EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000038/2023 (V)

Held on 17 & 18 March 2025

Employment Judge J M Hendry

X	**Claimant Represented by Mr Akram, Counsel**
Y	**Respondent Represented by, Mr James, Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. That the claim for unfair dismissal is not well founded and falls to be dismissed.

2. That the claim for Whistleblowing detriment is not well founded and is dismissed.

3. That the claim for failure to provide Terms and Conditions of Employment falls to be dismissed.

REASONS

1. The claimant in his ET1 sought a finding that he had been unfairly dismissed from his employment as a Security Officer/Night Porter with the respondent company. He had been employed to work at accommodation premises at Sellaness in Shetland. The claimant also made claims for race and disability discrimination which were withdrawn. He also made a claim for whistleblowing and whistleblowing detriment. The claims were set out in Better and Further Particulars prepared by the claimant's solicitors (JB126-130). The claims were opposed. The respondent argued that the dismissal was fair and that he had not been subject to any detriment.
2. The claims proceeded under the names X & Y following an Order by Judge Hosie made on 29 March 2023 (JB92).

Evidence

3. The Tribunal had the benefit of a Joint Bundle prepared by parties (JB1-382). I also heard evidence from 3 witnesses. The first witness referred to as Mr T was the Manager who dismissed the claimant and Ms F an HR Adviser. The claimant Mr X then also gave evidence.

Issues

4. There was no list of issues however parties in their pleadings had set out the basis of the claims being made and the respondent's responses. The claimant's position broadly was that the dismissal was unfair because of a failure to conduct a reasonable investigation specifically that some relevant CCTV footage had not been obtained. The respondent's position was that they had a genuine belief in the misconduct and that it constituted gross misconduct. It was suggested that they acted the way they did to dismiss the claimant because of a connection with a third party client. The claimant also alleged that Mr T did not have an open mind dealing with the matter because of his contact with the third party client and the fact that he had unfavourably determined a grievance made by the claimant against another employee prior to these events. In relation to whistleblowing the claimant set out various

alleged detriments (JB129) particularly subjecting the claimant to a disciplinary investigation and:

- Failing to protect or disclose CCTV footage of the incident reported by the claimant;
- Finding the claimant had behaved inappropriately towards Ms Z.
- Failure to provide Terms and Conditions of Employment.

5. In the course of the hearing Mr Akram also argued that the failure to report an alleged assault on the claimant to the Police was also a detriment.

Facts

The Tribunal found the following facts established or agreed:

6. The claimant, My X, had experience in the oil industry. He had previously worked as a Manager in that industry. He had been working in Shetland at the facility at Sellaness with a company SSGC when the respondent company took it over.
7. The respondent is a large multi-national company employing many thousands of staff. They have a dedicated HR department.
8. The background was that the claimant had worked at Sellaness as a manager before it was taken over by the respondent. He had been unsuccessful in his application to be a Manager or Supervisor with the respondent company but had "TUPED over'' to the respondent's employment as a Security Guard.

Previous Employment and Changes in Employer

9. The claimant had previously been employed by a company SSGC. He had received an offer of employment from them on 14 April 2020 (JB149-150). It contained information in relation to his holidays and other terms.
10. The claimant lived in Aberdeen but worked in Shetland on a three week on, three week off rotation.
11. When the respondent company had taken over the facility at Sellaness in August 2021 they had written to employees there such as the claimant about the change in ownership. The claimant received a letter from the respondent (JB170) on 26 April 2022. It confirmed his position with the Security Team

starting on 28 April 2022. It gave his rate of pay and his rotation. The letter made reference to enclosed particulars of employment at the Sellaness Centre. These could not be produced.

Sellaness and Events from August 2022

12. The facility is run as accommodation for workers on Shetland. Companies who have employees working at Sullom Voe Gas Terminal or at other local projects in Shetland such as wind farms will rent rooms for their employees there. It is akin to a Hotel. It has catering facilities. The corridors are covered by CCTV. The CCTV footage is kept for 30 days and then deleted.

13. The claimant as a Security Guard is required, along with other members of the team, to staff reception, assist residents and carry out security guarding functions. The reception is staffed throughout the day and night and security staff carry out checks and periodic patrols.

14. On 11 August 2022 Mr H who is the Operations Manager for EQ contacted Mr T and had a telephone discussion with him in relation to a concern that had been raised with him by a female employee, Ms Z, regarding the actions of the claimant Mr X. EQ were clients of the company and often rented rooms to their staff.

