EMPLOYMENT TRIBUNALS

Claimant: Mr David Hannon

Respondent: MITIE Limited

HELD AT: Manchester **ON:** 28-29th November and in Chambers 30th November 2022

BEFORE: Employment Judge Anderson (Sitting alone)

REPRESENTATION:

Claimant: In Person
Respondent: Mr Lester of Counsel

JUDGMENT

The claim of unfair dismissal is not well founded and is dismissed.

Employment Judge Anderson
5th December 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
20 December 2022

FOR THE TRIBUNAL OFFICE

REASONS

Introduction

1. The Claimant, Mr D Hannon brings a complaint of unfair dismissal against his former employer MITIE Limited.

2. This matter came before EJ Allen in April 2022 for the purposes of an in person Preliminary Hearing (Case Management). At that hearing, EJ Allen gave orders for the future conduct of this claim and a list of issues was agreed.

3. The list of issues read as follows:

   1.Unfair dismissal

   1.1 What was the reason or the principal reason for the claimant's dismissal? In particular, was the reason or principal reason for the claimant's dismissal conduct within the meaning of section 98(2)(b) of the Employment Rights Act 1996? The claimant alleges that the reason for his dismissal was because he had raised a grievance.

   1.2 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant? The claimant alleges that the process followed was unfair, wrong, did not follow guidelines, records/paperwork were missing, was not conducted face to face (as it should have been), and/or there were lies.

   1.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent? If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

   2.Remedy for unfair dismissal

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

   2.2 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 dismissal, whether it would be just.

2.3 What financial loss, if any, has the claimant suffered as a result of the unfair dismissal?

2.4 If the respondent failed to follow a fair procedure, can the respondent show that following a fair procedure would have made no difference to the decision to dismiss?

2.5 What basic award is payable to the claimant, if any?

2.6 Applying the statutory cap of fifty-two weeks' pay to the compensatory award, what amount should the claimant be awarded?

4. The agreed list of issues appeared to be the standard Burchell issues that I would expect to see in an unfair dismissal case with more specific points added throughout. I did not seek to alter the list of issues other than I canvassed with the parties whether it was necessary to separate liability and remedy in the way indicated by the list of issues. Mr Lester, Counsel for the Respondent indicated that his cross-examination in relation to remedy was about half an hour long. There was no objection from the Claimant to liability and remedy being heard together. I therefore directed that the hearing would consider liability and remedy at the same time.

5. There was no claim of wrongful dismissal before the Tribunal.

Procedural Matters

6. At the outset of the hearing, I called the parties in with a view to discussing procedural matters before taking a short amount of further reading time.

7. During this initial discussion, I explained to the parties the procedure that would be followed over the next few days and the order of the evidence. I explained to the Claimant that I could not and would not run his case for him but that if he was at any point unclear on Tribunal procedure, he could ask me to clarify what was happening.

8. I also provided some basic guidance in respect of cross-examination given that it can be difficult for a party to ask questions having never done so before. I indicated that the best questions are short, rather than a long speech. That the witness should wait for the question to finish before beginning their answer and that the questioner should also wait for the witness to answer before asking their next question. If a document needs to be referred to, ask the witness to turn to that page before going on to ask the question.

9. I noted from the case management discussion that the Claimant would need extra breaks and I offered to facilitate this. The Claimant said that this no longer applied and was not necessary. I acknowledged that but stated in any event, it was open to a party at any time to request a short comfort break.

10. On the morning of the hearing, the Claimant did not attend with either the bundle or witness statements in this matter. The Respondents solicitors had sent extra copies in to the Tribunal as directed, most probably for use by the public as is now the standard direction.

11. The Claimant said that the bundle and paperwork was at home. I called the clerk and the additional copy referred to above (witness statement bundle and hearing bundle) was handed to the Claimant.

12. There was a bundle of 310 pages. At the outset, three further pages were added to the bundle, all of which related to internal correspondence that should have been in the original bundle.

