Case No: 2301180/2022
2301552/2022

EMPLOYMENT TRIBUNALS

Claimant: **K Adeleke**

Respondent: **Mitie Limited**

Held at: **London South Employment Tribunal**

On: **29 – 31 August 2023**

Before: **Employment Judge Burge**

Representation
Claimant: In person
Respondent: Mr A Rozycki, Counsel

REASONS

JUDGMENT having been sent to the parties on 20 September 2023 and written reasons having been requested by the Claimant on 14 October 2023 for an appeal he has lodged at the Employment Appeal Tribunal in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Introduction

1. The Claimant worked as a porter at a hospital for over 9 years until he was dismissed for gross misconduct. He claims unfair dismissal and breach of contract (for failure to pay his notice pay).

The evidence

2. David Johnson (Service Support Manager), Terence Gilliland (Technical Services Manager) and Peter Johnson (Soft Services Manager) gave evidence on behalf of the Respondent. The Claimant, Kamoru Adeleke, gave evidence on his own behalf.

3. The Tribunal was referred during the hearing to documents in a hearing bundle of 328 pages as well as 3 CCTV extracts showing an alleged incident whereby the Claimant was said to have pushed a security guard out of an elevator.

4. At the start of the hearing the Claimant connected to the hearing via CVP and said he did not realise the hearing was to be in person. Witness statements had not been exchanged. The Claimant was sat in his car on his mobile phone with the bundle prepared by the Respondent. The Claimant confirmed that his witness statement was the document at pages 216 – 218. The Respondent then sent the Claimant their witness statements and the hearing was adjourned to start at 2pm to give the parties the time to read the witness statements and for the Claimant to get to London South Employment Tribunal. The Claimant had not had time to read the Respondent's witness statements and so the case was adjourned for the day to enable the Claimant to prepare.

5. Both Mr Rozycki and the Claimant provided the Tribunal with oral closing submissions.

Issues for the Tribunal to decide

6. The likely issues were identified by EJ Chapman KC on 22 July 2022 and agreed by the parties at this start of this hearing as follows:

    a. The principal reason for this dismissal and whether it was a potentially fair reason within section 98(1) -(2) of the Employment Rights Act 1996, the Tribunal noting that the Respondent's case is that this was a reason relating to the Claimant's conduct;

    b. Whether the dismissal was fair or unfair within the meaning of section 98(4) of the Employment Rights Act 1996 and whether, as to the dismissal itself and the procedure which attended the same, the Respondent acted reasonably in all the circumstances;

    c. If the dismissal was procedurally unfair, whether any adjustment should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in *Polkey v AE Dayton Services Ltd* [1988] AC 344 (HL) and the later case law in which this leading authority has been discussed;

    d. Whether it would be just and equitable to reduce the amount of any basic award because of any blameworthy or culpable conduct prior to dismissal pursuant to section 122(1) of the Employment Rights Act 1996 and, if so, to what extent;

    e. Whether it would be just and equitable to reduce the amount of any basic award because of any blameworthy or culpable conduct prior to dismissal pursuant to section 123(6) of the Employment Rights Act 1996 and, if so, to what extent;

    f. Whether the Claimant has any claim for breach of contract relating to notice, the Tribunal noting that it is the Respondent's case that the

Claimant committed an act of gross misconduct;

g. If appropriate and subject to time, the remedy/ies to which the Claimant may be entitled in respect of his claims for unfair dismissal (and, any breach of contract)

Findings of Fact

7. The Claimant was employed by the Respondent as a Porter between 7 May 2013 and 10 December 2021 and his place of work was University College London Hospital ("UCLH").

8. The Respondent is a large facilities management and professional services provider. It employs 77,000 people across the UK.