15. The manager made reference to a number of interactions between Ms Z and Mr X and the following was recorded (JB175-176):-

"*Due to his interactions the employee is uncomfortable staying at the Sellaness Facility and we have had to arrange a separate Hotel for her visit this week to Shetland. Our employee last stayed at Sellaness in June, and I believe there was some interaction between the two during that stay. However, the main concern is that the Security Guard subsequently visited EQ's reception……in Aberdeen in July and asked to speak to an employee, despite no contact details being shared.*

Although she wasn't present in the office at that time, a message was left for her. She was unnerved by this, raised the concern with me this week, and

requested authorisation to stay elsewhere on the island during her visit on Tuesday night and Wednesday night, which I approved. I have intended to raise the matter with you this week.

While the situation was asked of me today when the Security Guard in question approached an employee at Sumburgh Airport asking why she hadn't been staying at Sellaness, and then again in the car park at Aberdeen Airport where he pulled up in a taxi beside her as she was retrieving her car from the parking area, asking if she needed a lift. I don't believe these interactions had been threatening, however, I consider them inappropriate on a professional level.

As far as I'm aware no contact details have been shared between the two and there have been no interactions or approaches on Social Media. Obviously, there is an element of this that may be personal, my main concern is the fact that one of the employees does not feel safe staying at the facility due to what I would assert as unprofessional behaviour from a member of the respondent's team in a position of responsibility."

16. On 11 August 2022 the claimant wrote to the respondent's HR department (JB178-179) advising them about his meeting with Miss Z on the same day at Sumburgh and Babcock Airport when he was leaving the island after finishing his rotation. He noted that she had complained that he had visited her work and she was going to report him to his employer. He then alleged that when he first met her in June and was showing her to her room the following occurred:

"*Z began rubbing her hands all over my back and ass as I walked with them passed the shop while she grabbed my belt from my back. I was startled and concerned. As a result, I walked more quickly, got further away from her and maintained my distance. I suggested that we start by going to her colleague's room as she was on the ground floor. As we headed down the hallway her colleague informed me that she knows the location of her room and that X was the one having trouble locating her room.*"

17. He continued that he got her into the lift and starting walking her to her room and "*as we walked, she repeatedly tried to grab me but I walked faster ahead of her out of reach until we got to her room. I open(ed) her door with her card, docked the card in the electricity dock, stayed outside of her room the whole of the time and held door wide open with one of my hands and asked her to go into the side of the room and invited me to come in with her. I politely declined and tell her I cannot do that as I am working, and she is drunk.*

18. The claimant also asserted that on the evening of the same day he ran into Miss Z by chance in a corridor, that she was embarrassed and apologised for her drunken state. He wrote: *''I said that although she was drunk and said some rubbish, but she had not caused any trouble and went to her bed-there was nothing to report''* They then allegedly got into conversation in relation to the oil and gas industry. The claimant said that he told her that he was looking to get back into the industry. He wrote:

"*She told me that she knows a few people in the industry and if I ever needed any referrals, I should let her know. I said ok and left to continue my patrol.*"

19. He then explained that he had applied for a job at an oil company called Petrofac and that he had taken the opportunity when in town to visit EQ's Office and ask after Miss Z to see if she knew anyone in Petrofac. He wrote:

"*I went to reception, gave my name, the name of the company I worked for and requested to see Miss Z. I was told to take a seat while they tried to reach her unfortunately, the receptionist could not, as her line was busy, and I waited for about 10 minutes and left. I had no other contact or made any other attempt to contact this individual.*"

The claimant did not leave a message as to the reason for his visit.

20. The letter was received by Mr T. He was concerned at the content. He acknowledged it on 12 August (JB180). He wrote that he would pass the matter to the "People's Centre". This was the name for the HR department. He also passed a copy to the Aberdeen Head Office. He said that he would

get back in touch with the claimant when he was returning from annual leave. He did not do so. He expected the HR department to have done this in his absence.

21. Mr T was aware of the claimant and had dealt with a grievance he had taken out against another employee. In 2022. Mr T had not upheld that grievance.

22. The claimant was suspended from work on 31 August 2022. The reason for the suspension was that given that the claimant had "displayed inappropriate behaviours towards a member of the client business" and an investigation would take place. The claimant was suspended on full pay.

23. The claimant wrote to Mr W the Facilities Manager on 2 September 2022 in relation to the alleged assault. He wrote:

"

- *On 31 August at 08.57 hours you called my mobile phone - to say that I do not mobilise same day to Sellaness because you are in receipt of an allegation bordering on harassment against myself from a client.*"

24. The claimant reminded Mr W of the incident he had reported on 11 August. The claimant complained that he had not been given sufficient information about the alleged behaviours complained of. He reiterated that he had informed the Management about a "*sexual assault against himself by Miss Z on 16 June"* and said that he had been "*traumatised by the allegations and the manner in which he had been assaulted, treated unfairly and unjustly*".