13. In addition, following my initial reading of the bundle, I indicated that the Claimant's s.1 statement was not present and I would need this in the event the Claimant's start date was in dispute. I also noted that the Claimant's original grievance was not in the bundle and that If I were to adjudicate on whether this was the true reason for dismissal, I would need to see it. Both documents were then obtained by the Respondent that day.

14. During the hearing, it was apparent that the Claimant had great difficulty in taking direction from the Bench. The most common manifestation of this was that the Claimant would talk over the Judge. On day one of the hearing, the Claimant was asked repeatedly not to do this. During day two of the hearing, it was necessary to warn the Claimant that the Judge being heard was an important part of the proceedings and that the Judge did have the power to strike out a claim if a party continued to conduct themselves in that way. I made it clear that it was not my intention to do so at that stage and that I hoped the warning would suffice.

15. Another manifestation of this problem was that it was explained to the Claimant that it was necessary for the Judge to take a note during the case. On a number of occasions, the Claimant was asked to pause to enable me to take a note. However, the Claimant continued to speak. When asked to reflect back what had been asked of him, on one occasion, the Claimant said that he was not aware that he had been asked to stop to enable a note to be taken.

The Claimant Absenting Himself From Proceedings

16. On the morning of day two of the hearing, I was handed via the Tribunal Clerk a set of papers from the Claimant. I stated to my clerk that I would not read them at that point and that the parties should be brought into the room and the issue would be addressed.

17. Upon the parties entering the hearing room, I addressed the issue of the additional documents with the Claimant. The Claimant said that these were documents that were sent to him as part of the case.

18. Upon looking at the documents, it was apparent that they included the Respondents witness statements. In addition, they also included some papers marked 'Dentons' (the Respondents instructed solicitors) relating to some form of property transaction or plan. These additional papers (which I shall refer to as the 'property papers') were not in any way related to this case.

19. I asked Counsel for the Respondent to take instructions. I wished to be satisfied that the Claimant had been served with the hearing bundle. He did so and on his return, he outlined the chronology of correspondence with the Claimant. Importantly, the bundle had been served on the Claimant more than once, including in electronic format.

20. I asked the Claimant when he had received these additional papers (the property papers). He said that he did not know. I asked if he was able to put a month on it or a season of the year. He repeatedly said that he did not know. This did not assist me in understanding the chronology of this matter.

21. I also noted with the Claimant that at the end of day 1, it was indicated to the Claimant by myself that he should take the papers on the table (hearing and witness bundles) with him overnight. The Claimant said that he did not need to as he had them at home. I asked the Claimant to respond to this point – if there was an issue with the bundle why did he not take these papers home with him as suggested by myself? I did not receive a clear response to this question.

22. I asked the Claimant what it was he was asking me to do as a result of this. It was necessary to ask this a number of times. He said that he wanted me to know about it. I indicated that based on the chronology that I had heard, the bundle had been served. He said that he did not dispute the bundle being served. He said that he had a bigger issue to raise and that we should concentrate on that.

23. The Claimant then objected to the hearing proceeding further because he stated that he had been harassed by the Respondents Counsel.

24. Upon this allegation being raised and before it was particularised, I offered Mr Lester the opportunity to telephone his instructing solicitors with a view to obtaining a note taker as he was in Tribunal without an instructing solicitor being present. He did avail himself of the opportunity to take instructions, but ultimately it was not possible for a note taker to be secured and one of the Respondents witnesses sat at the table in order to take a handwritten note.

25. On the parties return to the hearing room, I asked the Claimant for the details of the allegation.

26. The Claimant then asked that the hearing take place in private. The stated reason was not entirely clear, but the Claimant stated that he did not wish to embarrass the Respondents Counsel. The only people in the hearing room were witnesses in the case, the Respondents Counsel, the Judge and a member of Tribunal staff.

