EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs A Pettitt	**v**	**ISS Facility Services Ltd**

Heard at: Reading **On**: 18,19, 20 and 21 September 2023

Before: Employment Judge S Matthews

Appearances
For the Claimant: Mr. Nixon (Solicitor)
For the Respondent: Ms. Egan (Counsel)

JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

1. By a claim dated 6 December 2020, the claimant has brought a claim for unfair dismissal which relates to the termination of her employment on 8 September 2020. The respondent's reason for dismissal was a reason relating to the claimant's conduct which is a potentially fair reason under s.98 of the Employment Rights Act 1996. The issues to be decided were therefore:

    1.1 What was the conduct?
    1.2 Did the respondent have a genuine belief in the claimant's guilt?
    1.3 Was that belief held on reasonable grounds?
    1.4 Did the respondent carry out a reasonable investigation?
    1.5 Did the respondent follow a fair procedure?
    1.6 Did the respondent, in all respects, act within the band of reasonable responses including in deciding what penalty to impose?

2. At the hearing we had an agreed bundle of 281 pages. Three pages were added at the outset of the hearing, consisting of letters regarding the claimant's increases in salary. Numbers in brackets below are references to pages in the bundle.

3. The tribunal heard sworn evidence from the claimant and from the following witnesses for the respondent:

    - Mr Sam Alford
    - Mr John O'Brien

4. It was agreed at the outset that we would hear evidence on liability first and, if the claimant was successful, we would deal with remedy on the final day. I agreed to hear evidence during the substantive hearing on contributory fault by the claimant, and/or a Polkey reduction.

5. The claimant indicated at the beginning of the hearing that English is not her first language and I assisted with the questions put to her in cross examination and ensured that she had time to read the documents she was referred to, or that they were read to her if necessary.

Findings of Fact

6. The relevant facts are as follows:

The claimant's employment

7. The date the claimant commenced employment is unclear. The respondent admits it was from at least 1 April 2004, the claimant says it could be as far back as 1994. There have been various TUPE transfers. The exact date does not have any bearing on my decision.

8. The respondent's business provides facilities management throughout the UK and at the material time employed more than 30,000 people. The claimant worked in the Cleaning and Transport Division as Team Leader at Terminal 4 Heathrow Airport.

9. The bundle did not contain the claimant's contract of employment. The claimant indicated she was on an old contract due to the TUPE transfer. There was a personal data form signed by the claimant on 4 March 2014 which sets out some limited details such as her job title and her contractual hours of work (61-62).

10. Further documentation relating to her employment is the Code of Conduct (86-89) which the claimant acknowledged receipt of by signed form on 27 April 2017 (90). There was also a Disciplinary Policy version updated August 2017 (91 -104).

11. The Code of Conduct says, "Where no legislation or rules govern personal conduct each employee must exercise sound judgment and due care." It states, "Discrimination and harassment including sexual harassment are unacceptable at ISS." (87).

12. The Disciplinary Policy states "Employees must not engage in any behaviour such as intimidation, harassment, victimisation or bullying likely to cause distress to any other person" (99). It is not clear whether the claimant

had seen this policy during her employment as there was no signed form to indicate that she had.

13. I was also taken to an IT Policy (101-104) that largely concerns the use of email and the use of the internet at work.

The conduct

14. The incident which led to the claimant's dismissal occurred on 28 March 2020. It relates to a video on the claimant's phone which, it is agreed, was a video of an older man sexually abusing, or attempting to sexually abuse, a child aged around four years old. The claimant was arrested on 29 March 2020 in relation to the video following the incident being reported to the police by another employee, Mr Asad Mahmood (AM). She was bailed to 24 April 2020 and her phone was confiscated. Ultimately no charges were brought and her bail conditions were lifted (148(a)).

15. The respondent investigated and concluded that the claimant had deliberately shown the video to three other employees. The respondent believed that this occurred on two occasions, once in the afternoon to Surinder Coushal (SC) and once at the end of her working day to three employees, SC again, Mr Greg D' Silva (GS) and AM. The respondent decided to dismiss the claimant for gross misconduct with immediate effect from 8 September 2020.

16. The claimant's case is that the video popped up on her phone when she was sitting in the rest room at the end of her shift. She exclaimed "Oh my God" and the three other employees came over and saw the video. She denies that she showed them the video. According to a statement she subsequently provided to the investigation, she then immediately deleted the video (116). It is not disputed and was not disputed at the time of the investigation and disciplinary that the video was indecent and offensive.