25. The claimant decided to report the matter to the Police which he did on or about 3 September (JB189). He set out a detailed statement which he submitted to the Police (JB190-191).

Investigation

26. The investigation into these matters was referred to Mr W. He first met the claimant in 6 September. In the notes of the meeting (JB192-207) the claimant was asked about his interactions with another individual AW another former female resident at the facility. She had locked herself out of her room. The statement from AW was put to him. It stated that she had been

approached by the claimant when she had been at Sellaness. It said that he had told her that he had to accompany her to her room and at her door he had asked her for her telephone number. She had given him her number without thinking too deeply about it. He subsequently attempted to call her .She saw the call but did not respond.

27. The claimant's response was that her version of events was misleading and that he had met her in the corridor and she was wearing no shoes. She could not remember her room number. He accordingly had to check which room she was in and open the door with the security key. They got talking and as they both lived in Aberdeen they agreed to swap numbers to allow him to make contact with her on WhatsApp. He called her but she did not respond. He did not attempt to call again.

28. The claimant then went on to discuss the concerns raised by the Mr H, the Operations Manager for EQ involving Miss Z. The incidents discussed were those of the 15/16 June, 15 July and 10/11 August.

29. The claimant gave his version of events. The claimant recorded the meeting and had the meeting notes transcribed (JB211-222). Mr W had made reference to a pattern of inappropriate behaviour referring both to the interaction with W and then Miss Z. The claimant's position was that their statements were misleading and that he had acted appropriately and professionally.

30. Later as part of the investigation Mr W contacted Miss Z for a response to the claimant's position. She indicated that his statement was false. She said that she did not touch, grope or interact in any way with him. She said that most of the interactions with Mr X were with her colleague Miss D. She explained that she had gone to reception and the claimant had offered to walk her and her colleague to their rooms. This was through double doors, one of the doors then opened towards the stairwell and he directed her upstairs. They did not go into the lift and she said goodbye to Miss D who went to her room. She said that she did not meet Mr X in the corridor later on. She said that later that day he had knocked on her door and introduced himself as Frank the security guard who had helped her the night before. He said he had not put her name in the book. (JBp196).

31. Miss Z went on to say that she had been at the dentist on the 15 July when she was called by EQ's reception to say that a Mr Frank Ibazebo was in reception for her. He had not made an appointment and she did not recognise the name. He had said he had an appointment. Reception told her that he worked at Sellaness. She was very concerned that he had attended at her place of work. She felt uncomfortable staying at Sellaness in the future. She explained the background to her employers. She asked to stay at a different facility on her return to Shetland and returned to the Island in August.

32. Miss Z said that had met him again at the airport in Shetland on the 10/11 August. She did not recognise him initially and when he came over and introduced himself at departures. He asked her why she was not staying at Sellaness. She said she was polite but ''short'' with him.

33. Miss Z's response continued that when she arrived at Babcock Heliport and went to her car with her bags. A taxi drew up and he jumped out of it and asked her why she was acting so professionally towards him. She was shocked and confused as they were not colleagues or friends. She said she was confused at his behaviour including the fact he had come to her workplace saying he had an appointment. He said he was offering her a lift in the taxi and had attended her work as it was the friendly thing to do. She asked him to leave and he did not. He asked her if she was angry towards him. She said his behaviour was not appropriate and intimidating. That she had told the terminal manager who would be contacting his manager. Miss Z was concerned that someone who was in a position of trust and who had access to her personal details would behave in this way.

34. Mr W also contacted Miss Z's colleague Mr M who was with her on the flight from Sumburgh to Aberdeen. Mr M said that he had stood in the presence of Miss Z during the conversation with Mr X. He was asked to say in order to "*deter him*" and that Miss Z was curt and short with him ending the discussion. Later leaving the Airport he saw the claimant standing speaking to her outside. He stated that "*Miss Z was upset by the interaction with Mr X and left in her car".*

35. Mr W contacted Miss LD on the 12 September (JBp.225). It was noted that she had had returned with Miss Z at the back of 11 on the night in question.

They had been drinking but were not, she said, staggering. They could not find Miss Z's room as it was her first day in the facility. They tried the wrong door and a "*young lad"* had come to the door. They returned to reception to seek support and met the claimant there as he was on duty. Mr X had offered to assist them and had taken them to the stairs in the accommodation part of the building. She though the suggestion that Miss Z would have groped the claimant as being ''unlikely''

36. The claimant e-mailed Mr W on 13 September 2022. He had gone through the Audio recording and had various queries on the written record that had been produced. He complained that no action that had been taken about the alleged sexual assault.