27. I refused the application for the hearing to be conducted in private. None of the reasons contained within the Tribunal Rules applied. Most importantly, I had regard to the fundamental principle that this was a public hearing and that this was only interfered with when it was appropriate to do so as prescribed by law. Public hearings are an important element of the transparency of the justice system. If anything, if the Claimant was making serious allegations, it was all the more important that the hearing was held in public.

28. The Claimant stated that after he left the Tribunal room yesterday, the Respondents Counsel asked to speak to him in private. He says that Respondents Counsel stated that you know you are not going to win the case, best before you leave the building state that you are going to drop the case. You know this is going public, it is not in your interest to be sacked for sexual harassment and it causes difficulty for future employment.

29. The Claimant complains that Counsel should not have spoken to him in the first place and that he did not appreciate the suggestion that the case was already won.

30. The Claimant said that because of this we should adjourn. He believed that if we did adjourn, it would necessitate the Respondent getting a different barrister. I explained that if this matter were adjourned, the representation of the Respondent was entirely a matter for the Respondent and not a matter that the Tribunal would become involved in.

31. I asked the Claimant whether there was anything further that he wished to add. He said “that’s it, for now.” I explained that this was his opportunity to set the point out and that I needed to know if there was anything else to be said. The Claimant repeated “for now” and this exchange continued in a similar vein. At the end of the exchange, it was apparent that there was nothing further to add and nothing further had been added.

32. In response, the Respondents position was as follows. Any discussion following the end of day 1 was without prejudice and as such inadmissible in Tribunal. This is a form of mutual privilege and the Respondent did not wish to waive that privilege. What was reported by the Claimant was not accepted but the Respondent did not wish to go beyond that so as to maintain its privilege. Further, the application to adjourn was opposed.

33. I rejected the application to adjourn this matter. In so doing, I took the allegations made by the Claimant at their highest. Taking them at their highest, they did not amount to harassment. Nor was it unreasonable conduct by the Respondent or any other label contained within the 2013 Rules. No further enquiry was necessary, because I was able to consider the allegation at its highest.

34. In terms of the submission made by the Respondent regarding this being a matter without prejudice, I acknowledged that there were circumstances in law in which the privilege would not apply, most notably where there was unambiguous impropriety. Given my findings above regarding the allegation being taken at its highest, I did not find there to be any impropriety, let alone unambiguous impropriety. The Respondent asserting that this evidence was inadmissible was not determinative. Rather, the key point was that the allegation taken at its highest did not take the point any further and there was no further enquiry that needed to be made. It was this key point that enabled me to proceed with the hearing, not the suggestion that the matter was without prejudice.

35. I also had to have regard to the overriding objective, including the need for hearings to be conducted within time and proportionately. A fair hearing was clearly still possible and there was no proper basis for suggesting otherwise. The Tribunal must guard against parties seeking to derail proceedings with tangents from the Tribunals central task of hearing the evidence fairly and applying the law to reach a decision. Most of the morning of day two had been taken up with tangential matters and it was important to return to the core task of hearing evidence.

36. Having indicated that we would then hear from the Respondents final witness, the Claimant stood up and in a raised voice stated that he was leaving.

37. I made it clear and repeated at least twice to the Claimant that if he left the room, the hearing would proceed in his absence.

38. When leaving the room, the Claimant repeatedly used the phrase or similar phrase of ‘I’m adjourning this’ or ‘I’m adjourning this myself’. The point was made to him that it was for the Tribunal to decide whether or not to postpone a hearing. The Claimant said words to the effect of that ‘I am the Claimant, I get to choose’.

39. The Claimant said that he was going to his solicitors and that he was appealing.

40. It is right to state that I regarded these statements as a continuation of my concern over the extent to which the Claimant wished to exert control over the proceedings.

41. The Claimant walked out of the room and asked his witnesses to follow him. I indicated that it was a public hearing and they were free to leave or remain as they wished. They subsequently followed the Claimant out of the room.

