EMPLOYMENT TRIBUNALS

Claimant: **Mr Alex West**

Respondent: **David Lloyd Leisure Limited**

Heard at:

London South (Croydon) a CVP hearing **On: 30/11/2023 - 1/12/2023**

Before: **Employment Judge Wright**
Representation:
Claimant: **Mr Alan West – claimant's father**

Respondent: **Mr S Proffitt - counsel**

REQUEST FOR WRITTEN REASONS

Oral judgment having been given on the 1/12/2023 and further to the claimant's request for written reasons, these written reasons are provided.

WRITTEN REASONS

1. It was the Judgment of the Tribunal that the claimant's claim of unfairdismissal contrary to the Employment Rights Act 1996 (ERA) is not well founded, it fails and is dismissed.

2. The claimant presented a claim form on 28/4/2022 following a period of earlyconciliation which started on 19/2/2022 and ended on 1/4/2022. The claimant was employed by the respondent as a Personal Trainer (PT) from

the 1/4/2014 and his employment terminated on 8/1/2022. The respondent is a provider of health, sport and leisure services, with 99 health clubs in the UK.

3. A case management hearing took place on 25/5/2023. At that hearing, theclaimant's claims under the Equality Act 2010 (EQA) based upon the protected characteristic of sexual orientation were made the subject of a Deposit Order. The claimant did not pay the deposit and that claim was dismissed on the 16/8/2023.

4. At that preliminary hearing, it was recorded that if the claim proceeded todetermine the unfair dismissal claim alone (which was the only claim before the Tribunal once the deposit was not paid), the hearing would be reduced from three days to two days. That direction was never formally actioned and as such, the hearing remained listed for three days.

5. The preliminary hearing recorded the issues to be determined in respect ofunfair dismissal are:

> 'Unfair dismissal
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> 23. The company says that Mr West was dismissed on grounds of his conduct.
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> 24. If so, did the company act reasonably in all the circumstances in treating that as asufficient reason to dismiss him? The Tribunal will usually decide, in particular, whether
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> a) the company had a genuine belief in his misconduct
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> b) made on reasonable grounds
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> c) following a sufficient investigation and a fair process and
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> d) dismissal was 'within the range of reasonable responses' open to anemployer in the circumstances?
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> 25. If the dismissal was unfair, did Mr West contribute to the dismissal by hisconduct? This requires the company to prove, on the balance of probabilities, that he committed the alleged misconduct.
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> 26. The burden of proof is neutral here but Mr West says that his dismissal was unfairbecause
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> a) the first two allegations relate to events outside working hours at a social event,and in any event have been taken out of context and exaggerated;
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> b) the real reason for his dismissal was because of the grievances raised in 2018.
>
> 27. If the procedure was unfair, what difference would a fair procedure have made to the outcome?'

6. The Tribunal heard evidence from the claimant. For the respondent it heardfrom: Ms Charlotte Saunders, General Manager at Cheam.

7. The claimant was an evasive witness, he was hesitant, deflective; and when itsuited him, he referred to the time-lag as an excuse for not being able to answer a question. There was one particular answer in re-examination, in which the claimant appeared to have been coached (when he reference the preliminary hearing and the EQA claim). In contrast Ms Saunders was a straight-forward, honest witness who did her best to assist the Tribunal and made concessions when it was reasonable to do so. There was a marked contrast in the two witnesses.

8. For the purposes of this Judgment, Mr Alex West will be referred to as theclaimant and his representative (his father) will be referred to as Mr West.

9. There was an issue with the claimant's representative. His representative onthe record (and noted as such in the ET1 page 14) is Mr John Tower of Tower Legal Services. Mr Tower did not represent the claimant at the hearing; his father did. The explanation for this was not clear. This matter was revisited at the conclusion of the hearing (see below).

10. There was a 284-page electronic bundle. Submissions were heard andconsidered.

11. The following findings of fact were reached by the Tribunal, on the balance ofprobabilities, having considered all of the evidence given by the witnesses during the hearing. This included the documents referred to by them and took into account the Tribunal's assessment of the evidence.

12. Only relevant findings of fact pertaining to the issues and those necessary forthe Tribunal to determine, have been referred to in this judgment. It has not been necessary and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced in the witness statements/evidence.

