EMPLOYMENT TRIBUNALS

Claimant: **Mr A Abolaji**

Respondent: **CIS Security Ltd**

Heard at: **East London Hearing Centre (by CVP)**

On: **4, 5 and 6 June 2024**

Before: **Employment Judge J S Burns**
Members: **Mr R Blanco**
Mrs S Jeary

Representation
Claimant: In Person
Respondent: Mr N Henry (professional advocate)

JUDGMENT

1. The claims of unfair dismissal and wrongful dismissal succeed.

2. The claims of disability discrimination and for arrears of pay fail and are dismissed.

3. The damages/compensation payable by the Respondent is £19261.63 as calculated in the Reasons below.

4. The Recoupment regulations apply. See paragraph 80 of the Reasons. The Respondent must pay the Claimant £14593 by 20/6/24 and the balance of total award, if any, once the regulations have been complied with.

REASONS

1. These were claims of unfair dismissal and disability discrimination contrary to section 15 Equality Act 2010 (and breach of contract (notice pay)).

2. The Claimant had also claimed arrears and was directed on 10/10/22 to provide further particulars of this by 31/10/22. He failed to provide any such particulars

by 31/10/22 or at all and then served a schedule of loss dated 14/12/22 which made no reference to any such arrears. The trial witness statements also make no reference to this. During the first day of the trial the Claimant applied to serve these particulars but we refused to allow this as it was too late. The claim for arrears is dismissed because the non-compliance with the direction and the failure to cover this in any witness statement makes it impossible to have a fair trial of any such claim within the current listing.

3. The claims and issues which proceeded by way of a substantive trial are set out in the Schedule.

4. We were shown extracts from CCTV video footage of events in the control room ("CR") at the Clifford Chance London office in the early hours of 19/11/21. We heard evidence from the Claimant, and his witnesses Khalid Mehmood and Mohammed Manneh (both former colleagues of his), and from the Respondent's witnesses Sigita Gedrimaite (Disciplinary Manager), Kieron Nunney (Appeal Manager) and Alex Morvan (Employee Relations Business Partner). The documents were in a bundle of 487 pages. In addition during the trial the Respondent produced at our request relevant documents relating to the Claimant's complaint that he had been treated inconsistently.

Findings of fact

5. The Claimant was employed by the Respondent as a security guard. He commenced employment as a security guard in 2002. His employment transferred from Bidvest Noonan to the Respondent on 1 September 2021 under the TUPE Regulations 2006 ("the transfer"). At the time of his dismissal he was a Duty Supervisor.

6. The Claimant was assigned to work at premises occupied by Clifford Chance. He worked in the CR which is used to centrally monitor a number of alarm and emergency monitoring systems for other buildings in Europe, the Middle East and Asia. It covers around 20 offices worldwide.

7. The Claimant has diabetes and an enlarged prostate gland. The Respondent admits that those conditions amounted to a disability for the purposed of Section 6 of the Equality Act 2010. A symptom of his condition is that he needs to urinate frequently.

8. We were taken to extracts from various applicable policies/guidance documents:

9. Bidvest Noonan had issued a Code of Conduct which included "*sleeping is also not authorised on site, neither is the resting of eyes or eye lids. If an officer is found sleeping on site then appropriate HR action will be taken"*. This does not state that sleeping on duty is gross misconduct and it appears to contemplate that a variety of HR responses could be appropriate.

10. The same document stated "*During a shift, it may be required for an officer to take a toilet break. If this is the case then the officer is required to radio control*

and request for a "Whisky Charlie". The control room can then either authorise the officer to go without the position being covered, or will organise an officer to cover the manned down position. Once the officer is back on post the officer is to radio the control room". This does not state that leaving a post unattended is forbidden in all circumstances and suggests that the person in the CR is able to approve an officer going to the lavatory without a post being covered.

11. The Respondent had "*assignment instructions*" for supervisors which included "*No sleeping on duty at any time"*. This is clear enough but it does not state that sleeping is gross misconduct.