17. The facts in dispute as between the respondent and the claimant were whether she displayed or showed the video to SC earlier in the day and to the three employees in the rest room at the end of her shift.

18. The claimant accepted in evidence that showing the video would be wrong. She knew she was not allowed to show it and it is her case that she did not show it. I do not need to decide whether she showed the video to the three employees or to SC earlier in the day, in the context of whether the dismissal was fair. I need to decide whether the respondent had a genuine belief that the claimant's did so and whether the belief was held on reasonable grounds after a reasonable investigation.

The investigation

19. On 31 March 2020 the respondent wrote to the claimant to inform her that she was suspended from work on full pay to allow a formal investigation to take place into breach of the Company Employee Terms and Conditions,

(109). It said, "The reason for your suspension is allegedly showing other members of staff indecent video content while on shift on 28 March 2020."

20. The letter went on to say that the conduct was considered a breach of section 6c of her terms and conditions (The Use of Electronic Communication) and it set out the wording of section 6c:

'Employees must not download, display or store any material which:

-would breach the normal laws of the UK

-would be regarded as indecent

-may be defined as pornographic in nature, or which are likely to cause offence to any reasonable person, which would be unacceptable under the Company's Equal Opportunities and Harassment Policies'.

The respondent accepts in the Grounds of Response that section 6c is contained to the management contract which was not the same contract as was issued to the claimant.

21. The investigation with Adam Broadbent took place on 14 April 2020 and the minutes of the meeting are in the bundle (117-122). Mr Broadbent did not give evidence and he has since left the respondent business. The notes indicate that he asked the claimant for her version of events. The claimant said that the other members of staff came over to her when she explained "Oh my God". On the video they were talking in Hindi. She asked SC what they were saying (119). The claimant agreed that the contents of the video were indecent (120).

22. The investigator had statements from SC, AM and GS (105-107). These were not made available to the claimant prior to the investigation; they were sent to her later at the disciplinary stage. The statement from SC said that the claimant showed her the video in the morning as well as in the evening. The statement from GS said that he and AM were watching a funny video and the claimant said, "I've got a video to show you as well". The statement from AM said that GS had showed him a funny video and the claimant said, "I've got a video to show you as well."

23. In the investigation hearing the claimant referred to issues in her relationship with SC and alleged that SC took her phone without her consent in 2018. In oral evidence the claimant said that the reason that she raised that was to show that SC hated her. She accepted that it was unlikely that SC did anything to her phone in 2018 that caused the video to pop up in March 2020.

24. In the investigation hearing the claimant also referred to AM being jealous of her pay because she was on the old contract.

25. The claimant's oral evidence to the investigation was supplemented by a statement she provided the day before (114-116). When asked about that statement in evidence she said she could not remember signing it and she conceded that it was drafted by her solicitor. A further supplementary

statement was sent the day after the investigation meeting (123). These statements refer to the problematic relationship with SC, including that she may have tampered with her phone in 2018 and the problematic relationship with AM.

26. Mr Broadbent agreed to fully investigate (as a grievance) the allegations that the claimant made against SC and AM(125). He took a statement from SC (127) who admitted that she hid the phone in 2018. She said that she was just playing around. He also took a statement from AM (129) who denied that he was motivated by any difference in pay. He knew what the claimant was paid and he knew that she was not paid more than he was (149).

27. The claimant was informed of the outcome of the grievance on 11 May 2020 (131), prior to the disciplinary hearing taking place.

28. I was not taken to the notes of the grievance hearing in evidence (189). In submissions respondent's counsel referred to GS showing a video to AM just before the video which the claimant showed. It was found to be potentially inappropriate for the workplace but Mr. Broadbent was satisfied that it was not as serious because it did not show potential child abuse.

29. Following the meeting and the investigation of the grievance, it was decided that there was a disciplinary case for the claimant to answer and that a disciplinary hearing should take place. The claimant was invited to a hearing by letter of 4 August 2020 (133-134). The letter again referred to section 6c of the management contract which is not the contract relating to the claimant. The letter said that the hearing relates to allegations that she shared video content with colleagues that was indecent in nature. It enclosed a copy of the investigation minutes, the statement of SC, AM and GS and it advised her of the risk of dismissal.

Disciplinary hearing

30. A disciplinary hearing took place on 6 August 2020 chaired by Sam Alford (Account Director). The claimant was accompanied on the telephone by Balvinder Bir (BB) (union representative) and minutes were taken (135-148). Mr Alford stated took advice on the process from the People and Culture Department (Human Resources) but made the final decision himself.