42. The Claimant having left the room, I considered afresh whether to continue with proceedings. I took the view that it was appropriate to proceed. The Claimant's leaving of the room was entirely voluntary, it was an attempt to control proceedings and it was not for a party to dictate to a Judge how proceedings should be conducted. The Claimant was aware of the consequences of his leaving.

43. No application was made by the Respondent at this stage.

44. The hearing proceeded in the absence of the Claimant. Ms Alison Thomas remained to be called on behalf of the Respondent and she proceeded to give evidence. Mr Lester then proceeded to make his closing submissions.

45. Immediately following the completion of submissions, (Mr Lester having received additional instructions) the Respondent applied for strike out of the Claimant's claim. The basis for the application was Rule 37(b), (c) and (d) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

46. The submissions could be summarised as follows: the Claimant had conducted the proceedings, including his own conduct during the course of the hearing unreasonably. This included his conduct towards the Respondent, the Judge, the orders, the documents and his leaving of the Tribunal. Furthermore, he had breached directions of the Tribunal including the Judges direction not to talk over him. Finally, by absenting himself, he had not actively pursued the proceedings. All of the above points also needed to be seen in the context of a Preliminary Hearing taking place before EJ Allen in April 2022 in which the Judge took time to go through with the Claimant what was required in terms of detail to put in his witness statement. It was also evident that the Claimant had done little by way of preparation for this hearing.

47. I refused the application to strike out. I made no findings on the substance of the points that the Respondent relied upon as part of its application. Rather, I took the view that it was an inherent part of my consideration of any strike out application to look at the issue of proportionality and also the stage at which the proceedings had reached.

48. The position was that the Claimant had voluntarily absented himself from proceedings, the evidence had concluded and the Respondent had made their closing submissions. This meant that I was then at the stage of considering my Judgment in this matter. There was no bar to me looking at

the merits of the case in light of the stage that had been reached in proceedings. The Tribunal was in a position to give a Judgment on the case and fairness dictates that if a Judgment on the case is possible, then it is more proportionate to give a Judgment on the evidence rather than strike out.

Paperwork Left – What to Do With the 'Property Papers'

49. Upon leaving the Tribunal room, the Claimant left the trial bundle and witness statements in the room.

50. In addition, because of the Claimant leaving, it was not possible to discuss what to do regarding the separate set of documents that appeared to relate to a London property transaction with 'Dentons' marked on them that were located on the Judges bench. They were on the Judges bench because I had not determined at that point what to do with them. At an earlier stage in day 2, prior to any suggestion of the Claimant leaving, the Claimant had requested the documents back because he wanted to complain about the Respondent and these were to be part of his complaint.

51. I have taken the view that the documents which the Claimant handed up to the bench should be returned to him. If the Respondents solicitors have mistakenly sent documents to the Claimant (and it is not for me to determine whether GDPR has been breached or not) then their remedy is against the Claimant should he refuse to return them. The documents were handed to the Tribunal by the Claimant for the purposes of these proceedings and it follows that they should be returned to the Claimant. Anything beyond that is beyond the jurisdiction of the Tribunal, which is a creature of statute with more restrictive powers than the civil courts. I have directed Tribunal staff to return the 'property papers' to the Claimant via post.

Witnesses

52. The Respondent called Mr John King to give evidence in relation to the investigation into the first written warning. Mr Agnew was called in relation to the decision to give a first written warning and Mr Insull was called in relation to the Claimants appeal against the written warning and also in relation to his further grievance.

53. In relation to the disciplinary process for which the Claimant was dismissed, the Respondent called Carole Bassey who took the decision to dismiss and Alison Thomas who heard the appeal against the decision to dismiss.

54. All witnesses provided witness statements. The first four witnesses were cross-examined. The fifth, Ms Thomas was heard after the Claimant absented himself.

55. The Claimant provided a witness statement on his own behalf. He also provided witness statements from Brian Hyde in relation to the first written warning and Gareth Bartley in relation to the first written warning and the dismissal. Because of the Claimant absenting himself, no witness was called by the Claimant, including himself. I had read the statements and it was open to me to place such weight on them as I saw fit, whilst acknowledging that they had not been subjected to the scrutiny of cross-examination. Ultimately, I read the statements, but with respect there was significant reference to the first written warning, when I was primarily concerned with the dismissal. Ultimately, the statements were of limited relevance at best.