12. The Respondent's Handbook Policies and Procedures section included the following: "*In the circumstances of gross misconduct, the company will normally dismiss the employee without the use of stages 1-3 of the disciplinary procedures, and without notice. …The following are examples of what is regarded as a very serious offence and could result in dismissal. The list is illustrative not exhaustive. » Sleeping on duty … Bringing the Company into disrepute ….. Wilful neglect of duty… Leaving the place of work without permission".* This creates a distinction between (i) gross misconduct which will normally justify dismissal without notice and (ii) "*a very serious offence*" which could result in dismissal (depending on the circumstances). Sleeping on duty appears to be in the second category. At the very least the policy fails to clearly identify sleeping on duty as gross misconduct.

13. The Claimant had been managed by Mr D Evans, who was also transferred to the Respondent under TUPE. The Claimant and his witnesses gave evidence that Mr Evans was an unfair manager, and they gave numerous examples of this, many of which dated from before the transfer. One such complaint was that Mr Evans used favourites as spies to collect evidence against other employees whom Mr Evans did not like, and that he would himself scrutinise CCTV footage selectively in order to try to find evidence of, for example, employees he did not like sleeping on duty, so that he could initiate disciplinary investigations against them, while ignoring similar behaviour by employees who were in favour.

14. Mr Evans left the employment of the Respondent many months ago, and was not called as a witness, and he has not had an opportunity to rebut these claims. It is unnecessary for us to make findings about Mr Evans's qualities as a manager and we do not do so.

15. Prior to the transfer Mr Evans had compiled a "*movement timeline*" - which is a transcription of what he had seen when watching the CCTV footage of the night of 17/7/21 in the CR, then staffed by two security officers, namely Mr Edmund Tabiri-Bekoe and Mr Altaf Miah. The document records images showing sleeping or similar behaviour by the two officers. For example "*2:58 Both Edmund and now Altaf are in chairs, reclined, with eyes closed".* There are other entries about both and then appears the following: "*4.40 Altaf who had been looking at PC now puts his feet up and closes his eyes…4.56 Altaf moves, does some work back to resting position 4.58"*

16. On 29/7/21 Mr Evans wrote to Mr Tabiri-Bekoe informing him that an investigation was underway against him in relation to his having slept on duty on 17/7/21. There is no evidence that such a letter was sent to Mr Miah.

17. On 13/10/21 Mr T McCrone interviewed Mr Tabiri-Bekoe about the sleeping on duty allegation against him.

18. In October 21 the Claimant lost his mother and he also contracted Covid. He took sick-leave from 22/10/21 but returned to work on 7/11/21. There was no formal return to work interview. The Claimant was born on 20/01/58 and was 63 years of age in October 21. He was still suffering the after-effects of Covid and was feeling debilitated and weak.

19. On the night of the 18/19 November 21 the Claimant was on duty in the CR. The other security officer on duty there was Mr S Ahmed, who previously had been placed to work alongside the Claimant by Mr Evans, contrary to the Claimant's wishes. The events in the CR were recorded by CCTV. This shows that in the early hours of the morning of 19/11/21 the Claimant sat still for extended periods. At one point for a brief moment his head nodded forward while he was still sitting up. He did not lie down or rest his head on the desk at any point. It is difficult to see on the video whether or not he had his eyes completely shut for any period of time.

20. The video also shows that at 3.40am Mr Ahmed got up and departed from the CR, returning at 4.19am, and that the Claimant, who had been left alone in the CR when Mr Ahmed departed, himself got up and left the CR at 4.16am, returning 5 minutes later at 4.21, by which time Mr Ahmed had returned. Thus the CR was left unoccupied from 4.16 to 4.19.

21. On 23/11/21 there was an exchange of words between the Claimant and Mr Ahmed. The subject was something to do with the amount of work Mr Ahmed had been doing. This may have been the catalyst for Mr Ahmed's complaint against the Claimant which he made the next day.

22. On 24/11/21 Mr Ahmed made a complaint to Julie Elvery (the Respondent's mental health first aider) about the Claimant's alleged treatment of him. Mr Evans then interviewed Mr Ahmed to record his complaints, which he did on 25/11/21. The record included complaints that the Claimant had left the CR unattended on 19/11/21 "*and was sleeping and resting his eyes"*, that he had used bullying language against Mr Ahmed by calling him lazy on 23/11/21, and that he had made racist remarks.