31. At the disciplinary hearing the claimant gave her version of events. She said again that she did not show SC the video earlier in the day and that SC, AM and GS came over to her in the evening, without her deliberately showing them the video. She admitted that she asked SC what they were saying as they were talking in Hindi. AM told her that she could get arrested. She referred to SC taking her phone in 2018, and said that AM had been 'after me' for my wages. She maintained that SC and GS were lying and they were collaborating to support AM.

32. In evidence Mr Alford said that during the disciplinary hearing he was keen to understand that the claimant accepted that the video was indecent and

offensive. She had accepted this during the investigation stage but he wanted to double check that was the case. He found she did accept it was indecent. She continued to deny that she had shown it to SC earlier in the day. She said she had gone over from the air side of the airport to the land side earlier in the day and spoken to SC, showing her a picture of a dirty toilet when she saw her in the rest room.

33. Following the hearing, Mr Alford decided to take further statements from SC, AM and GS (149-156). AM maintained that he was not motivated by pay, and SC maintained that the video had been showed to her earlier in the day.

34. After those meetings Mr Alford formed the view that the claimant had shown the video to SC, AM and GS. He did not accept the claimant's version of events. He did not accept that AM had put the other witnesses under pressure to give witness statements or that they conspired in any way. He was aware that the police had decided not to press charges. He accepted that what he was dealing with was not therefore a criminal offence. He considered the second bullet point in section 6c (paragraph 20 above) which refers to displaying material which 'would be regarded as indecent' and he focused on deciding, on the balance of probabilities, whether that had occurred. He did not consider obtaining details of the police investigation because he had been able to talk to the police witnesses himself. He made the decision that it was not appropriate to look at the video itself. Its existence and the indecent content was not in dispute and in any event the claimant said she had deleted it.

35. Mr. Alford did not obtain any CCTV film in relation to the investigation. There was no CCTV in the rest room where it was alleged that the claimant had shown the video. The claimant's representative submits that Mr. Alford should have considered obtaining CCTV from the corridor outside the rest room. Mr. Alford would have had to request that from the airport authorities. During the disciplinary hearing the claimant's representative stated that it would be 'nice' to see if there was any video evidence that backed up SC's statement that she was shown it earlier in the day by showing where the claimant was earlier in the day.

36. Mr Alford noted that the claimant had an unblemished record. He took into account that she had 27 years of service, as advised by the claimant's union representative (although her actual length of service may have been less, see paragraph 7 above). Mr. Alford nevertheless decided that the only appropriate sanction was dismissal. He decided that three employees had been subject to gross misconduct and were very upset at being shown the video. He decided that no one exercising sound judgment would have shown a video of that nature and that, in these circumstances, zero tolerance was appropriate.

37. The letter confirming termination with immediate effect is dated 7 September 2020 (157). Mr. Alford stated that there had been a breach of section 6c; it explained the reasons for the decision and it explained that he was satisfied that she had shown the video, the video was indecent, she

was aware of the content and she continued to show it despite the distress that this would cause the other employees. He gave her a right of appeal.

The appeal

38. The claimant appealed by letter dated 11 September 2020 (159) on the grounds that there was no evidence that she had downloaded, stored or displayed any material. She had not breached the laws of the UK and she referred to the failure to deal with the allegation of harassment she had made against the witnesses.

39. An appeal hearing was arranged for 15 October 2020 before Mr O'Brien (Senior Finance Business partner, now Finance Director). As before, the claimant was accompanied by BB and there was a notetaker. Mr O'Brien took advice from HR on the process but he made his decision independently.

40. In the appeal the claimant maintained that she did not display the video, the other employees chose to watch it. She said in evidence that during the meeting the other people talked over her but I find that the notes indicate that she was given plenty of opportunity to put forward any further evidence or any mitigation.

41. On the basis of that meeting and the information from the investigation, Mr O'Brien decided to uphold the dismissal for gross misconduct. He did not consider obtaining details of the police investigation, getting CCTV or looking at the video itself.

42. In evidence, the claimant said that she raised CCTV with Mr O'Brien stating that it could show where she was in the afternoon and whether she showed the video earlier on to SC. She could not remember when she suggested CCTV and conceded it may have been after the appeal. There is no email or any evidence in the bundle to corroborate that she did raise it.

43. The outcome of the appeal was given by letter of 20 October 2020 and the decision to dismissal was upheld (166). The letter stated, "We agreed the video was displayed". Mr O'Brien explained in evidence that his view was that the other employees would not have been able to describe the contents so consistently if it was not shown to them. The letter referred again to section 6. It referred to her length of service but said that "This does not exclude you from adhering to the ISS Code of Conduct."