56. In relation to the claimants witness statement, it initially focuses on the first written warning and is scant in detail regarding the disciplinary process that he was dismissed for. I note that this matter had the benefit of a case management discussion before EJ Allen and it is fair to say that the lack of detail does not assist the Claimant.

57. The Respondent did not provide a witness statement from Mr Gerard Murphy who undertook the investigation in relation to the allegation of gross misconduct. The Respondents stated reason for this was that the investigation was not the subject of challenge.

Findings of Fact

58. I made the following findings of fact on the balance of probabilities.

59. For the purposes of this Judgment, I will not publicly identify the member of the public that made the complaint given that her complaint includes an allegation of sex related misconduct. I will refer to her as ‘the complainant’ or similar throughout this Judgment.

60. The chronology in respect of the first written warning and the disciplinary process overlap. In making my findings of fact below, I deal with the written warning first followed by the disciplinary process that led to dismissal.

61. The Claimant commenced employment with the Respondent on 11th May 2016 as a cleaner. It was apparent from references in the papers that the Claimant had previously worked as a cleaner and I raised the possibility given the nature of the cleaning industry that TUPE could apply and that service with a previous employer may count.

62. When clarifying this with the Claimant at the outset of the case and before he gave evidence, the Claimant stated that there was a break of three months before working for MITIE. I asked the Claimant the reason for that break and he stated that he would rather not say. I did not pursue the matter further and therefore find that his start date is as per the ET 1.

63. On 8th December 2020, the Claimant raised a grievance with the Respondent. The gist of that grievance was that a man named Vinny was blocking the Claimants applications for promotion. That the Claimant had made numerous applications and had not heard back in relation to some of them. A grievance hearing was held on the 23rd December 2020 and this resulted in the grievance outcome letter dated mistakenly dated 20th January 2010, which I take to mean the 20th January 2021.

64. In that letter, Mr Birch dismissed the grievance and provided an explanation for doing so. My initial reading of the letter is that it appears to answer a narrower point than was raised by the Claimant in his initial grievance. However, nothing appears to turn on that and it was not a point raised by the Claimant during the case.

65. On the 4th January 2021, there was an incident. Mr Scott Brannan had finished his shift in Huddersfield. He was walking through Manchester Piccadilly and saw members of staff stood around 'having a chat'. He noted that this seems to be the case every time he passes through the station and went to the group to ask what was going on.

66. The summary of the allegation against the Claimant was that he refused to return to work having been given an instruction by Mr Brannan to do so. Furthermore, in so refusing, he was animated and the word 'aggressive' was used to describe the Claimants body language and use of his arms.

67. The Claimant disputes that Mr Brannan had the authority to issue him with an instruction. The Respondents position as articulated by Mr Agnew and Mr Insull was that even though Mr Brannan was not the Claimants line manager, he was a supervisor and entitled to issue the Claimant with an instruction. If a supervisor were to see something wrong and to not take steps to deal with the situation, that would be considered to be poor practice.

68. There is a dispute of fact over whether the Claimant swore. Not all of the witnesses present can agree on a position on this.

69. This matter came before Mr Agnew for a disciplinary hearing on the 9th April and a first written warning was issued. It then came to Mr Insull on appeal against that written warning. Mr Agnew told the Tribunal that he did not make a finding that the Claimant swore whereas Mr Insull on appeal said that he did make such a finding. Irrespective of the swearing point, the allegation of refusing an instruction and aggressive behaviour was upheld.

70. Much of the Claimants case has focused on the issue of whether or not he swore on that day, but I note that that is not the cornerstone of the warning that was issued against him.