23. The Claimant was suspended on 26/11/21 pending investigation of the following allegations *"(i) Leaving the control room unattended for a prolonged period of time on 18/11/21* (in fact 19/11) *(ii) Acting unprofessionally in addressing colleagues on site in the presence of others.* (this was a reference to the Claimant calling Mr Ahmed lazy in the presence of a colleague called Valentyna on 23/11/21) *and (iii) using racist language*.

24. On 28/11/21 the Claimant raised a grievance against Mr Evans. This was kept separate from the investigation and disciplinary process against the Claimant.

Mr Moscrop interviewed the Claimant about it on 16/12/21, interviewed Mr Evans about it on 12/1/22 and dismissed it on 14/1/22.

25. Mr Morvan instructed Mr T McCrone to investigate the allegations against the Claimant. The Claimant attended an investigation meeting on 1/12/21 at which he admitted having left the CR unattended, (he said in order to go to the lavatory which he needed urgently), and had not attempted to use his radio to call anyone to cover his absence. He denied calling Mr Ahmed lazy and denied using racist language.

26. Mr McCrone interviewed other witnesses. Valentyna confirmed that she had heard the Claimant calling Mr Ahmed lazy but she and the other witnesses did not corroborate the claim that the Claimant had used racist language.

27. Mr McCrone submitted a report on 8/12/21 which found that the claim of use of racist language could not be established, but that he recommended that the case should proceed to a disciplinary hearing against the Claimant. Mr Morvan agreed.

28. On 10/12/21 Mr Ahmed was interviewed as a potential witness against Mr Tabiri-Bekoe in relation to the allegation that the latter had slept on duty on 17/7/21. He did not support the allegation. However Mr McCrone submitted a report that he had established as a fact that "*Edmund Tabiri-Bekoe spent long periods of time facing away from the CCTV cameras with his eyes shut*"

29. By 16/12/21 Mr McCrone had viewed the CCTV of 19/11/21 and Mr Morvan decided to add a fourth charge namely that the Claimant had been sleeping on duty on 19/11/21.

30. In his oral evidence Mr Morvan explained that when originally formulating the allegations against the Claimant, he had decided not to include sleeping-on-duty (despite the fact that Mr Ahmed had included this complaint on 24/25 November 21 against the Claimant) because sleeping on duty was a very serious matter which could lead to dismissal. Hence he (Mr Morvan) had not wanted to include a sleeping-on-duty charge unless he had CCTV evidence to back up what Mr Ahmed had said. He had not felt the need for this approach in relation to the other charges because, without the sleeping-on-duty, and given the Claimant's mitigation, "*a final written warning would "quite possibly" be the appropriate penalty for the other charges".*

31. On 20/12/21 Mr Morvan issued an invitation to Mr Tabiri-Bekoe to attend a (re-scheduled) disciplinary hearing on 29/12/21. This never took place because Mr Tabiri-Bekoe resigned from his employment with the Respondent.

32. We asked Mr Morvan why he had supported investigations and disciplinary action against Mr Tabiri-Bekoe and the Claimant in relation to claimed sleeping-on-duty, but had not against Mr Miah, despite the fact that there was a record of Mr Miah on duty in the CR, having sat still with his feet up and his eyes shut for 16 minutes on 17/7/21. Mr Morvan said he had noticed this at the time and agreed that there was inconsistency in treatment between the Claimant and Mr

Miah, but that when he contacted Tracy, a Bidvest Noonan employee, to discuss the matter, she had told him that prior to the transfer, Bidvest Noonan had investigated Mr Miah, and had concluded that no disciplinary action should be taken against him, and had told him as much, and this caused Mr Morvan to conclude that it would be unfair to re-open a closed case against Mr Miah.

