



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr R Turhan

v

Poppies (Camden) Limited

Heard at: London Central

On: 8 and 9 December 2021

Before: Employment Judge Hodgson

Representation

For the Claimant: Mr Airey, solicitor

For the Respondent: Ms Singer, counsel

JUDGMENT

1. **Poppies (Camden) Limited shall be as the sole respondent in this case and is substituted for the previous respondent.**
2. **The claim of unfair dismissal is well founded and succeeds.**
3. **The claim of wrongful dismissal succeeds subject to loss being established.**
4. **The claim for unlawful deduction of wages is dismissed on withdrawal.**
5. **The claim that the particulars of reasons for dismissal are inadequate or untrue pursuant to section 93 Employment Rights Act 1996 is not well founded and is dismissed.**
6. **The claim for failure to pay accrued holiday pay pursuant to the Working Time Regulations 1998 is not withdrawn and shall be determined at the remedy hearing.**
7. **Any payment pursuant to section 38 Employment Act 2002 shall be considered at the remedy hearing.**
8. **There will be a further hearing to determine remedy.**

REASONS

Introduction

- 1.1 On 4 January 2021, the claimant commenced proceedings in London Central employment tribunal. He brought a number of claims including unfair dismissal.

The Issues

- 2.1 I considered the issues at the start of the hearing.
- 2.2 The respondent disputed it was the correct respondent. It alleged Poppies (Camden) Ltd was the claimant's employer.
- 2.3 The claimant alleged unfair dismissal. The respondent's alleged he was dismissed fairly for a reason related to conduct.
- 2.4 The claimant alleged that he was not bound by any variation of contract associated with furlough and that he should receive the balance of his wages back to March 2020.
- 2.5 The claimant alleged that he had not received, pursuant to regulation 14 Working Time Regulations 1998, for payment in lieu of holiday accrued but not taken.
- 2.6 The claimant alleged breach of section 93 Employment Rights Act 1996, it being his case that the reason given in purported compliance was inadequate or untrue.
- 2.7 The claimant sought an award pursuant to section 38 Employment Act 2002 for breach of section 1(1) Employment Rights Act 1996. He alleged he had not been sent a contract in 2013 and further he had received no section 4(1) notice of change following furlough.
- 2.8 The claimant alleged wrongful dismissal.

Evidence

- 3.1 The claimant gave evidence.
- 3.2 The respondent called three witnesses: Mr Ural Hassan, the respondent's director; Mr Ekrem Hassan, the respondent's business development manager; and Mr Osman Aziz, sole director of London's Fish Shop Ltd, who shares office space with his cousin, Mr Ural Hassan.
- 3.3 I received a bundle of documents and a supplementary bundle of documents was also agreed.

- 3.4 The claimant gave written submissions.
- 3.5 I received further submissions from both parties after the hearing had ended.

Concessions/Applications

- 4.1 The respondent initially indicated the claimant's employment status may be disputed. However, it was subsequently conceded he was an employee.
- 4.2 At the conclusion of submissions, Mr Airey sought to amend to change the identity of the employer. This was initially resisted. By consent, the claimant agreed to provide a specific written application. Both sides agreed to provide written submissions. Both agreed that I should determine the matter on the basis of those submissions. I deal with the application to amend below.
- 4.3 At the start of submissions, the claimant withdrew the claim for unlawful deduction from wages. The claim for accrued holiday pay remained live.
- 4.4 There had been a request for anonymisation which was dealt with prior to the hearing by EJ Burns. The application was not renewed.
- 4.5 I have asked the parties to confirm whether they can agree the weekly wage for the purpose the regulation 14 claim.