71. Within the above chronology, the Claimant did raise a further grievance (5th April 2021 – pg. 177) suggesting that Scott was a liar and that action should be taken against him. Because of the overlap in issues, this was dealt with by Mr Insull as part of the appeal. He dismissed the Claimants further grievance.

72. A complaint (page 176) was received from a member of the public via social media. After including identifying details, it stated:

> "At 17.04pm on the 29th March 2021 I was sexually harassed by a member of Mitie staff at Manchester Piccadilly train station. As I passed this person, he uttered the phrase 'look at those tits'. Upon hearing this I was filled with disbelief and utter disgust. I turned round and glanced at the person in question and he told me he had said "look at those tears". Apart from the fact that I was not crying or upset, this comment doesn't even make any sense. This act is extremely degrading and made me feel incredibly uncomfortable and scared. I do have more details of his description and a picture. I sincerely hope that there will be swift disciplinary action for this person as his actions are completely unacceptable."

73. The Claimant suggests that the Respondent included the complainants name and telephone number to him when providing the evidence to him in order to lure him into contacting the complainant. The Respondent accepts that it should have redacted the contact details of the complainant. I do not find that the Respondent failed to redact the details with a view to luring the Claimant into committing an act of misconduct.

74. The Claimant was invited to an investigatory interview. In interview on the 13th April 2021, when asked if he said "look at those tits" the Claimant laughed and said "No, why would I?" Laughs "I tell you why I wouldn't I'm a leg man." "Am I supposed to have said that?"

75. The Claimant denied having spoken to the complainant. It was evidently a difficult meeting and at one point in the meeting the Claimant said that he was going to leave the meeting.

76. The Claimant was suspended by letter dated 13th April 2021.

77. The letter of the 22nd April 2021 invited the Claimant to a disciplinary meeting. That letter made clear that if the allegation of gross misconduct was upheld, this could result in the Claimant's summary dismissal.

78. The allegation against the Claimant was outlined. The incident date was identified as the 29th March 2021. It was alleged that the Claimant said in relation to a member of the public “look at those tits”.

79. The disciplinary hearing took place on the 28th April 2021 via MS Teams. The Claimant’s RMT rep, Mr Clive was present. Ms Bassey described the Claimant as animated and angry at the meeting. She also recalled the Claimant’s Union representative advising him to calm down.

80. Ms Bassey sought to go through the allegations with the Claimant. She described the Claimant as denying everything from the CCTV evidence to the investigation minutes.

81. The Claimant raised the possibility of Gareth, his colleague making the remark. He did not suggest that he heard Gareth make this remark. However, no other colleague was present.

82. Furthermore, during the course of the disciplinary meeting, there was an exchange following which Ms Bassey explains to the Claimant the effect that such behaviour can have on women and how it is reasonable for women to complain when they are subjected to such behaviour. The Claimant did not appear to show insight into why the complainant felt the need to complain.

83. Ms Bassey decided to dismiss the Claimant. A detailed decision letter was provided to the Claimant which set out the reasoning of Ms Bassey.

84. The Claimant appealed the dismissal. In the appeal letter, the Claimant asserted that he could not have made the comments as he was gay. This matter was not explored during the course of the Tribunal hearing as the Claimant absented himself before the evidence of Ms Thomas and it was not raised with any prior witness in cross-examination. It does not appear in the Claimant’s witness statement.

85. The appeal was heard on the 24th May 2021. During the course of the appeal, the Claimant complained that Ms Bassey was rude to him at the disciplinary hearing. In the appeal, the Claimant also denied during the investigatory process making the ‘leg man’ comment.

86. Ms Thomas was able to access an element of the CCTV that still existed at the time of the appeal. The CCTV she viewed did confirm that there were two travellators. The Claimant was on one passing the complainant going in the other direction. It does establish that the Claimant could not have been elsewhere as he had earlier suggested. She considered that what she viewed was entirely consistent with the account of the complainant.