33. We do not believe this evidence from Mr Morvan. It is not referred to in Mr Morvan's witness statement, (despite the fact that claimed inconsistent treatment of Mr Miah and the Claimant was flagged in the list of issues in October 22). His witness statement at paragraph 45 contradicts this account as it reads "*We had only just taken over the Clifford Chance contract at that time, and had no knowledge of what may, or may not have gone on previously. We were not party to that ….*". There is no contemporaneous note, email or other document to suggest that this conversation between him and Tracy ever took place. There is evidence of an investigation starting against Mr Tabiri-Bekoe before the transfer, but not one against Mr Miah.

34. The Claimant's disciplinary hearing was held before Sigita Gedrimaite on 22/12/21. The Claimant denied using racist language and said he had been bantering with Mr Ahmed on 23/11/21. The CCTV footage was played . He was asked "*what the policy (was) if you are alone in control"*. He answered that "*If I need to step out, I will call someone to cover me*". *That day I would normally have 2 people at the west. I only had 1 person. Instead of calling someone from patrol to come in for two minutes…I popped out as I was busting to go*". Ms Gedrimaite then commented "*but you confirmed you needed to call someone*". The Claimant's answer was "*but before they got there, I would have dehumanised myself*" (ie wet himself).

35. He denied that he had been sleeping on duty and said he had been reading something when his head was still. When Ms Gedrimaite told the Claimant that she had a witness statement from Mr Ahmed saying that the Claimant had been sleeping, the Claimant's response was to laugh and retort "*I have seen (Mr Ahmed) doze off. All I need to do is alert him. Why didn't he call me? I would have answered*."

36. Ms Gedrimaite, having discussed the matter with Mr Morvan, found the charges proved and telephoned the Claimant on 24/12/21 to tell him that he was summarily dismissed. Mr Morvan sent written confirmation on 29/12/21 confirming that the charge of using racist language was "discontinued" but that the other charges were upheld.

37. The Claimant appealed on 30/12/21 and his appeal was heard by Mr K Nunney on 19/1/22. Mr Nunney had obtained a letter from the Claimant's GP which confirmed the Claimant's health conditions and his need to urinate frequently. Mr Nunney viewed the CCTV footage himself. He dismissed the Claimant's appeal.

38. The Claimant obtained ACAS certificate on 27/2/22 and presented his claim on 24/3/22.

The law

39. Where the conduct of the employee is established by the employer as a potentially fair reason for dismissal under Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows:

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 upon 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.'

40. A dismissal for misconduct will not be unfair if it is based on a genuine belief on the part of the employer that the Applicant had perpetrated the misconduct, which belief is based on reasonable grounds following a reasonable investigation BHS v Burchell [1978] IRLR 379.

41. An Employment Tribunal should not substitute itself for an employer or act as if it were conducting a rehearing of or an appeal against the merits of an employer's decision to dismiss. The employer not the Tribunal is the proper person to conduct the investigation into the alleged misconduct. The function of the Tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the result of that investigation, is a reasonable response. HSBC v Madden [2000] ICR 1283.

42. The range of reasonable responses test (or to put another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances, as it does to the reasonableness of the decision to dismiss for the conduct reason. Sainsbury v Hitt 2002 EWCA CIV 1588

43. In 1981 in Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 the Employment Appeal Tribunal (EAT) provided guidance on claims of inconsistent treatment, setting out three possible ways where decisions made by an employer in truly parallel circumstances in relation to a different employee may be relevant.

- Employees may be led by an employer to believe that certain categories of conduct will be overlooked or will be more mercifully treated in the light of the way that other employees have been dealt with in the past.

- It may show that the dismissal in the instant case is not for the reason put forward, ie that the asserted reason for dismissal is not the real or genuine reason.

- Evidence as to decisions made by an employer in two truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances.

44. The EAT emphasised that: "*It is only in the limited circumstances that we have indicated that the argument (ie the disparity argument) is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar or sufficiently similar to afford an adequate basis for the argument."*

Conclusions

Unfair dismissal.

45. We find that the Claimant's conduct was the reason for dismissal.

46. We find that the decision makers (Ms Gertrimaite and Mr Nunney) had a genuine belief in the misconduct.

47. The finding that the Claimant had "*acted unprofessionally*" (ie had called Mr Ahmed lazy on 23/11/21) was based on reasonable grounds as the complaint had been corroborated by Valentyna. This however was a makeweight and a petty matter which by itself would certainly not have justified any significant penalty.