9. The Respondent has a Disciplinary Procedure which sets out the processes that will take place in relation to a potential disciplinary matter and includes suspension, an investigation by a manager and a disciplinary hearing and appeal. Examples of actions that may constitute gross misconduct include:

> *"• Aggressive or other unacceptable behaviour towards suppliers, clients or colleagues*
> *• Acts of bullying or violence, including physical assault"*

10. The Respondent has a Zero-tolerance policy:

> *Zero-tolerance*
>
> *While this handbook provides a number of principles to help you make the right decisions when at work, there are specific areas where we take a clear and unambiguous stance. This includes a zero-tolerance position for any of the following areas:*
> *• Condoning unsafe working practices*
> *• Discrimination on any grounds, including but not limited to; race, religion, disability, gender, age or sexual orientation*
> *• Violence and aggression*
> *• Bullying and harassment or abuse of authority*
> *• Bribery and corruption*
> *• Creating a toxic work environment*
> *• Retaliation against those who speak up and do the right thing*
> *• Any criminal behaviour*"

11. David Johnson was the Claimant's line manager. He had management experience and also had experience of disciplinary matters. He gave evidence that is accepted, that health and safety measures are extremely important when working in a hospital due to the vulnerable nature of hospital users. The hospital notifies operational employees of the rules and policies they need to follow via "ToolBox Talks". Toolbox talks and signage gave rules about covid precautions including the wearing of masks. Security officers were posted at entrances to UCLH sites to ensure that people

adhered to the rules. The Claimant accepts that over the period in question he had to wear a face mask.

12. Mr Syed was employed as a security officer to ensure that entrants to UCLH wore face masks. On 29 September 2021 the Claimant entered the hospital building without wearing a facemask. Mr Syed provided a witness statement on the same day, although he was not a witness in the Tribunal. The witness statement said that he had told the Claimant to wear a face mask and the Claimant said "who are you? Are you new in this hospital? Do you work here? Ask you boss who I am. I will suspend you. There is no corona". When the Claimant went to the elevators Mr Syed's account was that he tried to bock the elevator doors from closing and the Claimant "pushed [him] hard to get out of the lift". Mr Syed then followed the Claimant into the lift and down to the Claimant's locker where he was told by a colleague that the Claimant worked in the hospital. Mr Syed reported the incident to his manager.

13. The Claimant provided a contemporaneous statement of what he said happened on the day. It is unclear whether he wrote it or whether he verbally told someone else who wrote it for him, but he agreed with the contents of the statement and so I find it is an accurate representation of what he said about the incident at the time. He said that he had told the security guard he was going to the basement to get his face mask and the security guard had refused to step back from the lift door. There was no mention of him pushing the security guard.

14. David Johnson then suspended the Claimant due to the seriousness of the allegations against him. The Claimant said that by this time he had been working for 4 hours, however, his contemporaneous statement gives a time frame of 2 hours.

15. David Johnson's initial investigation involved reviewing the two statements, obtaining and viewing stills from CCTV of the alleged incident.

16. The investigation meeting took place on 1 November 2021 and the Claimant was represented by Mr Lebnouj, a Trade Union representative. David Johnson's evidence is that at the meeting the Claimant said that the Claimant had a serious cold and it had been the security guard who attacked him, not the other way around. I accept this evidence as this is what is reflected in the minutes of the meeting which the Claimant signed. The notes say "nothing happened. It's the security guard who abused and assaulted me… He is the one who attacked me in the lift". The Claimant felt that the security guard should not have followed him. They all agreed that David Johnson would review the CCTV footage which he did by watching it on slow motion and freeze frame.

17. Having reviewed the CCTV footage David Johnson concluded that

> *"the footage showed the Claimant arriving at reception, he walked past a box of masks and spoke to the security officers at the reception desk for a short time. While doing so, there was another*

box of masks nearby which he ignored. He handed something to the officer at reception, and then started to make his way towards the lifts, again he ignored the face masks. It was at this point the Security Officer followed him and started gesturing at him to put on a mask. Throughout the exchange, I could see the Claimant's body language as quite aggressive and short, compared to the Security Officer who seemed to be politely asking him to come back to reception to get a mask. The footage clearly then showed the Claimant entering the lift, and then several seconds later the Security Officer being forcibly pushed out by the Claimant."