87. The Claimants appeal against dismissal was not upheld.

The Law

88. The Right not to be unfairly dismissed is contained within s.94 Employment Rights Act 1996.

89. In the present case, it is agreed that the Claimant had in excess of two years continuous service and that he had been dismissed by the Respondent.

90. It is for the Respondent to prove that the reason or principal reason for the dismissal was one of those listed within s.92(b) Employment Rights Act 1996. In this particular case, the Respondent relies upon conduct as the reason for dismissal.

91. A reason for dismissal is a set of facts or belief held by the employer which cause them to dismiss the employee: Abernethy v Mott Hay and Anderson [1974] IRLR 213 per Cairns LJ. This has been subsequently affirmed on numerous occasions and has most recently been analysed by the Supreme Court in Jhuti v Royal Mail [2019] UKSC 55.

92. If the Respondent does prove a potentially fair reason for dismissal, then reasonableness under s.98(4) ERA 1996 must be considered. The classic formulation of a conduct case based on BHS v Burchell [1978] IRLR 379 requires the Tribunal to consider a) whether the Respondent formed a belief that the employee had committed the act of misconduct and whether that belief was held on reasonable grounds b) whether the Respondent had undertaken such investigation as was reasonable in the circumstances of the case and c) whether the decision to dismiss was within the range of reasonable responses open to an employer.

93. It is also necessary to look at whether the employer followed a fair procedure in dismissing the Claimant.

94. The burden of proof for the purposes of s.98(4) is neutral.

95. Key to understanding the Burchell test is the concept of a range of reasonable responses. It is not for the Tribunal to substitute its own view for that of the Respondent. Rather the Tribunal must answer the questions posed from the perspective of whether or not the actions taken fall within the range of reasonable responses open to an employer, having regard to the size of the undertaking and the administrative resources available to it.

96. Evidently, there are decades of case law relating to the law of unfair dismissal. There was nothing to suggest that this was anything other than a straightforward application of the Burchell test. No specific authority or point of law was put before the Tribunal to consider in respect of the law of unfair dismissal.

Conclusions

97. The Claimant disputes the reason for dismissal. He suggests that the real reason for his dismissal is the fact that he submitted a grievance to the Respondent, followed by a further grievance.

98. The Respondent bears the burden of proving the reason for dismissal. I find that the Respondent has established that the reason for dismissal was conduct.

99. The genesis of the disciplinary process against the Claimant was a complaint made by a member of the public. That member of the public was entirely independent of MITIE, was not prompted by MITIE and was the sole cause of the disciplinary action. Furthermore, there is nothing in the wider evidence to suggest that the Respondent viewed this opportunistically. It was a serious matter and it was treated as such. This is not a Jhuti type case or an Aslef v Brady [2006] IRLR 576 type case.

100. Whilst the timing of the first written warning does require a degree of scrutiny given its proximity to a grievance being raised by the Claimant, I find that there is no connection between the grievance and the written warning. The written warning emanated from a staff member who was unconnected to the Claimant giving him an instruction and the Claimants evidenced reaction to it. In any event, as I note below, the first written warning was not determinative of the decision to dismiss.

101. The investigation was carried out by Mr Murphy. I am satisfied that the Respondent carried out such investigation as was reasonable in all the circumstances of the case. Evidence was obtained from relevant witnesses and there was an attempt to secure CCTV evidence. The CCTV was not the property of the Respondent and they did not have an unfettered right to view it. A CCTV timeline was subsequently provided to Ms Bassey. Ms Thomas was in a position to view some of the CCTV footage for herself. This was within the range of reasonable responses (c.f. Sainsburys Supermarket v Hitt [2003] IRLR 23) and the Respondent secured the evidence as best it could in the circumstances.

102. The CCTV footage was not central to the case against the Claimant. It only assisted in identifying that the Claimant was not having a cigarette break at the time of the incident and the fact that he did go past the Claimant on the travelator. The Respondent took these matters into account, but most fundamentally, it believed the complainants account of events over the Claimants.