48. The conclusion that the Claimant had left the CR unattended was based on reasonable grounds. That was not in dispute. What was in dispute were the circumstances in which he had done so. At the disciplinary hearing the Claimant admitted that he knew that the proper practice was that "*If I need to step out, I will call someone to cover me* " and that he had not tried to call someone, but he also offered an explanation for this namely that if had he done so "*before they got there, I would have dehumanised myself*" (ie wet himself).

49. It is possible to speculate about this explanation in the light of the Claimant's apparent demeanour as he got up to leave the CCTV room, which appeared unhurried, but the suddenness, intensity and urgency of the Claimant's call of nature at 4.16am on 18/11/21 is peculiarly something which only he will know about and there was no real evidence to gainsay his account of this.

50. By the time the Claimant left the CR room, which he did for about 5 minutes, he had been left alone by Mr Ahmed for 36 minutes. It is not in dispute that the Claimant suffers from health conditions which require him to urinate frequently.

51. The Bidvest Noonan Code of Conduct which the Respondent prayed in aid does not state that leaving the CR unattended is a gross misconduct offence, and it even vests in the CR the decision as to whether posts can be left unattended for "toilet breaks".

52. In these circumstances while we agree that some level of fault should have been attributed to the Claimant in that he had broken a rule that he should have tried to call another officer to tell them of the situation (even if he could not wait until the cover arrived), we do not agree that the evidence reasonably supported the conclusion that what the Claimant had done was a gross misconduct offence.

53. Mr Morvan himself in evidence volunteered that without the sleeping-on-duty the other charges (ie the leaving the CR unattended charge) would "*quite possibly have justified a final written warning*" (only).

54. The finding that the Claimant had been sleeping on duty was not based on reasonable grounds. As Mr Morvan recognised, Mr Ahmed's uncorroborated word about this was inadequate. The CCTV footage is unclear as to whether the Claimant was sleeping or just sitting still. It is unclear whether he has his eyes shut. He is not resting his head on the desk or lying on the floor. The evidence is ambiguous and even on the civil standard of proof, does not support a reasonable conclusion that the Claimant was sleeping. If Mr Ahmed at the time had tried to speak to the Claimant and he had not responded, or if he had been snoring or resting his head on the desk, the matter would be different but there were no clear indicators of this kind. It was 3am in the morning and the Claimant was weak and debilitated. He may well have been drowsy and stationary but it does not follow that he must have been sleeping. It was not fair to find that he had been sleeping when the CCTV could just as easily support the reasonable conclusion that he was just drowsy but awake.

55. The decision by Mr Morvan after the Claimant had presented his grievance against Mr Evans, to add the "*sleeping on duty*" charge is unexplained and troubling in the light of what the Claimant and his witnesses have stated (largely unchallenged) about the manner in which they and their colleagues were managed both before and after the transfer.

56. In particular there is unexplained inconsistent treatment of Mr Miah on the one hand and the Claimant and Mr Tabiri-Bekoe on the other. The record of Mr Miah on duty in the CR sitting still and with his eyes closed and his feet up for 16 minutes on 17/7 seems to be far stronger evidence of sleeping than what we saw of the Claimant on the CCTV of 19/11/21, and yet Mr Miah was on our findings not even interviewed about this. (The only interview of him was as a potential witness against Mr Tabiri-Bekoe).

57. Even if, contrary to our main finding, there had been enough to convict the Claimant of this, then there was certainly more than enough to convict Mr Miah also, but no action was taken against Mr Miah. The Claimant's explanation is that Mr Miah was a favourite of Mr Evans who disliked and wished to get rid of Mr Tabiri-Bekoe and the Claimant. We are not in a position to decide whether that explanation is correct or not. However, we do find that in the circumstances it was not open to the Respondent fairly to charge and convict the Claimant of sleeping on duty, while at the very same time Mr Morvan, who as ER lead was superintending and arranging the process against the Claimant, was aware of

the fact that Mr Miah was being let off scot free despite the existence of stronger evidence against him in relation to exactly the same claimed offence.