37. The claimant was invited to a meeting by letter on 13 September 2022 namely a reconvened investigatory meeting. The meeting did not take place and had to be re-arranged (JB237-238) to the 22 September. That meeting did not take place and was again re-arranged (JB244-245). It ultimately took place on 11 October 2022. The allegations to be investigated were set out as follows:

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- *On 15 June 2022, it is alleged that a female member of the client business was staying at Sellaness and was unable to locate her room at which point you were approached by her friends for assistance. Further detail is that you escorted her to her room when it is believed there was no business reason to escort her to her room and doing so does not form part of your usual duties as Security Officer. Furthermore it is alleged that on 16 June 2022, at approximately 20.00 hours you actively knocked on her door advising her that you had helped her the previous evening, making an unwarranted introduction on a personal level;*
- *On 15 July 2022 at approximately 15:46, it is alleged you attended reception where the client is based and asked to speak to her without*

any prior notice leaving the client feeling uneasy regarding her safety. This resulted in the client funding alternative accommodation for future business visits to the Sullom Voe Terminal due to a lack of trust in the Y's member of staff, bringing the company into disrepute;

- *On 11 August 2022, it is alleged that you were at Sumburgh Airport. You approached the female member of client business, engaging in conversation, which made her feel uncomfortable and uneasy of her safety. Furthermore, you approached her after arriving at Babcock Heliport when she was loading her car. It is believed there was no reason for you to approach the female client member at this time and the client then advised you the behaviours displayed were inappropriate and that she had reported the offence to her Management for reporting to Y as your employer."*

38. The reconvened meeting was Minuted and a transcript produced (JB246-262). The claimant also recorded the meeting and obtained a transcript. (JB263-380).

Disciplinary Hearing

39. The respondent's investigation concluded in October/early November. It was decided to take disciplinary action against him. He was invited to a disciplinary hearing by letter of 11 November 2022. He was warned that the conduct might amount to gross misconduct. Reference was made to the Y's Rules of Conduct specifically at the point:

"*Employees must not at any time do anything, either by their act or omission, which brings the company into disrepute;*

- *Employees must not engage in, condone or encourage any behaviour that could be regarded as harassment, bullying, victimisation or discrimination;*
- *Employees must not make any statement or comment, either written or verbal which may constitute defamation of another person or company, or which may be construed as libelous;*

- *Employees must be honest at all times, in connection with their employment and must not breach the trust or confidence that is provided to them by the company or client.*"

40. The letter included a pack of information of the company's Disciplinary and Performance Capability Policy, Rules of Conduct and the Investigation Report and Minutes.

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41. The claimant emailed the respondents on 14 November requesting time to provide a detailed response and arrange representation. He wrote:

"*The Disciplinary Pack comprises Meeting Minutes with several falsifications, inconsistencies, mannerisms, and stereotypically racial stereotyping of myself. In order to reach a pre-determined result, the transcription of the audio recording has been manipulated and misrepresented maliciously."*

42. The first Disciplinary Meeting was rescheduled, and re-arranged for 24 November 2022. That meeting was subsequently rescheduled for 8 December 2022 and that meeting was subsequently re-arranged for the 19 December 2022. The claimant warned that the hearing would proceed in his absence. The letter stated:

"*Should you fail to attend this meeting that has been re-arranged on three occasions, a decision may be made by the Disciplinary Hearing Manager in your absence, based on the information available to them."*

43. The claimant was unable to get trade union representation which he hoped to obtain. He was in contact with ACAS.

44. The claimant did not attend. He emailed on 16 December 2022 that he was withdrawing from the process. He wrote:

Notice of Final Withdrawal from the prejudicial sham of Appeal process; a Charade of Justice

"*Mr T has been indirectly and directly involved. He should have recused himself of involvement with the consideration of the appeal because of a potential conflict of interest or lack of impartiality. Mr T informed me in his own words that he does not care what I do and proceeded to give me a lecture on how we treated immigrant workers during his time in Saudia Arabia. When I brought forward a formal grievance against his direct report CR.*"

45. Mr T convened the Disciplinary Meeting on 19 December. He considered the Investigation Report and the documents submitted by the claimant. He considered that the allegations were upheld. He wrote to the claimant on 13 January 2023 (JB345-350) setting out his findings:

Witnesses

46. I found the respondent's witnesses, Mr T and Ms F, to be both credible and reliable witnesses. They gave their evidence in a professional, straightforward and clear manner and showed no antipathy towards the claimant. The claimant was a confident and articulate witness but I had considerable concerns both as to his recollection of events and the truthfulness of much of his evidence.