18. David Johnson concluded on 10 November 2021 that there was sufficient evidence of gross misconduct as contrary to what the Claimant had said, the CCTV shows that the security guard was pushed out of the lift.

19. On 25 November 2021 a letter confirming the Claimant's suspension from duties was sent to him. It said that he was suspended from duties on full pay following allegations of gross misconduct, namely:

"unprofessional behaviour, using aggressive and threatening behaviour at work.
- *Specifically, it is alleged that on 29th September 2021 after you were challenged about not wearing a mask, you became aggressive and physically assaulted a security guard."*

20. The letter invited the Claimant to a disciplinary hearing and copies of the disciplinary policy, the investigation meeting notes and the CCTV Footage were enclosed with the letter. The Claimant was warned that the allegation could constitute gross misconduct and the outcome could result in dismissal.

21. Mr Gilliland was the disciplinary officer. The Disciplinary Hearing took place on 3 December 2021, chaired by Mr Gilliland, a note taker and the Claimant was accompanied by his union representative, Mr Lebnouj. When shown the CCTV footage the Claimant said that it was not his hand that pushed the security guard.

22. I accept Mr Gilliland's evidence that he had never chaired a disciplinary ending in a dismissal before but in this case he believed that the Claimant had pushed the security guard having reviewed the CCTV footage himself. Mr Gililand rejected the Claimant's contention that it was the security guard who pushed him as the CCTV did not support his version of events.

23. In evidence to the Tribunal Mr Gilliland said that once he reached the conclusion that the Claimant had committed gross misconduct, he did not take into account length of service as there was no doubt that gross misconduct had been committed. In his witness statement he said

"In the Claimant's case, his record was irrelevant. The Respondent takes a zero-tolerance approach to violence, regardless of the disciplinary record. It is not acceptable and it would not have

mattered about his clean record. A clean record did not lessen the severity of his actions."

24. On 10 December 2021 the Claimant was summarily dismissed for gross misconduct.

25. The Claimant appealed against his dismissal on 30 December 2021. In summary his appeal was that the CCTV footage did not show a physical assault, he was allergic/suffered discomfort when he put a mask on that day and that not putting a mask on was not a serious offence, he did not have covid so was not spreading disease by not wearing a face mask. He also appealed that past character reference during his employment since 2012 had not been taken into account and that he had been wrongfully dismissed.

26. Peter Johnson was designated the appeal officer. As Soft Services Manager, he was responsible for cleaning services in UCLH and managed approximately 220 staff. I accept his evidence that he had been involved in many disciplinaries before, he had dealt with zero-tolerance misconduct before, that they were treated with the upmost severity and the typical sanction was dismissal. Peter Johnson reviewed the investigation bundle and CCTV footage.

27. The appeal hearing took place on 7 February 2022. At the appeal hearing the notes show that the Claimant changed his position from his appeal letter now that he had seen the CCTV footage. I accept the Claimant's evidence that his Union representative had encouraged him to plead for his job and so he apologised for his actions, said that it would never happen again and highlighted his clean record and length of service. I accept the Claimant's evidence that he never admitted to pushing the security guard out of the lift he was simply trying to plead for his job back, although I find that Peter Johnson did interpret what the Claimant was saying as an admission that he had pushed the security guard.

28. Peter Johnson issued the outcome letter on 22 February 2022, he did not uphold the appeal. He decided that the clean record and the Claimant's apology was insufficient reason for him to overturn the dismissal when considering the level of misconduct.

Legal principles relevant to the claims

Unfair dismissal

29. Section 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the Respondent under section 95, but the Respondent must show the reason for dismissing the Claimant (within section 95(1)(a) ERA). S.98 ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within s.98(2).

s.98 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…,

(b) relates to the conduct of the employee,

….