58. The Claimant had a long unblemished previous record and continuity of service since 2002. He was recovering from Covid, was recently bereaved and was suffering chronic health issues causing him to urinate frequently. There was substantial mitigation.

59. We find in all the circumstances that summary dismissal was not within a range of reasonable responses. The harshest penalty which in our view was open to a reasonable employer was a final written warning.

60. The Claimant was unfairly dismissed.

61. We find that but for the unfairness we have identified he would have retained his employment with the Respondent.

62. We find that he contributed 50% to his dismissal and that all his damages for unfair dismissal must be discounted by that amount.

Wrongful dismissal.

63. We are not satisfied on a balance of probabilities that the Claimant slept on duty. In any event the Respondent's policies do not characterise sleeping on duty as gross misconduct justifying summary dismissal.

64. We do not find that the Claimant leaving the control room unattended while he visited the lavatory for 5 minutes was a gross misconduct offence and again in the Respondent's policies there is nothing to suggest that it was.

65. We accept the finding that the Claimant called Mr Ahmed lazy. If this was misconduct, it was extremely minor and certainly not a fundamental breach of contract.

66. Accordingly, the failure to pay the Claimant notice pay was a breach of his contract, and his wrongful dismissal claim succeeds.

Discrimination arising from disability.

67. The claim is that the Claimant was dismissed because he went to the lavatory, which was something arising from his disability.

68. He was not dismissed for going to the lavatory but for leaving the CR unattended while not trying to phone/radio for cover. Hence the discrimination claim fails and is dismissed.

REMEDY

69. Average weekly pay. The parties produced evidence that the Claimant earned the following sums net of NIS and tax in the following 5 months which they both

accepted should be regarded as representative: April 21: £2048.07; May 21 £2282.58. June £2282.78, July 21 £2752.19 and September 21 £2534.84. The total of these is £11900.46 and the average weekly net pay derived from that by dividing by 5, multiplying by 12 and dividing by 52 is £549.25 per week. We have applied that in calculating the notice pay and compensatory award.

70. Wrongful dismissal/Notice pay: No employment contract was available so we have proceeded on the basis that the Claimant's entitlement was the statutory period of 12 weeks. The award is 12 x £549.25 = **£6591**

Unfair dismissal:

71. Basic award: The Respondent sent us a small bundle of supplementary documents including an excel spreadsheet showing the transfer information which the Respondent received from Bidvest Noonan which included confirmation that the Claimant's continuous service started in July 2002. We regard this as the best evidence of this point. The continuous service was therefore 19 years to December 2021. The Claimant's pay is capped at £544 per week, being the 2021 rate. The award is 19 years x 1.5 x £544 = £15504 x 50% = **£7752**

72. Loss of statutory rights £500 / 2 = **£250**

73. Compensatory award. The Claimant's evidence about his attempts to mitigate was unsatisfactory. He first said that he had been unable to seek work as a Security Officer because of mental exhaustion. He was unable to produce any medical evidence of this. He then said that he had been unable to apply for new security work in 2022 because his SIA licence had expired and he could not afford a new one, but then conceded that his licence was still current in 2022 and that it expired only in September 23. He then suggested that in fact during the first six months of 2022 he had made an application to be re-employed as a Security supervisor with Bidvest Noonan but had not received a reply and had registered with agencies and made applications but had found nothing suitable. However he was unable to produce any documentary evidence to show this.

74. He did obtain a new job at a lower hourly rate and with less hours of work (than he had received when employed by the Respondent) from about 15/7/22 working in a "mental care home" run by Ashwood House Ltd, where he remains in employment.

75. We find that the Claimant was not incapacitated from working in the security industry in 2022 but failed to make any proper effort to obtain a suitable replacement job in the industry. Had he made a proper effort, we find he would have fully mitigated his loss of income by no later than 15/7/22. He will be fully compensated by his notice pay award for the period to 18/3/22. His losses from 18/3/22 to 15/7/22 (a period of 17 weeks) are 17 x £549.25 = £9337.25 x 50% = **£4668.63**

Section 38 Employment Act 2002

76. We are satisfied that the Respondent sent an "employment measures" letter to the Claimant on 19/8/21 which constituted sufficient compliance with the obligation in section 4 ERA 1996. Accordingly no award is made under section 38.