Submissions

47. Mr Akram first of all reminded the Tribunal of the terms of Section 98 of the Act and the case of Burchill. The investigation into the allegations had been inadequate and outwith the band of reasonable responses available to the respondent. He referred to the ACAS Code and the necessity of a fair and even handed investigation. He turned to discuss the Whistleblowing claim that the claimant had made and to what he regarded as being the detriments he suffered (p129 para 29) namely subjecting him to a disciplinary hearing, failing to disclose the CCTV of the incident and finding that he had behaved inappropriately towards Miss Z. He reviewed the evidence in relation to the first incident and the claimant's position set out at page 278. He had specifically raised the issue of what rule or process he had apparently broken.

48. Counsel then addressed the specific allegations made against his client. The first allegation relating to the incident on the 15 June could, not be supported

by the evidence. There was no proper basis to contradict the claimant's evidence or corroboration for the position of Miss Z. Even if the claimant had knocked on her door there was nothing untoward in what followed. The second allegation related to the claimant going to Miss Z's office in Aberdeen. The dismissal letter says that this action 'caused' Miss Z to seek alternative accommodation and shows that there was likely to have been third party pressure.

49. He continued that the employers had failed to apply the same standard to the claimant's evidence as they had to the evidence of Miss Z. They had taken no steps to investigate the assault or recover the CCTV that would have existed. It was never put to Miss Z that she had offered to help the claimant in the industry. In relation to the third allegation which was approaching her at the airport again there was nothing untoward alleged. The evidence was that it was a small group of passengers boarding a charter flight for Shetland workers which did not disembark at the public airport building.

50. The claimant also complained that there had been no induction into his new role and no 'on boarding' as to how his duties should be carried out.

51. In summary the employer had no reasonable factual basis for upholding the allegations. The claimant believed that Mr T was biased against him because of an earlier grievance against a colleague. He had promised to get back to him after he had made the allegation of assault but had not done so. No steps had been taken to follow up the CCTV which would have been backed up by the provider.

52. Mr James pointed out that the claimant could not argue that the dismissal related to the alleged whistleblowing. In his Further and Better Particulars (page 126) this had not been pled. He had stated there that the dismissal was because of the impact the complaint against Ms Z would have had against their relationship. The claimant's position had altered on occasion. Ms Z was clear that he had knocked on her door. The claimant says she had assaulted him but in his pleadings he says he meets her and says (p30) ''*I told her there was nothing to apologise for*'' and ''*she had not caused any trouble*''

53. Counsel then reviewed the evidence and suggested that the claimant's assertion that Miss Z had offered him a reference and that this was the

reason he had gone to her workplace was highly improbable. She could not comment on how qualified or experienced he was not having worked with him. He suggested that his account could not be relied upon and that his evidence was self -serving.

Discussion and Decision

The Reason for Dismissal

54. The first matter for the tribunal to consider was whether it had been satisfied by the respondent that the reason for the dismissal was one of the potentially fair reasons for dismissal contained in section 98(1) or (2) of the Employment Rights Act 1996 ('ERA'). They had said that it was the claimant's conduct that had led to dismissal, so that it was for them to show that misconduct on his part was the real reason for dismissal, i.e. under s.98 (2)(b) of the ERA.

55. The claimant's position in his BFP (JBp126) was that the dismissal was because of the relationship between EQ and the respondent company with the suggestion that there was some pressure from the third party who employed Miss Z. There was no evidence of this and I accepted that there was no pressure applied by them and that although EQ was an important client they were not essential to the operations at Sellaness nor indeed a significant user of the facility. The respondent is part of a much larger group of companies and I accepted Mr T's evidence that although maintaining relationships was important it would not sway whether disciplinary action was taken or not. The allegedly serious way in which the claimant's conduct had apparently impacted on Miss Z was properly a factor that a reasonable employer was entitled to have in mind.

56. In the circumstances, it is clear that the reason for dismissal was clearly the claimant's perceived misconduct and what the employers had in mind at the time of dismissal was the whole circumstances around the various incidents and that these "*related to the conduct of the employee*" – s.98(2)(b).

Section 98(4) ERA

57. The task for the Tribunal in terms of section 98(4) of the Act was to ascertain whether, in all the circumstances (including the size and administrative

resources of the respondent) the dismissal was fair or unfair. The Tribunal had regard to the well-known cases of **British Home Stores Ltd v Burchell** [1978] IRLR 379, **Iceland Frozen Foods v Jones** [1982] IRLR439, and **Sainsbury's Supermarkets v Hitt** [2003] IRLR 23 and to the guidance contained in those cases as to the approach the Tribunal should follow in assessing such a dismissal.