Preliminary Matters

13. The hearing started on the 29/11/2023, day one of three. The claimant andMr West joined the hearing by telephone as they did at the preliminary hearing. There was therefore audio, but no video. Due to this the hearing did not start until 10.25am. The technology issue was discussed. Mr Proffitt

made the point that the claimant had recorded on his schedule of loss that he had paid legal fees of £29,820 as at 15/6/2023 to Tower Legal Services (page 80). As such, he said it was not unreasonable to have expected the claimant's legal representative to arrange for the claimant to be able to join the hearing via the internet, with sound and vision.

14. It was decided that in view of the listing of three days and in accordance withthe overriding objective, that the hearing would be adjourned until the following day. The claimant and Mr West would then attend the Croydon Regional Office in person and a hearing room would be set up so that they could join the hearing, via video from Croydon.

15. There was some discussion with Mr West regarding these arrangements,however, that was how the hearing proceeded.

16. There were discussions about preliminary matters. The respondent hadproduced a witness statement for Mr O'Connor the appeal officer. The appeal was a review, not a rehearing and Mr O'Connor upheld Ms Saunders' decision to dismiss. The Tribunal was of the view that Mr O'Connor's evidence did not assist it, in determining Ms Saunders' decision to dismiss.

17. Similarly, Mr West wished to call Mr Johnny Proctor as a witness. There wasno witness statement served upon the respondent from Mr Proctor. The Tribunal was also told that Mr Proctor had attended the Tribunal in person on day one and had travelled from Preston (it is not clear why he did this when the hearing had been converted to a video hearing). Mr Proctor had provided a character witness statement for the claimant during the disciplinary proceedings (page 132). His evidence did not assist the Tribunal in deciding whether or not the dismissal was fair in accordance with the ERA. As such, an application to call him as a witness was refused.

18. The structure of the hearing was discussed and Rule 45[1] was applied. Two hours was granted for the total questioning of each witness. The claimant would give evidence first to ensure that his evidence was concluded whilst he was physically in Croydon. Thirty minutes each was given for closing submissions. Mr West then said that the claimant wanted to make a three hour opening statement. It was explained this was not permitted and that the claimant (or Mr West as his representative) would have the opportunity to made a closing submission with a time limit of 30 minutes.

[1] Of the The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

19. Mr West made reference to the fact the claimant's five-page witnessstatement was a 'summary'. The Order for Directions was quite clear as to what the witness statement should include:

> 'Witness statements
> 13. The claimant and the respondent must prepare witness statements for use at the hearing. **Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement**.
>
> …
>
> ***A witness statement is a document containing everything relevant to the issues to be determined by the Tribunal of which the witness has good knowledge and can tell the Tribunal about****. Witnesses will not be allowed to add to their statements unless the Tribunal agrees. At the hearing the Tribunal will read the witness statements. Witnesses may be asked questions about their statements by the other side and the Tribunal. Witness statements should be typed if possible and using no less than a 12 point font. They must have paragraph numbers and page numbers.* ***They must set out events, usually in the order they happened and using headings where appropriate****. If the witness statement refers to a document in the file it should give the page number.* ***They must also include any evidence about financial losses and any other remedy the claimant is seekin****g.*' [Emphasis added]

20. The claimant's witness statement did not contain any remedy evidence.

21. The suggested directions were sent to the parties on 16/12/2022. Thepreliminary hearing then followed and the matters the claimant needed to address in his witness statement were set out in that Order.

Findings of fact

22. The claimant attended a Christmas party on 3/12/2021. The party was paidfor by the respondent, at a venue which it had arranged. It was immaterial whether or not there was a £10 contribution from staff. It was attended by staff only. The party continued after the formal event had ended and some of the attendees (including the claimant) went onto another venue and then onto a colleague's (Mr Proctor's) house, to continue as Mr West put it, further jollity (the after party).

23. That event led to complaints about the claimant which were made to theClubroom Manager. The complaints were:

    a. that on an unspecified date, the claimant put his hand on hiscolleague's (MM) stomach and asked her if she was 'expecting';

b. at the after party, the claimant said to a colleague (RL) ‘seriousquestion, are you a poofter?’; and

c. the claimant made inappropriate comments to a colleague (JS), also atthe after party.

24. The Clubroom Manager investigated the complaints and he asked each of thecomplainants and witnesses to produce a written statement. Statements were produced from: MM on 13/12/2021 (page 90); AF undated (page 91); JM undated (page 92); JS undated (page 93); and RL undated (page 94).

25. Mr West made much out of the start of RL’s statement which said ‘please findattached updated statement’ followed by a paragraph relating to events which related to him at the after party on the 3/12/2023. The Tribunal find that the seven-line paragraph is in fact RL’s updated statement. Furthermore, RL’s statement is credible as he concedes that he would have been rather intoxicated by that point in the evening (around 11.30pm).