Claimant's evidence

77. The Claimant said initially that he had not received any documentation from the Respondent informing him of the change in his employer at the time of the transfer. It is clear from documentation subsequently produced by the Respondent that in fact he was sent several such documents at least one of which he signed. The Respondent then made a late submission that as the Claimant had intended to deliberately mislead the tribunal he should suffer a penalty.

78. We do not think the Claimant deliberately set out to mislead us over this. Nearly three years have elapsed since the transfer and the Claimant was put on the spot about this. We think he misremembered and do not find it appropriate to penalise him.

Total award

79. The Total is £6591 notice pay plus basic award £7752 plus LOSR £250 plus compensatory award £4668.63 = £19261.63.

Recoupment Regulations

80. These apply. The Claimant's NI number is JX727561B. The prescribed period is 18/3/22 to 15/7/22. The prescribed amount is £4668.63**.** The difference between the total award and the prescribed amount is £14593.

Employment Judge J S Burns
Dated: 6 June 2024

SCHEDULE - LIST OF ISSUES

Unfair Dismissal

1. It is admitted that the Claimant has 2 years continuous service for the purposes of Section 108 of the Employment Rights Act 1996.
2. It is accepted that the Respondent dismissed the Claimant for the purposes of Section 95 of the Employment Rights Act 1996.
3. No issue in relation to time limits included in Section 111 of the Employment Rights Act 1996 arises.
4. The Respondent says that the reason, or if more than one, the principal reason for the dismissal was the conduct of the Claimant. It is for the Respondent to prove that is the case. The Claimant contests the suggestion that the Respondent had any genuine belief in his misconduct.
5. If the Respondent satisfies the Tribunal that its reasons for the dismissal were for 'conduct' then the Tribunal will go on to consider whether the dismissal was fair or unfair applying the test set out in Section 98(4) of the Employment Rights Act. The following matters are relied upon by the Claimant:

    1. He says that there was no or no adequate investigation into his suggestion that the allegations against him were made in bad faith; (Dave Evans using Soheel Ahmed) and

    2. He says that the CCTV did not provide any reasonable grounds for believing he was asleep on duty; and
    3. He says that his treatment was inconsistent with other employees who were not dismissed; and
    4. He says that even on the Respondent's case the decision to dismiss him was one that fell outside a range of reasonable responses.

6. The Respondent says that if the dismissal was unfair then the conduct of the Claimant provides a sufficient basis for it to say that any compensatory award should be reduced or extinguished because it could or would have fairly dismissed the Claimant in any event. It bears the burden of proof in that respect.

Discrimination because of something arising in consequence of disability.

7. The Respondent accepts that the Claimant has a disability for the purposes of Section 6 of the Equality Act 2010 and that they had actual or constructive knowledge of that.
8. The unfavourable treatment complained of by the Claimant is his dismissal.
9. The 'something arising' is said to be the frequent need to use a toilet. The Claimant will need to satisfy the Tribunal that that is the case.

10. The Tribunal will have to decide whether the Claimant's dismissal was 'because of' his frequent need to use the toilet". If so;

11. The Respondent will be liable for an act of discrimination unless it can show that the treatment of the Claimant was a proportionate means of achieving a legitimate aim. The Respondent has identified having to enforce the requirement to man the control room continuously as a legitimate aim.

Breach of contract – notice pay

12. The Respondent accepts that it dismissed the Claimant without notice or pay in lieu of notice.

13. The Tribunal will have to determine what the terms of the contract are in respect of notice either by reference to express terms, terms in respect of notice implied by the Employment Rights Act, or the implied term at common law that an employee will be given 'reasonable notice'.

14. The Respondent says that at common law it was entitled to determine the contract without notice as the Claimant's conduct amounted to 'gross misconduct' (a serious breach of contract). It will be for the Respondent to prove the facts upon which it relies.

15. If the Claimant was dismissed in breach of contract what, if any, loss and damage has he sustained?