The Facts

- 5.1 The claimant was dismissed, allegedly for gross misconduct, on 14 September 2020.
- 5.2 The claimant alleged he was employed by Poppies Fish and Chips Ltd from 2011. It was the respondent's case that his contract transferred to Poppies (Camden) Ltd no later than April 2013. I find the claimant started working for Poppies Fish and Chips Ltd on or around 11 March 2011. I do not need to resolve whether he was unemployed beforehand. There is reference to a partnership agreement of 25 July 2011. It is not disputed he was an employee. I do not need to consider this further.
- 5.3 I have seen a contract of employment which is undated but records that his employment began on 1 April 2013 ("the contract"). The contract confirms there was a change in 2013 when his 10% holding was increased 25%. I have also seen various payslips which indicate that the employer was Poppies (Camden) Ltd. The claimant has given no evidence to demonstrate why Poppies Fish and Chips Ltd remained his employer. I find on the balance of probability that the employer was Poppies (Camden) Ltd from at least 2013. The respondent does not dispute that he maintained continuity of employment.

- 5.4 At the time of the claimant's dismissal, he was the operations manager. He had been an area manager. The contract of employment referred to the claimant being an operations manager and records his salary was £100,000. In April 2013, his salary was less. His P60s demonstrate a salary of £30,000 in 2014, £35,000 in 2015, £39,250 in 2016, and £69,241.19 in 2017. There is no satisfactory explanation from the respondent for why the contract is undated, and unsigned. There is no satisfactory evidence as to when it was given to him or how. There is no satisfactory evidence as to when the new salary was included. Mr Ural Hassan's evidence states the claimant became operations manager around April 2017.
- 5.5 It is arguable that the claimant's evidence was contradictory as to whether he received the contract or not. At times, he appeared to agree with counsel for the respondent that the contract had been sent to him, but this was not explored and no date or method was identified I am not satisfied that he fully understood the question or that he was making a concession. I find any apparent agreement in cross examination arose from confusion about the nature of the question. Generally, if a contract is given to an individual, there is a covering letter. Frequently a signed copy is retained. I have neither in this case. I am not satisfied the claimant conceded that the contract was sent to him. I find, on the balance of probability, this contract was not given to the claimant at any time.
- 5.6 The respondent trades under the name Poppies Fish and Chips (Poppies). It has three shops and two market stalls. Before the pandemic it employed around one hundred and fifty staff. Mr Ural Hassan was the sole director. The staff included a number of relatives of both Mr Ural Hassan and the claimant.
- 5.7 Around 2016, whilst the claimant was the area manager, the claimant had an interaction with a local resident, who has been identified by the respondent as Mr V Jo-nes.
- 5.8 The resident had concerns and grievances about parking in Camden. In particular, it appears he alleged that employees, and possibly customers, of Poppies were given preferential treatment and parking fines were not imposed. Whatever his motivation, he would interact regularly with the claimant and raise his concerns. This led to a degree of friction. The resident would photograph the claimant. On one occasion, when the claimant was undertaking deliveries, he was feeling stressed. This led to him reacting negatively to the resident. The claimant lowered his trousers and exposed his penis. He did so out of anger; it was a lewd gesture demonstrating annoyance or contempt. The resident took a picture.
- 5.9 Thereafter, the resident wrote some form of electronic leaflet or document in which used the photograph. I will refer to it as the photograph. The photograph is headed "Exposed" and then refers to "Poppies' Mini-Flasher." It goes on to make general allegations about preferential

treatment for parking and it appears to suggest that the traffic enforcement officers are corrupt. The image of the claimant showing his penis is superimposed over the claimant's car which appears outside Poppies restaurant. It is unclear whether this document was released on social media. I have no evidence that it was. I accept the claimant's evidence that he was unaware of the photograph.

