. There are two stages within s.98. First, the employer must show that it had a potentially fair reason for the dismissal within s.98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.
61. In this case, it is not in dispute that the respondent dismissed the claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason under s.98(2). The respondent has satisfied the requirements of s.98(2).
62. S.98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.
63. In misconduct dismissal, there is well established guidance for Tribunals on fairness within s.98(4) in the decisions of Burchell [1978] IRLR 379 and Post Office v Foley [2000] IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within s.98(4), the Tribunal must decide whether the employer acted within the range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of a reasonable employer.
64. I find that the respondent held a genuine belief that the claimant was guilty of misconduct in respect of employee B. Its evidence was clear about why it dismissed the claimant. The dismissal and appeal letters were unequivocal

and were capable of allowing the claimant to understand why he had been dismissed.

65. Mr Bloom contends that the respondent did not carry out a reasonable investigation. The reasons I set out below as follows:

65.1.1 The failure to inform the claimant of the exact nature of the allegations against him. Here, Mr Bloom includes the letter of invitation to the disciplinary hearing among those that fall short of what was required by the respondent.

65.1.2 The absence of any signed statements from A or B is identified as a fundamental flaw.

65.1.3 The absence of detailed notes prepared during the course of the investigation.

65.1.4 The complete absence of B at the dismissal and appeal hearings.

65.1.5 The withholding of the identities of A and B which was said to have placed the claimant at a substantial disadvantage.

65.1.6 The influence of Mr Day which was central to the decision to dismiss.

65.1.7 The assertion by Mr Wilson in the investigation report that serious misconduct had taken place “over a long period of time” which said to have been prejudicial.

65.1.8 Unfairness in preventing access to the CCTV footage central to the allegation concerning B.

65.1.9 The alleged failures of Messrs Horstead and Holt to speak with B to confirm her allegations and seek further clarity if required. Specifically, it is alleged both that they just sat back and allowed things to unfold when they should have taken a far more active approach to the evidence of B.

65.1.10 That the respondent did not follow its own disciplinary procedure in the 2014 Handbook. As I have identified, there is a tension between the applicable handbook; the claimant asserts the 2014 Handbook as being the one which applies whereas the respondent relies on the 2019 Handbook.

66. The respondent’s failure to reasonably take account of B’s own statement that C’s actions were stated not to be deliberate. As will be seen, I do not consider that they have amounted to an unfairness which renders the claimant’s dismissal unfair.

67. I consider that the claimant was provided with sufficient information with regards to the allegations that were raised against him throughout the disciplinary

process. Much is clear from the documents within the bundle and the claimant's obvious familiarity with the allegations raised against him as set out during the course of the disciplinary and appeal process.

68. Whilst the case of **Linford** (see above) makes clear that written statements are required it is also the position that the EAT in Linford made clear that Linford was for guidance only and it was not sacrosanct. I find that this is not a fundamental flaw.
69. With regards to the absence of notes I do not find this to be the case.
70. I do not find the absence of B at the dismissal or appeal hearings to be a significant flaw or a flaw at all and note that the claimant did not request her attendance at these hearings.
71. I find that it was entirely proper to withhold the identities of the complainants in light of their desire to remain anonymous. I cannot see how the respondent can be criticised here. Both complainants had requested that their identities remained confidential and not revealed to the claimant.
72. I do not agree that it is clear that Mr day was involved in the decision to dismiss or unduly influenced it in any way. It is also clear from his email dated 12 October 2021 that he provided a series of "things to consider" underneath his analysis of the evidence presented to Mr Horstead and Ms Stout. Accordingly, I form the view that this was a genuine attempt to provide guidance and not influence the decision-making process.
73. I do not find that the decision to dismiss and reject the appeal were prejudiced by the actions of Mr Wilson. Mr Holt and Mr Horstead accepted in evidence that they considered the totality of the evidence presented to them and formed a view in relation to the evidence that they saw. I do not find that either men were influenced by Mr Wilson's comment.
74. I find that the delay in providing the CCTV footage to the claimant to be of no consequence. The claimant had been provided with an account of B's allegation which allowed him to recollect that encounter and provide an explanation in respect of what he saw. I reject the contention put forward by the claimant and in submission on his behalf that Mr Wilson deceived him by providing him with misleading information as to what was alleged or could be seen from the CCTV.
75. I find that Mr Holt and Mr Horstead did what was required of them during the course of the disciplinary and appeal processes respectively.
76. I find that the claimant was aware of the content of the 2019 policy and on the balance of probabilities I find that the 2019 policy was in force at the material time. In this regard I prefer the evidence of the respondent's witnesses against that of the claimant.

77. I find that the respondent did take into account the totality of B's evidence including the fact that it was her view that she did not consider the claimant's actions to be deliberate.
78. I have the band of reasonable responses clearly in mind in reaching my decision. It is immaterial what decision I would have made. The claimant's case is that the respondent's management was looking for a reason to dismiss him and landed on the allegations raised by A and B as justification for his dismissal.
79. On the evidence, I find that the respondent was entirely justified in reaching the decision that it did with regards to the allegations of misconduct made against the claimant. The investigation had found that there was CCTV footage which corroborated B's allegation that the claimant had allowed his left hand to hit her. Whether or not there was CCTV footage which actually shows the claimant made contact with B is in my mind immaterial because of the limits of CCTV footage in this case and more importantly, the strength behind the allegation made by B. I find that the allegation of touching as alleged by B to be made out on the basis that B raised the allegation after having been touched. It later came to light that there was CCTV footage available which supported her allegation that the claimant had made an unnatural movement towards her and touched her. Given this evidence, I find that the respondent was entirely justified to reach the decision that the claimant had committed the breaches of its policy as alleged against him. Further, I find that the respondent's decision to dismiss the claimant fell within the range of reasonable responses to his conduct.
80. Breach of contract
81. The claimant was dismissed without notice. He brings a claim of breach of contract in respect of his entitlement to 12 weeks' notice pay.
82. The respondent says that he was entitled to dismiss him without notice for gross misconduct for the reasons set out above.
83. I must decide if the claimant committed an act of gross misconduct entitling it to dismiss without notice. In distinction to the claimant's claims of unfair dismissal, where the focus was on the reasonableness of the respondent's decisions, and it is immaterial what decision I would myself have made about the claimant's conduct, I must decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.
84. Mr Bloom submits that on the evidence before the Tribunal it was not possible to form the view that the claimant acted in breach of contract in dismissing the claimant without notice. Ms Walker contends that the respondent was not in breach and therefore the claimant is not entitled to his notice pay.
85. I have set out my findings above with regards to the claimant's actions. I find that they are equally applicable to the question as to whether or not the claimant was guilty of conduct entitling the respondent to dismiss without

notice. I find that the respondent was entitled to find that the claimant had committed a repudiatory breach of contract by way of his actions and accordingly the claimant was not entitled to notice pay. His complaint of breach of contract fails and is dismissed.

Employment Judge Forde

Date: 7 November 2022

Sent to the parties on: 18 November 22

For the Tribunal Office