30. The second part of the test is that, 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:

s.98 (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

31. The employer bears the burden of proving the reason for dismissal whereas the burden of proving the fairness of the dismissal is neutral. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. As Lord Justice Griffiths put it in *Gilham and ors v Kent County Council (No.2)* 1985 ICR 233:

> *"The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness".*

32. In the case of *British Home Stores v Burchell* [1978] IRLR 379 EAT, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal:

(1) the employer believed the employee to be guilty of misconduct;

(2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
(3) at the time it held that belief, it had carried out as much investigation as was reasonable.

33. In the case of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

34. In the case of *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23 CA, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

35. The Court of Appeal in London Ambulance *NHS Trust v Small* [2009] IRLR 563 warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In *Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 82 the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

36. The Employment Appeal Tribunal in *Clark v. Civil Aviation Authority* [1991] IRLR 412 laid out some general guidelines as to what a fair procedure requires. But even if such procedures are not strictly complied with a dismissal may nevertheless be fair – where, for example, the procedural defect is not intrinsically unfair and the procedures overall are fair: *Fuller v. Lloyd's Bank plc* [1991] IRLR 336.

37. The Court of Appeal in *Shrestha v Genesis Housing Association Limited* [2015] EWCA Civ 94:

> *"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole. Moreover, in a case such as the present it is misleading to talk in terms of distinct lines of defence. The issue here was whether the appellant had over-claimed mileage expenses. His explanations as to why the mileage claims were as high as they were had to be assessed as an integral part of the determination of that issue. What mattered was the*

reasonableness of the overall investigation into the issue."

38. As observed by Mr Justice Langstaff in *Sharkey v Lloyds Bank Plc* UKEAT/0005/15/SM:

> *"It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness any prospect of there having been a dismissal in any event being a matter for compensation and not going to the fairness of the dismissal itself."* (para [26])

Breach of contract

39. A court or tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice.

Compensation

40. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought compensation is awarded by means of a basic and compensatory award.

41. The compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (*Polkey v A E Dayton Services Limited)* [1988] ICR 142.

42. S.124A ERA provides for adjustments to the compensatory award if a party has failed to comply with the ACAS Code of Practice on Discipline and Grievance Procedures (2015).

43. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

> *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".*

44. A reduction to the compensatory award is primarily governed by section 123(6):

> "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it*

considers just and equitable having regard to that finding…"

45. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 111. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Conclusions

46. I conclude that the reason or principal reason for dismissal was alleged conduct. The Claimant did not advance any other potential reason in the Tribunal.

47. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

48. The Respondent received a complaint from a security guard who was tasked with ensuring that all entrants to UCLH wore a face covering. He said that he was treated aggressively and physically pushed from an elevator when he tried to insist that the Claimant wore a mask. David Johnson investigated, he obtained statements from both employees, viewed CCTV stills and had a meeting. Upon being told by the Claimant that it was the security guard who had assaulted him, he agreed that he would view the CCTV footage following which he decided that the security guard's version of events was correct and concluded there was a case to answer against the Claimant. The Claimant was sent the relevant policies and knew what the case was against him.

49. Mr Gilliland considered that the behaviour constituted:

> *"• Aggressive or other unacceptable behaviour towards suppliers, clients or colleagues*
> *• Acts of bullying or violence, including physical assault"*

50. Mr Gilliland held a disciplinary meeting, reviewed the documents, reviewed the CCTV footage and decided that the behaviour was in contravention of the Respondent's Zero-tolerance policy that there are specific areas where a clear and unambiguous stance is taken, including where there is violence and aggression. The Claimant appealed, apologised and asked for leniency due to a clear work record and length of service. Peter Johnson considered the documents, representations and dismissed the appeal. The disciplinary procedure took place within a reasonable period.