- 5.10 The photograph is confusing because it refers to a date and time, 05-08-2018 at approximately 10:15:07. This would suggest the photograph was taken in 2018. It is this photograph Mr Ural Hassan says he discovered on 11 September 2020. I note his statement in a civil claim in the High Court states the date was 12 September 2020. I do not consider this to be significant, I accept that there was an error in his statement to the High Court.
- 5.11 The respondent has a general email address for enquiries from customers being info@poppiesfishandchips.co.uk, Mr Ural Hassan states he was trying to find a logbook for a London black cab vehicle owned by the respondent. He checked the inbox and, as a result of the broad search-terms used, he came across an email from Camden-Street-photos@hotmail.com dated 16 August 2016 and timed at 00:38 to which the photograph was attached. He says this is the first time he had seen the photograph, and I have no reason to doubt his evidence on this. When he found that email, it had already been opened. At no time did Mr Ural Hassan enquire who had opened it.
- 5.12 The claimant alleges the respondent knew of the photograph since 2016. I have received limited evidence. The witness statements do not record who had access to the inbox. It is clear the in box was used for general enquiries. Mr Ural Hassan had access, but I accept that it was not his role to check it. I have no reason to believe that he opened the email in 2016. Other individuals, who were senior managers had access. I am not satisfied that I have received accurate evidence as to who had access. It has been suggested the claimant had access. Whilst he may have had the relevant authority, I accept his evidence that he did not access the inbox. Had he opened the email I find, on the balance of probability, that he would have deleted it. What is clear is that trusted employees had access to the email. Someone opened it. It is possible it was opened without the attachment being viewed, but I find on the balance of probability, that the attachment was viewed, as it was opened.
- 5.13 I have no evidence to suggest that the respondent has ever sought to ascertain who opened the document in 2016 or what action was taken. However, what happened in 2016 is important. The fact that Mr Ural Hussain did not investigate in 2020, and the fact that the respondent has not produced any evidence about what happened in 2016, other than accepting the email was received and opened, does not preclude a finding that management was aware of the attachment in 2016. I must make findings of fact on the best evidence available.

- 5.14 I find the document was received in 2016. It was opened. On the balance of probability, it was viewed. On the balance of probability, it come to the attention of management. There is no suggestion any action was taken at the time. I therefore find that relevant managers in the respondent company were aware of this email, and the photograph, when it was sent in 2016.
- 5.15 When Mr Ural Hassan viewed it on 11 September 2020, he took no steps to ascertain what had happened in 2016. He did not seek to discover who had opened it, or why no action had been taken at the time.
- 5.16 Mr Ural Hassan decided to proceed with disciplinary action against the claimant.
- 5.17 There has been dispute about whether there was a handbook in place. The evidence I have on this is limited. I accept there was some form of handbook in 2015 and that was subject to some form of review in 2019. However, the claimant never read the handbook. Mr Ural Hassan did not consult it when he commenced disciplinary proceedings.
- 5.18 The handbook provides that disciplinary action will only take place after careful investigation of all the facts and after opportunity to present the employees case. It provides for formal verbal warnings that normally last three months, written warnings that last six months, and final written warnings that last 12 months. It says there is a right to appeal from any disciplinary action. He had received a previous warning. The warning period does not appear to equate with the provisions of the handbook. The fact of the warning is not relevant to any decision I must make. Any discrepancy in the period it remained live, and the handbook does not assist me.
- 5.19 Mr Ural Hassan alleges that he called the claimant on 11 September 2021 and stated he had seen the photograph. He says he told the claimant his action may be considered an act of gross misconduct leading to summary dismissal and that he would arrange a meeting to discuss the matter. The claimant denies that that conversation took place. The claimant was not suspended. The claimant was not contacted by email, letter, or text. There is no documentary evidence in support of Mr Ural Hassan's contention.
- 5.20 I have been invited to prefer Mr Ural Hassan's evidence because the claimant's evidence is said to lack credibility.
- 5.21 I accept there are times when the claimant's evidence has been poor, inconsistent and contradictory. However, there has also been difficulty with the evidence of the respondent's witnesses. I am not satisfied that anyone has demonstrated such frankness or consistency in his evidence that I would find it helpful to decide disputed facts on credibility alone. In this case an application of the balance of probability is likely to be more reliable.