44. Those are my findings of fact; I will go on shortly to describe the conclusions that I have reached as a result.

The Law

45. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Section 98 of the 1996 Act deals with the fairness of dismissals.

46. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). This is conceded. The potentially fair reason is conduct.

47. 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.

48. Section 98(4) 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.

49. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in British Home Stores v Burchell 1980 ICR 303. 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 section 98(4), the Tribunal must decide whether the employer acted within the band or 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 the reasonable employer (Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).

50. The Tribunal should also refer to the ACAS code of practice on Discipline and Grievance Procedures 2015 and take account of the whole process including any appeal (Taylor v OCS Group Ltd 2006 ICR 1602, CA).

Submissions

51. I will outline the submissions which I received as far as they are relevant to my conclusions.

52. The claimant's solicitor submitted that the investigation should have looked for more evidence, obtained details of the police investigation, looked at the phone on which the video appeared to ascertain the timing of when that video was shown, particularly so they could see whether it was shown to SC earlier in the day. The claimant's solicitor also said that the respondent

should have investigated which platform the video appeared on, although he could not explain how that would have made a difference to their conclusion. This was was not raised at any the stage in evidence or during the disciplinary procedure itself. The claimant's solicitor said that it was not made clear to the claimant that this act was gross misconduct. He submitted the sanction was unreasonable and there should instead have been a written warning for a very serious breach of discipline (97).

53. Counsel for the respondent submitted that showing a video of attempted sexual abuse of a child is plainly gross misconduct even if not set out specifically in the Code of Conduct. Some acts of gross misconduct do not need to be specified and the claimant had confirmed in evidence that she knew it was wrong. The investigation was within the range of reasonable responses; all three witnesses were interviewed and obtaining details from the police would not make a difference as the respondent was able to interview the witnesses themselves. If the claimant thought anything from the police investigation was relevant it was open to the claimant to seek to obtain it. For the respondent to look at the video in the course of the investigation would, potentially, involve a criminal offence, and the respondent was entitled to rely on the accounts of the witnesses. The content of the video is not in dispute. To obtain CCTV was not proportionate; this is not a criminal investigation and there was no CCTV in the rest room where the incident occurred.

Conclusions

54. I need to decide whether the respondent had a genuine belief that the claimant was guilty of misconduct. If so, was that belief held on reasonable grounds? Did the respondent follow a fair procedure and act within the band of reasonable responses in deciding what penalty to impose? In reaching my conclusions on the facts I have taken into account that the range of reasonable responses is engaged at all stages of the disciplinary process.

<u>What was the conduct?</u>

55. The claimant had a video on her phone that was indecent and offensive. That is not disputed. Three employees saw it. The claimant disputes that she showed it to them and asserts that they came over to her and looked at it of their own accord. The respondent, after investigation, decided that the claimant did show it to the other employees. I find that was a reasonable decision, following a reasonable investigation.

<u>Did the respondent have a genuine belief in the claimant's conduct?</u>

56. I find that the respondent's management had a genuine belief that the claimant showed the video to the other three employees. None of the individual managers involved in the investigation or disciplinary believed the claimant's explanation that two of the employees had a grudge against the claimant and that their evidence was fabricated.

Was that belief held on reasonable grounds?

57. I find that it was. The respondent's management were influenced by the three employees whose accounts matched. The respondent reached a reasonable conclusion that they had not colluded. All the witnesses were clear that she invited them to look at the video.

58. The respondent carried out a full grievance procedure regarding the claimant's complaint that two of them were motivated by a grudge. The claimant was given ample opportunity to put forward her case and her case was carefully investigated. The respondent was entitled to find it was implausible that the other employees were all lying. A reasonable employer was entitled to disbelieve the claimant's version of events.

Did the respondent follow a fair procedure?

59. Investigation. I find that the respondent carried out an investigation that was within the range of reasonable responses. The investigation focused on the claimant's defence that she did not show the video. The investigator kept an open mind, dealing with the grievance against the other employees first. Statements from the three employees were provided for the disciplinary investigation but Mr Alford nevertheless took the step of interviewing those three witnesses again.

60. The claimant says the respondent should have looked at CCTV to see if the earlier meeting took place with SC. Mr Alford reasonably decided it would not be determinative as there was no CCTV in the rest room where the meeting took place. At the hearing this week it has been advanced for the first time that there was a camera outside the rest room that may show the times when the claimant went in and out of the rest room. I find that a reasonable employer would not have looked at CCTV outside the rest room. That was not proportionate and would not have shown what actually happened in the rest room where the alleged conduct took place.