58. Under paragraph (a) of this sub-section the question of whether the employer acted reasonably, particularly where the reason for dismissal related to conduct of an employee, often involves consideration of the adequacy of the employer's investigation and thus whether a reasonable employer could have concluded that he was guilty, i.e. the ***Burchell*** test.

59. The adequacy of the investigation itself was raised in the ETI. The claimant said it was a sham. He also argued, however, that he had done nothing wrong. His Counsel suggested that the claim that Miss Z had offered to help him in the oil industry and give him a reference was not explored with her. Miss Z was asked to comment on the claimant's position and did so in some detail on the 31 August. She sets out what she says happened with no mention of the offer of a reference and writes: ''*He then immediately left saying nothing more''* The matter was in effect out to her. It was apparent from Mr T's evidence that he thought the idea that Miss Z would either offer or be in a position to give a reference on someone she hardly knew to be highly unlikely. The Tribunal came to the same conclusion.

60. The real focus of the case was, therefore, firstly the substantive one of whether the claimant's conduct in itself could reasonably have been considered by a reasonable employer to be "sufficient" reason for dismissal (taking account of any mitigatory factors) and secondly di the lack of any forewarning that this sort of conduct might lead to instant dismissal render the dismissal unfair. In this case a clear focus required to be maintained on exactly what that conduct was, what the character of that conduct and the effect of the conduct had been.

61. The respondent expressly labelled that conduct as "gross misconduct". They described the breaches of the health and rules as amounting to a 'gross breach of duty' The question of whether a dismissal is fair or unfair under

s.98(4) of the ERA is not answered by deciding whether or not the employee has been guilty of gross misconduct. As Phillips J said in ***Redbridge London Borough v. Fishman*** [1978] ICR 569:

"*The jurisdiction based on* [what is now section 98(4) of the Employment Rights Act 1996] *has not got much to do with contractual rights and duties. Many dismissals are unfair although the employer is contractually entitled to dismiss the employee. Contrary-wise, some dismissals are not unfair although the employer was not contractually entitled to dismiss the employee. Although the contractual rights and duties are not irrelevant to the question posed by* [s.98(4)]*, they are not of the first importance. The question which the Industrial Tribunal had to answer in this case was whether the* [employer] *could satisfy them that in the circumstances having regard to equity and the substantial merits of the case they acted reasonably in treating the employee's* [conduct] *as a sufficient reason for dismissing her.*"

62. This has been more recently confirmed by the EAT in **Weston Recovery Services v. Fisher** (EAT0062/10) i.e. that the only relevant question is whether the conduct was "sufficient for dismissal", according to the standards of a reasonable employer and whether dismissal accorded with equity and the substantial merits of the case" (s.98(4)(a) and (b)).

63. The Tribunal is entitled to have regard to the guidance contained in the ACAS Code of Practice relating to disciplinary and grievance matters which sets out best practice in relation to the process to be adopted in disciplinary matters.

Investigation

64. The respondent's investigating officer had the practical difficulty that the three witnesses were employees of EQ. However, despite these problems the investigation was reasonably thorough. I do not intend to rehearse the process but the allegations were put to the claimant and he was given an opportunity to respond and then further investigations were made. The process consisted of receiving the initial complaint from EQ with short statements from Miss Z and her colleague Ms W about the events 15/16 June, 15 July and 10/11 August 2022 and having a telephone call with Mr GH in relation to the events at the airport and then considering the matters raised by the claimant in explanation for his actions. Although the claimant was not given the documents headed ''witness statements'' the contents were put to him for comment and no unfairness arises. The meetings that took

place were lengthy and went into considerable detail. In short the allegations in essence are relatively simple and straightforward.

65. In the BFP (JBp127) which were submitted by the claimant's solicitors on his behalf the question of the unfairness of the investigation centred around a failure to review CCTV footage of the incident on the 15 June. This is potentially a serious flaw in the process. However, I accepted the respondent's witnesses's evidence that their understanding was that the CCTV footage was only kept for a relatively short period and by the time of the claimant's complaint on the 11 August (JB 178) unavailable. The claimant challenged this in evidence suggesting that from his experience the providers of the CCTV service keep a back up for a longer period. I would have thought that the cost of keeping such amounts of data from their various clients, let alone 24 hour footage from Sellaness, indefinitely would be impracticable and expensive but there was no evidence led by either party from the provider of the service. It is surprising that the claimant did not seek to recover the footage from the third party haver. In any event I accepted the evidence that of respondent's managers that they reasonably believed that the footage was unavailable to them.