- 5.22 On the balance of probability, if Mr Ural Hassan had contacted the claimant, as he said he had, there would have been some written evidence in support. It is likely that there would have been an email, text, or a letter. Further, it is likely the claimant would have asked a witness to attend, had he been told he was to attend a disciplinary. I therefore find that Mr Ural Hassan is mistaken and that he did not contact the claimant on 11 September 2020.
- 5.23 It is agreed the claimant did attend a meeting on 14 September 2020. There is a dispute about whether he was contacted by Mr Ural Hassan or Mr Erkem Hassan. I accept most of the claimant's dealings were with Mr Erkwe Hassan. It is the claimant's case that he was asked to attend a meeting by Mr Ekrem Hassan, but was not told what it was about. Moreover, as he was frequently contacted by Mr Ekrem Hassan he had no reason to believe there was a disciplinary hearing. Mr Ekrem Hassan was not challenged on this point. I think it is possible that the claimant is right. However, I must decide this on the balance of probability. I find the claimant is mistaken and the phone call on 14 September was from Mr Ural Hassan. It is less clear to me whether it was said that it was a disciplinary hearing. Mr Ural Hassan gives no detail, and I have already found that he did not telephone the claimant on 11 September. I find if there was a mention of disciplinary hearings, no detail was given.
- 5.24 The claimant did attend a meeting on 14 September 2021. The content of that meeting is disputed. I have heard from Mr Ural Hassan, Mr Ekrem Hassan, and Mr Osman Aziz, all of whom were present at the hearing. The claimant was alone and had no witness. Each of the respondent's witnesses confirmed that the photograph contained in the email from 2016 was shown to the claimant and the claimant was asked to explain the circumstances. Mr Ural Hassan's evidence is the claimant shrugged and there was no further discussion. The claimant was told that his action was gross misconduct, and he was dismissed.
- 5.25 The claimant says he was not shown the photograph, but instead he was told that Mr Ural Hassan no longer wished to continue working with the claimant, but that his rights would be observed, and his losses paid. It is his case he was given no reason for the dismissal.
- 5.26 There is no clear evidence about the content of this meeting. Ms Mr Ural Hassan claims that he took notes, but the notes were put in the claimant's personnel file, which later disappeared.
- 5.27 I have oral evidence of three individuals who say that the photograph was shown to the claimant. No contemporaneous documentation demonstrates the truth one way or the other. I think both accounts are feasible. I find the photograph was either shown to the claimant or it was referred to it. I find the conversation was brief. To the extent the claimant was asked for an explanation, I find that there was no serious attempt to

pursue any explanation or persuade the claimant to give any detail of the circumstances.

- 5.28 The respondent alleges that a dismissal letter was sent. The respondent does not have a copy. The claimant says no letter was sent. It is the respondent's case that the hardcopy was kept on the claimant's file, and it has not been possible to retrieve any electronic copy.
- 5.29 I received no adequate explanation for why the respondent should not be able to retrieve an electronic copy. No evidence was given about how the letter was generated. Most documents now are generated electronically. No evidence was given as to how it was sent. Frequently letters are now sent by email. I do not accept, on the balance of probability, this letter was generated other than by electronic means. I do not accept it has been lost. On the balance of probability, there was no letter.
- 5.30 On 23 November 2020, the claimant's solicitor requested a written statement of reasons for dismissal. The response of 7 December 2020 states "Your client very well knows that he was dismissed for gross misconduct. A copy of the offending document has already been supplied to him. He exposed his genitals in public whilst displaying a Poppies T-shirt." This says nothing about a letter of dismissal. Had there been a letter dismissal, on the balance of probability, it would have been referred to.
- 5.31 I find that at no time was the claimant informed of his right to appeal. I accept the claimant knew, in principle, he could appeal.
- 5.32 The claimant initially disputed signing a furlough agreement. He brought a claim for unlawful deduction from wages. That claim was withdrawn without explanation. There is an email from the claimant to Lalarukh Pervaiz on 25 March 2020 returning the attached furlough document and referring to the claimant's signature by touchscreen. I find the claimant was sent a furlough agreement on 25 March 2020. He signed it electronically and returned it on 25 March 2020. His original evidence, which suggested that he could not remember signing the statement, was misleading. He was on furlough as from 25 March 2020 until his dismissal. He agreed that he would not work for the business and would receive 80% of his pay up to a maximum of £2500 per month.