26. The claimant was suspended on 8/12/2021 (page 249).

27. That resulted in an investigation meeting on the 13/12/2021 at which theallegations were put to the claimant (page 102).

28. At the meeting, the claimant made an opening statement and then refused toanswer any questions (page 211).

29. Ms Saunders then reviewed the statements taken during the investigation andon 22/12/2021 invited the claimant to a disciplinary meeting (page 105). The claimant was informed that the allegations were of discrimination and sexual harassment, which amounted to potential gross misconduct. He was informed the allegations were:

> ‘• It is alleged that on 3rd December 2021, you made unwanted advances of a sexual and physical nature to fellow employees, [JS]. The company alleges that this allegation amounts to an assault of an indecent nature and, if substantiated in any way, represents a gross breach of trust and confidence and a breach of our duty of care to our employees.
>
> • It is alleged that on 3rd December 2021, you made comments of a discriminatory nature towards a fellow colleague, [RL], namely by asking ‘are you a poofter?’. This company alleges that this matter, if substantiated, represents a gross breach of trust and confidence and a breach of our duty of care to our employees.
>
> • It is alleged that you asked a fellow employee, [MM], and if she was expecting, andtouched her stomach without authorisation. This matter, is substantiated, demonstrate unprofessional and unacceptable behaviour.’

30. It is not clear why the first allegation is not specific, unlike the secondallegation. However, the nature of the conduct in respect of JS was put to the claimant in the investigation meeting, (page 211):

> '4.6 Did you make a comment when she bent over? Did you tell her to stop teasing you?
>
> 4.7 Do you see how this could be considered inappropriate and harassment?
>
> 4.8 What was [JS's] response to you?
>
> 4.9 Did you ask [JS] to put her bum on the pool table so you could do a better shot?
>
> 4.10 Did you make a comment about how all PTs look at [JS] at work?'

31. The investigation meeting notes and the employees' statements wereenclosed with the invitation to the disciplinary meeting (page 107).

32. The disciplinary meeting was rearranged due to the claimant's annual leaveand it took place on 6/1/2022 (page 114).

33. There was an issue with the claimant breaching the terms of his suspension,which were that he could not use the respondent's gym facilities, nor contact its members or employees; save that he could make contact through the Clubroom Manager (page 250). The claimant was also told that if there was someone he thought could assist in investigating the allegations against him, to contact the Clubroom Manager.

34. It came to the respondent's attention that the claimant had entered the Epsomgym on five occasions between 16/12/2021 and 24/12/2021 (page 110).

35. On the 5/1/2022 the claimant forwarded five testimonials and a statementfrom Mr Proctor (page 120). The testimonials were dated 23/12/2021 (pages 127, 128, 129, 130) and 5/1/2022 (page 131). The statement from Mr Proctor was also dated 5/1/2022 (page 132). Mr Proctor's statement said that he had no idea why the claimant had been suspended and then went onto recount a conversation with JS and to reference the event and the allegation she had made against the claimant.

36. It was put to the claimant that not only had he attended the Epsom gym tosolicit the testimonials from his clients, but also that he had discussed his suspension and in particular the reasons for it, with Mr Proctor. The claimant denied this. The claimant's answers to questions in this regard were odd. He did not answer directly, said that he thought it was irrelevant or that he did not see the relevance of the question.

37. In respect of Mr Proctor's statement, it was put to the claimant that it was aninsult to intelligence to suggest anything other than it was obvious he had asked Mr Proctor to write the statement. The claimant replied that it was not obvious at all and that he did not speak to Mr Proctor in advance about the allegations against him.

38. Ms Saunders accepted that there was never any question about theclaimant's ability as a personal trainer. She said he was highly knowledgeable and good at his job; his abilities in the role were not in question and were not an issue.

39. The Tribunal finds the claimant did solicit the testimonials and the statementfrom Mr Proctor. The claimant could have approached Mr Proctor through the proper channels (via the Clubroom Manager). The testimonials were not necessary. The fact the claimant breached the terms of his suspension to obtain them demonstrates his fundamental misunderstanding of this whole process and situation.

40. In fact, Mr Proctor's statement appears to corroborate that the first allegationdid happen and that the claimant made comments to JS which were unwelcomed and made her feel uncomfortable. It may well have been that she did not want to be responsible for the claimant being dismissed and she expressed that to Mr Proctor.