61. The claimant's representative says that the respondent should have asked for records of the police investigation. The claimant did not offer any details of the police investigation during the disciplinary process, other than to indicate that no action was being taken and bail conditions were lifted. The respondents were able to interview the witnesses who gave evidence to police directly. I find that it would not have been proportionate to seek to obtain details of the police records.

62. The claimant's Solicitor suggested that the respondent should have investigated which platform the video appeared on. I do not understand the relevance of the platform and the claimant's solicitor was unable to explain it to me. What would it show? If it was WhatsApp that would potentially mean the video was sent to the claimant by someone else (in itself a potential offence). The claimant's solicitor also said the respondent could have looked to see when it was opened to see if it was opened at the time SC alleged she was shown it. The claimant said in evidence that she deleted it. If she had not deleted it, surely the police would have required her to delete

it? To look at it in itself could be an offence and it is entirely understandable that the respondent chose not to look at an offensive video.

63. I therefore do not accept the claimant's solicitor's submissions about what the respondent should have done. The respondent is not required to establish beyond reasonable doubt that the conduct occurred. The respondent's investigation was thorough and within the range reasonable responses.

64. Disciplinary process. I next consider the disciplinary process. A formal disciplinary process was followed as would be expected from an employer of this size and resources.

65. The matter was dealt with promptly. The claimant knew the case against her. She was given ample opportunity to put forward her case at the disciplinary hearing and the appeal hearing. She was offered a representative at the disciplinary hearing and the appeal and she was accompanied at both. The hearings were conducted by managers independent of the investigation and they took care in reaching their conclusions including, in the case of Mr Alford, re-interviewing the witnesses himself. I find that the procedure was conducted fairly and within the range of reasonable responses.

66. There was a minor flaw in referring to section 6c in the invitation to the disciplinary hearing and appeal. Section 6c was a clause in the management contract which the claimant was not a party to as she was not a manager. This flaw was not sufficiently serious to make the procedure unfair. The claimant was aware of the case against her, the nature of the allegations were clear, she understood what it was alleged she had done wrong and she conceded in evidence that if she had done it, it would be wrong. She understood from the outset of the disciplinary that dismissal was a possible outcome.

Did the respondent in all respects act within the band of reasonable responses in deciding which penalty to impose?

67. I find that it was within the band of reasonable responses for the respondent to decide that the claimant was guilty of gross misconduct by showing the video to the other employees. The claimant herself accepted that showing the video to the other employees would be wrong. It was serious enough for another employee to report it to the police and the police to investigate. I accept the respondent's counsel's submission that some acts are manifestly gross misconduct and do not need to be spelt out in contractual terms. I find this is one of them. The Acas Code gives examples of unlawful discrimination and harassment including deliberately accessing internet sites containing pornographic, offensive or obscene material. The respondent's Code said, "Discrimination and harassment including sexual harassment are unacceptable at ISS".

68. I find that the decision to dismiss the claimant was within the band of reasonable responses. Although the claimant had a long record without any previous warnings, this is a very serious offence. It could have resulted in criminal prospection. The respondent reasonably did not believe the claimant's case that she did not show the video. I find that it was reasonable for the respondent to conclude that the seriousness of her actions warranted an immediate dismissal notwithstanding her length of service. The respondent took into account 27 years of service which may in fact have been more than she served. Some employers might have decided in similar circumstances to give a final warning, but the question is not what another employer may do but whether what this employer did fell within the band of reasonable responses. The respondent decided, reasonably, that there should be a zero tolerance in this case which where there was a video which showed potential child abuse.

69. Although not pursued in submissions by the claimant's solicitor there is the issue of whether GS was treated differently because the grievance found that he probably showed an inappropriate video. The finding was that it was not in the same category as the video which the claimant was found to have shown which involved child abuse, or potential child abuse. I find that it was a reasonable response by the respondent to treat the action by the claimant as considerably more serious.

70. I find the respondent therefore properly considered the claimant's length of service, the explanation that she gave for her actions and gave her an opportunity to put forward mitigation. She did not offer mitigation for her actions, only denial. She made her case predominantly on the assertion that the other three witnesses were lying. She did not show any remorse for the offence that the video had caused them.

71. I find, for these reasons, that the respondent's decision to dismiss the claimant was within the range of reasonable responses to her conduct and, therefore, the claimant was not unfairly dismissed.

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Employment Judge S Matthews

Date: 20 November 2023

Sent to the parties on: 5 December 2023

For the Tribunal Office