The law

- 6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it

relates to the conduct of the employee. At this stage, the burden for showing the reason is on the respondent.

- 6.2 In considering whether the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.
- 6.3 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many cases, though not all, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.
- 6.4 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23.)
- 6.5 Pursuant to section 207 Trade Union and Labour Relations (Consolidation) Act 1992 the ACAS Code on Disciplinary and Grievance Procedures 2015 ('the Code') is admissible in any employment tribunal proceedings, and the tribunal is obliged to take into account any relevant provisions of the Code. A failure to observe any provision of the Code shall not in itself render that respondent liable to any proceedings. The key relevant provisions in this Code are set out below.

4. ... whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.
- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.

...

...

5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

...

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

...

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

13. Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- a formal warning being issued; or
- the taking of some other disciplinary action; or
- the confirmation of a warning or some other disciplinary action (appeal hearings).

26. The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.

27. Workers have a statutory right to be accompanied at appeal hearings.

28. Employees should be informed in writing of the results of the appeal hearing as soon as possible.

29. Where disciplinary action is being considered against an employee who is a trade union representative the normal disciplinary procedure should be followed. Depending on the circumstances, however, it is advisable to discuss the matter at an early stage with an official employed by the union, after obtaining the employee's agreement.

- 6.6 If the employee is in repudiatory breach of contract, the employer may affirm the contract or the employer may accept the breach and treat the contract as terminated. In the latter case, the employee will be summarily dismissed. If the employee's breach is repudiatory, and it is accepted by the respondent, the employee will have no right to payment for his or her notice period.
- 6.7 In order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1WLR 698, CA.**
- 6.8 The degree of misconduct necessary for the employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal to decide. In **Briscoe v Lubrizol Ltd 2002 IRLR 607** the Court of Appeal approved the test set out in **Neary and another v Dean of Westminster 1999 IRLR 288, ECJ** where the special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." There are no hard and fast rules. Many factors may be relevant. It may be appropriate to consider the nature of employment and the employee's past conduct. It may be relevant to consider the terms of the employee's contract and whether certain matters are set out as justifying summary dismissal. General circumstances, including provocation, may be relevant. It may be appropriate to consider whether there has been a deliberate refusal to obey a lawful and reasonable instruction. Clearly, dishonesty, serious negligence, and willful disobedience may justify summary dismissal, but these are examples of the potential circumstances, and each case must be considered on its facts.
- 6.9 If it is alleged the respondent affirmed the contract, it may be appropriate to look at the full circumstances. The nature of any affirmation in the circumstances surrounding it may need to be considered
- 6.10 The Employment Act 2002 section 38 provides:
- (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies--

(a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change),

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

6.11 Section 92 Employment Rights Act 1996 provides that an employee may request a written statement of reasons for dismissal in certain circumstances. Section 93 Employment Rights Act 1996 provides that a complaint may be made if the reason “given in purported compliance ... are inadequate or untrue.”

Conclusions

7.1 I first consider the unfair dismissal claim.

7.2 Has the respondent established the sole or principal reason for dismissal? The reason for dismissal “is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.”¹ It is the respondent's case that Mr Ural Hassan took the decision to dismiss. His reason is that, on or about 11 September 2020, he discovered the photograph in the info inbox when searching for another document. As a result, he asked the claimant to attend a disciplinary hearing. He asked the claimant about the photograph and received a shrug by the way of explanation. He took this to mean that the claimant accepted that it was a true picture. He noted the claimant was wearing a Poppies T-shirt. The photograph appeared to be outside a Poppies restaurant and appeared to be related to the claimant's position as an employee. I accept that he believed all those matters. The fact of that belief has not been challenged.

7.3 It is the claimant's case that he was simply told that Mr Ural Hassan no longer wish to work with him. The claimant may have been told that, but I accept that the trigger for Mr Ural Hassan's action on 14 September 2020 was the photograph. I therefore accept the respondent has established the sole or principal reason. It related to conduct.