41. In any event, the respondent did not take any action in respect of theclaimant's breaches of the conditions of his suspension.

42. The claimant attended the disciplinary meeting on the 6/1/2022. He made astatement and then did not answer any questions which followed.

43. The difficulty for the respondent, or in particular Ms Saunders, is that theclaimant did not engage in the process. He did not explain or excuse himself. He did not offer any mitigation. Most importantly, he did not offer any assurance that such actions would not happen again in future.

44. As submitted by Mr Proffitt, this left the respondent with absolutely noconfidence that the claimant would change his behaviour and that was a critical issue. There was therefore the risk for the respondent that such behaviour would happen again in future.

45. The claimant relies upon the motivation for the respondent taking disciplinaryaction as resulting from a grievance he raised on 16/10/2018 (page 89). The claimant provided a summary of the disciplinary action in one of his submissions to the Tribunal (page 67-68). The claimant has made no attempt to link his grievance in 2018 to the events which took place in December 2021.

46. Furthermore, the claimant and Mr West were adamant that this was a groundfor dismissal. It was not. It was poor formatting for the fourth bullet point to follow the three bullet points which covered the grounds for dismissal. That was all it was. All Ms Saunders did, was to acknowledge the point the claimant had made regarding his 2018 grievance.

47. The claimant appealed his dismissal. The appeal hearing (which was areview) took place on 1/2/2022 and Ms Saunders' decision to dismiss was upheld.

The Law

48. Section 94 of the Employment Rights Act ('ERA') states that an employeehas the right not to be unfairly dismissed by his employer.

49. Section 98 ERA states:

> *(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 thedismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or someother 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—*
>
> *(a) relates to the capability or qualifications of the employee forperforming work of the kind which he was employed by the employer to do,*
>
> *(b)* ***relates to the conduct of the employee****,*
>
> *(c) is that the employee was redundant, or*
>
> *(d) is that the employee could not continue to work in theposition which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
>
> *…*

(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 thesize 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 thesubstantial merits of the case

[Tribunal's emphasis]

50. The ERA requires the claimant to prove that he has been dismissed. The burden then shifts to the employer to prove the reason for the dismissal. If the respondent succeeds in showing a potentially fair reason for dismissal, there is a neutral burden for the purposes of determining whether or not the dismissal was fair.

51. If the respondent fails to show a potentially fair reason for a dismissal it isunfair. If a potentially fair reason is shown, the general test of fairness in s. 98(4) must be applied. The helpful test is the range or band of reasonable responses, a test which originated in the misconduct case of British Home Stores v Burchell [1980] ICR 303, but which has been subsequently approved in a number of decisions of the Court of Appeal.

52. The manner in which the employer handled the dismissal is important inconsidering whether the respondent acted reasonably in all of the circumstances in treating that reason as a sufficient reason for dismissing the claimant. A Tribunal will therefore be keen to find out that the process which led to the claimant's dismissal was affected in an appropriate way, i.e., within the range of reasonable responses applicable to an employer of the size of the respondent with such administrative resources available.

53. It is important that in carrying out this exercise the Tribunal must notsubstitute its own decision for that of the employer.

Conclusions

54. Ms Saunders had a genuine belief in the claimant's misconduct. It wasreported by five employees and there was general corroboration of the allegations.

55. Ms Saunders also had reasonable grounds for that belief. The events werereported shortly after they had occurred. The employees who had made the reports were reliable members of staff and Ms Saunders spoke to them prior to the disciplinary meeting. To some extent, Mr Proctor's statement on the 5/1/2022 corroborated her reasonable belief that indeed something untoward had taken place at the after party.

56. The investigation process was fair and reasonable. It complied with therespondent's own policy and with the Acas Code. It is open to an employer to put the allegations to an employee in an investigation meeting, without prior notice. In some cases, that is the correct thing to do, before any collusion can take place.

57. The investigation has to be reasonable; not perfect. The Tribunal wasconcerned that in respect of the first allegation, it was put in a general sense, without specifics; the respondent did not set out what the unwanted advances were. This was however corrected by enclosing the statements which contained the actual allegations. Furthermore, the specifics of the allegation had been put in the investigation meeting. It should be made clear what the actual allegation is and specifically, what aspect of it the respondent considers to be the wrongdoing. That would have then avoided the difficulties Ms Saunders experienced when she was asked what aspect of the allegation amounted to a physical assault and she accepted there was no physical assault. However, the allegation as put does not actually say that there was a physical assault (that was a misrepresentation of the allegation).