66. I did not find the claimant a convincing witness. It was noteworthy that when the claimant clearly realised that Miss Z was going to complain to his employers after the incident at the airport on the 11 August he raised a complaint of assault. It layman's terms he seems to have attempted to ''get his retaliation in first''. The suggestion that he was assaulted did not sit well with his previous silence, his attempts to strike up a relationship with Miss Z or his own evidence that he had reassured her that nothing untoward had occurred (JBp191). It can be seen from the transcripts of the meeting with Mr T on the 6 September(JB217) that the claimant, somewhat surprisingly, was not prepared to go into the details of the alleged assault. The allegations were put by Mr T to Miss Z who rejected them and also to her colleague (JB223) who thought the suggestions being made by the claimant were ''unlikely''. It was clear that the matter was investigated and that there was ample material on which the employer could reject the claimant's position.

Was the dismissal within the band of reasonable responses open to the employer?

67. An important matter that came out in the hearing was whether the claimant could have been aware that the alleged conduct was a breach of discipline. It is hard to track down what the claimant says about this issue or indeed if it is mentioned at all as the ET1 (running to a number of pages) references race discrimination, disability discrimination and whistleblowing as all arising from the disciplinary process and the dismissal and also makes reference to background disputes. Nor is this particular issue focussed in the BFP lodged when the claimant had legal advice. However, it seems to appear in a letter sent to the Tribunal by the claimant (JB 28-63) as a complaint about the problems he had dealing with drunk residents: *"..there was no onboarding nor training offered by Sodexo on joining Sellaness lodge. Throughout my employment I did not attend any training at the lodge. There were no defined site assignments or procedures for dealing with such residents there…"* Although in his evidence the claimant questioned what rules he had broken and whether what he had been alleged to have done could be treated as a breach of discipline of which he was aware this is not as Mr James pointed out how the case was pled.

68. The claimant also refers to the meeting with Mr T and the audio transcript (JB263-280). It seems from that transcript that there was discussions about whether the claimant had in some way broken an established process by guiding Miss Z to her room. There was nothing conclusive in that particular matter although Mr T thought it odd that he felt required to do so but the claimant justified it on the basis that Miss Z was drunk and needed assistance. Miss Z and her colleague had a different recollection.

69. Both sides seemed to have become a little preoccupied with the detail and general duties/ processes rather than the actual nub of the disciplinary issues. There clearly was an issue around the expected correct interaction between Security Guards and residents. This was clearly a matter that the disciplinary officer had in mind and the invite to the disciplinary hearing contained a document called Sodexo's Rules of Conduct. That document does not seem

to have been included in the Joint Bundle which is unfortunate but no issue was taken about the accuracy of the except contained in the dismissal letter (JBP348).

70. Employers should, if possible, have clear disciplinary rules in relation to expected conduct. An employee should know what they should and should not do. It would be out with the band of reasonable responses to dismiss in such circumstances. The importance of an employee being aware of the rule in question was canvassed in the case of ***Donachie v Allied Suppliers Ltd*** EAT 46/80 where it was held that it was unfair to dismiss an employee who was unaware of the rule in question. That was in reference to a particular rule. The lack of any rules or training in relation to the conduct of a Security Guard such as the claimant and their interactions with residents is an important issue. Counsel for the respondent indicated that the employer was entitled to take the a wider and common sense view of the conduct. There are some actions that while they may not be proscribed in writing which would nevertheless be accepted as being inappropriate behaviour and likely to lead to disciplinary action.

71. On the other hand the claimant's Counsel suggested a much narrower approach should be taken. Firstly there were no clear rules that had been broken he suggested and secondly looking at individual elements of the conduct he posed the question as to what could be regarded as objectionable? Even if the claimant had knocked on Miss Z's door or asked for a telephone number so what? I concluded that this is to take too narrow a view and it was not the way in which the employers here approached matters. Their approach was perfectly reasonable and within the band of reasonable responses open to them

72. The claimant's reaction to these events is instructive. In his ET1 and in his responses to the disciplinary charges he queries the reference to what the correct processes should have been and decries the fairness of the process indicating that the participants are all biased against him. He denies he was guilty of any breach of discipline but by this he seems to mean how his duties should be performed. He does not say that the alleged behaviour complained about was innocuous rather he makes considerable efforts to paint the

witnesses as giving inaccurate accounts and to try and invalidate the investigation and disciplinary process on various grounds. I came to the conclusion that the claimant knew fine well that his actions had been ‘‘inappropriate’’ or more simply he knew that how he behaved was not part of how he knew he was expected to behave.