103. I find that the Respondent held the belief that the Claimant had made the statement alleged and held that belief on reasonable grounds. Both Ms Bassey (dismissal) and Ms Thomas (appeal) believed that a) the Claimant was located where the complainant alleged that he was b) the Claimant was

identified via a photograph and c) found the complainants account to be credible. There was more than sufficient material to establish this belief.

104. In terms of whether or not the decision to dismiss was within the range of reasonable responses, this was a case in which it was alleged that the Claimant had made a sexist remark in a public place to a member of the public whilst wearing the uniform of the Respondent. It prompted that member of the public to report the Claimant to the company. It had the potential to poorly reflect on the company. It exposed a member of the public simply going about their day to unwanted sexual conduct. The Respondent was entitled to treat this as a matter of gross misconduct.

105. The Respondent actively considered mitigating factors and this is expressly recorded in the relevant decision letters. This went beyond lip service, these were in the mind of the relevant decision makers and they did weigh these matters up carefully.

106. It is also correct to note that the Claimant did not assist himself throughout the disciplinary process. Whilst allowances must be made for how difficult it is to be faced by a disciplinary process, the comments made at the investigatory interview were ill-judged and throughout the disciplinary process various positions have been adopted to the extent that his account lacked a consistent narrative. There was nothing to suggest that the Claimant had shown remorse or insight into his behaviour and there was very little if anything to which the decision makers could use by way of mitigation.

107. The fact that the Claimant had a first written warning was of only tangential relevance to this case. The Respondents decision makers were aware of the warning and it was relevant when looking at the issue of mitigation to acknowledge the existence of a prior warning. However, both Ms Bassey and Ms Thomas made it clear that the act of misconduct alleged against the Claimant was serious enough in isolation to warrant dismissal. Such a conclusion is within the range of reasonable responses open to them.

108. Finally, I address any outstanding procedural matters. In relation to the allegation of documents not being provided, during the hearing this was directed at the first written warning stage. I find that the proof of postage provided by Mr Agnew establishes that he did send the documents to the Claimant. It follows that prior to lodging his appeal against the warning, the Claimant had the relevant documents. In any event, this was not material to the decision to dismiss. In terms of the dismissal process, I have not identified any documents that were not provided to the Claimant and nothing was put to Ms Bassey to suggest otherwise.

109. I carefully considered the Respondents approach to the evidence of the complainant. Both Ms Bassey and Ms Thomas spoke to the complainant outside the disciplinary hearing itself. Only Ms Thomas took a note, Ms

Bassey said that she was advised by HR that she did not need to do so. Reading between the lines, it seems that both spoke to the complainant because neither wanted to make the finding that they did without speaking to her. Both appear to have done so out of an abundance of caution in a 'belt and braces' sense. It is a complicating factor. Both were clear in their evidence that ultimately, the evidence that led to their respective decisions was already present. In neither case did speaking to the complainant alter the evidence. Looking at matters as a whole as I am required to do for s.98(4) ERA 1996, this did not render the overall process as unfair.

110. The Claimant knew the case against him, was aware that his employment was at risk and he had multiple opportunities to state his case. He also had the benefit of union representation. The Respondent was faced with an employee who was evidently difficult to deal with during the disciplinary process. I find that both Ms Bassey and Ms Thomas had an open, sought to question appropriately and wanted to deal with matters as best they could.

111. The list of issues suggests that the meetings in this matter should have taken place face to face. This was not raised with any witness. Given the Covid Pandemic, I do not find that the Respondent was under an obligation to hold face to face meetings and it was not outside the range of reasonable responses to hold remote meetings.

112. The decision to dismiss was within the range of reasonable responses open to the Respondent.

113. It follows that the complaint of unfair dismissal was not well-founded and is dismissed.

114. Given the events during the course of the hearing, which are outlined above, at the conclusion of the hearing, I chose to reserve judgment. These reasons were written in the days immediately following the hearing to minimise the time lapse between the evidence being concluded and the Judgment being written up.

Employment Judge Anderson
5th December 2022