58. The claimant relied upon the events taking place outside of working hours.The Tribunal was however satisfied that there was sufficient nexus or a link between the Christmas party and the after party for the misconduct to come within the respondent's remit. It is a question of fact for the Tribunal to decide whether or not the allegation was in the course of the claimant's employment. The ERA does not limit the conduct to that which took place solely in the workplace.

59. In Thomson v Alloa Motor Company Ltd 1983 IRLR 403, the EAT held that 'conduct' within the meaning of s.98(2)(b) ERA means 'actings of such a nature, whether done in the course of employment or outwith it, that reflect in some way upon the employer-employee relationship'. In any event, it is accepted that the third event took place in the workplace.

60. In respect of the claimant's contention that the event(s) were taken out ofcontext and were exaggerated; the difficulty was that he did not engage in the process. He did not offer his version of events or provide any context. He did not say during the process what had been exaggerated.

61. The claimant did not provide any rationale why the real reason for hisdismissal was the 2018 grievance, other than to make that statement. The previous incidents were not of the same nature as these allegations. Again, there was nothing to link the 2018 grievance to these allegations.

62. The Tribunal then considered whether or not the dismissal was within therange of reasonable responses open to an employer in the circumstances. As invited by Mr Proffitt, the Tribunal reminded itself that it is not to and cannot substitute its own view, for that of the respondent.

63. It does not have to be the case that every employer would dismiss in thesecircumstances; just that dismissal was an option open to a reasonable employer.

64. Particularly taking into account the lack of explanation from the claimant; himtacitly acknowledging he did put a question to RL in respect of his sexuality which was objectively offensive and the failure to give the respondent any assurances in respect of his future behaviour, the Tribunal finds that the decision to dismiss was within a range of reasonable responses.

65. Turning then to s.98(4) ERA, the respondent acted reasonably in dismissingthe claimant in the circumstances. In considering the equity and substantial merits of the case, there was nothing to suggest the claimant was treated differently to other employees. The dismissal was therefore fair.

66. For those reasons, the claimant's claim is not well-founded and is dismissed.

A matter which arose at the end of the hearing.

67. The fact the claimant was represented by Tower Legal Services was noted atthe outset. In particular, according to the schedule of loss, that the claimant had paid nearly £30,000 to his representative and yet he did not have the technology to conduct a video hearing was highlighted.

68. Under the Financial Services and Markets Act 2000 s.89M a claimsmanagement company who charges claimant's fees for their services, has to be registered with the Financial Services Authority (FSA); this includes an arrangement on a contingency basis. Breach of which is a criminal offence. Tower Legal Services did not appear to be registered.

69. The claimant produced two schedules of loss. The first dated 16/3/2023 claimed 'interim costs' of £21,000 paid to Tower Legal Services (page 66). The second dated 15/6/2023 the claimant claimed interim costs of £29.820. This sum was included despite Employment Judge Fowell's instruction: 'An updated schedule of loss should be provided by 15 June 2023. It should

reflect [the claimant's] new employment and should not include any claim for legal costs' (page 74).

70. After Judgment had been delivered, Mr West was asked whether the claimanthad paid any monies to Tower Legal Services? Mr West replied that that the claimant had not paid for anything, that there was a contingent fee agreement and that the claimant would not be asked to pay for anything. Mr West went onto to say that Tower Legal Services was a trading name for Questo Eperlei

Ltd. Mr West said that he had made the point at the preliminary hearing the fees were for claims handling and that Tower Legal Services was not purporting to act as solicitors or barristers. Mr West said that Tower Legal Services was not registered with the FSA and that he was a statutory director of the company.

71. Notwithstanding the position vis-à-vis registration with the FSA, Mr Westseemed to be completely unaware that he and by implication the claimant, had just admitted to misleading the Tribunal. The claimant had made two separate claims for interim fees of £21,000 then £29,000 which he simply had not incurred or paid out.

72. Neither he nor Mr West took the opportunity to correct that impression whentechnology was discussed on the first morning of the hearing and the respondent made reference to the fees which the claimant claimed to have paid to Tower Legal Services.

73. Questo Eperlei Ltd t/a Tower Legal Services has seven days to confirm to therespondent and the Tribunal that it was in fact appropriately registered with the FSA in accordance with the Financial Services and Markets Act 2000.

13th December 2023

Employment Judge Wright

JUDGMENT SENT TO THE PARTIES ON

15th December 2023

FOR THE TRIBUNALS OFFICE