51. The Claimant submitted that he had been at work for 4 hours by the time that the Respondent contacted him to say that he was accused of being aggressive to the security guard. His contemporaneous statement said it was two hours. Either way, a two or four hour delay for the security guard to report the behaviour and for the Claimant to be contacted is not unreasonable.

52. The Claimant also submitted that he did not think that the Respondent's witnesses had human resources experience, they only had operational experience. I do not agree. They all had management experience and experience with disciplinary matters. It was reasonable that they conducted and decided the process.

53. The Claimant further submitted that he wanted the security guard to be a witness in the Tribunal, and a woman who had been near his locker on the day. However, he does not suggest that there was anyone else who was a witness to the elevator incident. As explained at the beginning of the hearing, it is not my role when considering an unfair dismissal complaint to re-examine and make a decision on whether or not he assaulted the security guard. My role is to decide if the dismissal was fair or unfair, looking at whether the Respondent had reasonable grounds for the belief that he had assaulted the security guard, at the time the belief was formed they carried out a reasonable investigation and acted in a procedurally fair manner. The issue is not between the Claimant and the security guard. The complaint of unfair dismissal is between the Claimant and his former employer, the Respondent.

54. I conclude that the Respondent had reasonable grounds for the belief that the Claimant had committed misconduct, at the time the belief was formed the Respondent had carried out a reasonable investigation and the Respondent otherwise acted in a procedurally fair manner.

55. Was dismissal within the range of reasonable responses? The Claimant submitted that dismissal was too harsh a sanction given his clean record and his length of service of 9 years. Some employers may have decided that given these factors a written warning was appropriate. However, it is not my role to determine what I would have decided. The Respondent had decided on reasonable grounds, that the Claimant had pushed a colleague and this fell within examples of gross misconduct in the Disciplinary Policy in that it was "Aggressive or other unacceptable behaviour towards suppliers, clients or colleagues" and/or "Acts of bullying or violence, including physical assault". "Violence and aggression" was also cited in the Respondent's Zero-tolerance policy. I conclude that dismissal was within the range of reasonable responses which a reasonable employer might have adopted.

56. I therefore conclude that the dismissal itself and the procedure was within the range of reasonable responses of a reasonable employer. Accordingly, the Claimant's complaint of unfair dismissal fails and is dismissed.

57. As I have concluded that the dismissal was fair, I do not need to go on to consider *Polkey* or contributory fault.

58. The Claimant was dismissed without notice. He brings a breach of contract claim in respect of his entitlement to notice.

59. The Respondent says that it was entitled to dismiss him without notice for

gross misconduct. I must decide if the Claimant committed an act of gross misconduct entitling it to dismiss without notice. In distinction to the Claimant's claim of unfair dismissal, where the focus was on the reasonableness of management's decisions, and it is immaterial what decision I would 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.

60. When reviewing the CCTV footage in the Tribunal, David Johnson could not pin point the moment when the Claimant's hand was visible. Counsel said there was a moment where the railing inside the elevator was obscured, but having viewed the evidence myself multiple times it seems to me that this may have been the security guard's hand. However, the security guard had reported being pushed out of the elevator. The CCTV shows that he was leaning into the elevator and that he suddenly moved back quickly which is consistent with a push. The Claimant says that he moved back because the doors started to close. The doors do not appear to be moving on the CCTV. On balance I conclude that it is more likely that the security guard was pushed by the Claimant, than he was not.

61. Intentionally pushing a colleague does amount to gross misconduct, this is reflected in the disciplinary policy as well as the "zero tolerance" policy. I therefore conclude that pushing a colleague out of an elevator when they are carrying out their duties of ensuring that entrants to the hospital wear face coverings does constitute conduct so serious as to fundamentally repudiate the contract of employment. The Claimant is therefore not entitled to be paid his notice pay and his complaint of wrongful dismissal fails.

_____

Employment Judge **Burge**

_____

Date **18 October 2023**

REASONS SENT TO THE PARTIES ON
19 October 2023

.

.....
FOR EMPLOYMENT TRIBUNALS

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.