73. The word ‘‘inappropriate’’ is very commonly used or over used but without a context it is says nothing about the actual form of the of behaviour being complained about. There is no doubt that the respondent’s managers were concerned at what seemed to be a pattern of behaviour of the claimant asking for the telephone numbers from female residents on some pretext. I found it impossible to believe as the claimant maintained that he was in some way just collecting ‘‘contacts’’ in the oil industry. In his evidence, he claimed, that Miss Z offered to give him a reference. He somewhat backtracked from that when he accepted that she had never worked with him and would not be in a position to vouch for his character, experience or work which are the usual features of a reference. His evidence became that she might be useful in some way as a contact and that is why he went to see her unannounced.

74. The crucial circumstance in this case was the claimant’s behaviour. He had no cause to visit Miss Z’s workplace or as seems likely claim he had an appointment. After the claimant met Miss Z at Sumburgh it must have been clear that she did not want to interact with him but despite that he then took the opportunity when seeing her outside at her car to jump out of the taxi he was in to speak to her and ask her why she was behaving is such a way towards him and why she wasn’t stating at Sellaness. His explanation that he though she was having some problem with her car was evidence that seemed to be highly improbable.

75. The employers believed that this all amounted to harassment. It was unwanted behaviour. It had the effect of upsetting her and causing her to make a complaint to her employers and to arrange alternative accommodation. The issue then is whether in all the circumstances the decision to dismiss for this conduct falls outside the range of reasonable responses available to the employer.

76. The ACAS Code gives as a general rule that an employee should not be dismissed for a first disciplinary offence unless the conduct amounts to gross misconduct. The matter turns on how serious the misconduct is and it has been accepted that so called gross misconduct entitles and employer to potentially dismiss fairly for a first breach of discipline.

77. The employers have in their disciplinary policy reference to breaching trust and confidence, harassment and bringing the company into disrepute as potentially amounting to gross misconduct. The claimant was referred to the policies and the Rules of Conduct in the invitation to the disciplinary hearing (JB 295-298). The claimant's response (JBp309-310) does not indicate he is unaware of the policy. The hearing was delayed for some weeks until the claimant withdrew from the process on the 16 December and that letter is also silent on any suggestion that the claimant was unaware of the Code or it's terms. Nor is this referred to in the ET1 or later BFP. In any event although the employer is open to criticism for not having clearly brought the Code or disciplinary policy to the employee's attention prior to the disciplinary process or to have some guidance in place on how security guards interact with residents those are not issues that have been pled. Many other reasons are pled.

78. Even had this been pled not every aspect of behaviour can be noted down in rules. It must be apparent for example that physical violence towards another would be wholly acceptable. The claimant wore a uniform of the respondent company and was in a unique position of authority over residents. He knew his behaviour crossed the line and Miss Z telling him that she was going to report the matter did not result in him apologising for his behaviour or any upset it had caused but to the strenuous efforts he has made to divert attention away from his own actions.

79. The employer was entitled to regard his behaviour as being a breach of trust and confidence, harassment and actions that brought the company into disrepute with Miss Z's employers and that leads the Tribunal to conclude that the dismissal was within the range of reasonable responses available to the employer.

Whistleblowing

80. The claimant suggested that he had sustained detriments as a consequence of him having made Protected Interest Disclosures by alleging he had been assaulted on the 11 August. There was no basis in the evidence for this claim. The claimant as suspended because of a potentially serious matter that had been brought to their attention before the disclosure was made. The disclosure could not have had any bearing on whether the claimant received Terms and Conditions of Employment when he had been employed initially by another company in 2010 and then transferred to the respondent in 2021. Nor did I find that it played any part in the protection or failure to disclose CCTV footage.

Terms and Conditions of Employment

81. There is an obligation to provide full and accurate particulars to an employee under Section 1 of the Employment Rights Act 1996. Under 38 the he Tribunal shall award compensation if the claimant is successful in another claim before the Tribunal. The claim therefore fails. However I would make these additional comments. There is no requirement on a TUPE transfer to provide new Terms and Conditions. The claimant was entitled to rely on the terms communicated to him by his previous employer (JB p149-157) . The respondent company in any event believed that they had sent updated Terms to the claimant on the transfer (JBp170) The claimant claims that he did not receive the supposedly enclosed documents. To be fair the respondent couldn't locate a copy. However, the claimant appears to have signed the acknowledgment and I find it difficult to accept that the claimant would not have protested and protested loudly if he had not received the document or been fully aware of his Terms and Conditions as amended by that letter.

Employment Judge: J M Hendry

Date of Judgment: 8 May 2025

Date Sent to Parties: 12 May 2025