7.4 I must consider whether there were grounds to support the belief, and if so, when the belief was formed based on those grounds, had there been a reasonable investigation, being one which was open to a reasonable employer.

¹ *Abernethy v Mott, Hay and Anderson* [1974] ICR 323

- 7.5 Ultimately, when considering the reasonableness of the decision to dismiss, it is necessary to consider all of the relevant factors and to apply the wording of section 98(4) Employment Rights Act 1996. A reasonable investigation may not only be relevant to establishing the grounds relevant to the belief, but it may also be equally relevant to whether dismissal is within the band of reasonable responses.
- 7.6 I raised with the parties the ACAS code of practice on discipline and grievance procedures 2015 and in particular I drew the parties' attention to paragraph 4, 5, 9, 11, 12, 13, and 26 – 29.
- 7.7 The conduct in question goes back to 2016. The codes suggests an employer should deal with the issue promptly. The respondent knew about the photograph in 2016. However, there is no evidence of investigation at the time. When the matter came to Mr Ural Hassan's attention, in September 2020, it was still necessary to investigate.
- 7.8 Mr Ural Hassan was aware that the email had been sent in 2016 and had been opened. He was on notice that someone may have considered it. He took no steps to ascertain if anyone had seen the email or considered it in 2016.
- 7.9 His investigation consisted of exploring the web site of the person who had sent the photograph. The result of that investigation was never communicated to the claimant. Other than the perusal of the website, he took no other steps to ascertain the relevant circumstances, prior to the disciplinary hearing.
- 7.10 The investigation that did take place was extremely limited and failed to consider what action, if any, had been taken in 2016 and, if no action had been taken, why no action was taken.
- 7.11 Further, he took no steps to delegate the investigation to any other individual, but instead decided to investigate the matter and conduct the disciplinary himself.
- 7.12 No steps were taken to inform the claimant of the alleged misconduct, or to seek an explanation from the claimant prior to the disciplinary hearing.
- 7.13 Sometime after 11 September 2020, prior to the hearing, Mr Ural Hassan decided to hold a disciplinary hearing. At no time did he notify the claimant of the nature of the allegation. Paragraph 9 of the ACAS code suggests best practice is that there should be a notification in writing. The purpose of notifying an employee of the alleged misconduct is to allow that employee to prepare to answer the case at a disciplinary meeting. The employee should normally have copies of the written evidence. There was a total failure to give written notification. To the extent the claimant was told anything in the conversation prior to the meeting, it was insufficient to allow him to prepare adequately for the hearing.

- 7.14 It is fair to say the meeting was held without delay after 11 September 2020. However, given the facts had been known by the respondent since 2016, there was considerable delay in that respect.
- 7.15 Even on Mr Ural Hassan's best evidence, the meeting was brief. It went little further than the claimant been shown the photograph, and being asked for an explanation about whether it was a true photograph. There was no further questioning after the claimant shrugged.
- 7.16 Viewed one way, it may be said that the facts were clear, and there was nothing further to say. However, the purpose of forewarning an employee is to allow the employee to prepare adequately. When an allegation is, essentially, raised at the disciplinary hearing itself, is not surprising that the explanation is limited.
- 7.17 The respondent failed to inform the claimant of his right to be accompanied. Being accompanied to a disciplinary hearing is an important safeguard. Disciplinary hearings are likely to be stressful. Having a companion may ease that stress and help the employee put forward explanations or mitigation.
- 7.18 At the disciplinary meeting, the claimant was dismissed without notice. He was given no letter of dismissal. He was given no right of appeal. Whilst I accept the claimant knew, in principle, he could appeal, the respondent should recognise that in circumstances where there is no investigation, the allegations had not been put in writing, and the disciplinary hearing itself had been cursory, it is unlikely that an employee, who is not informed of the right of appeal, would have continuing confidence in the process. Moreover, the claimant was dismissed by the most senior person in the company. There can be no criticism of the claimant for not appealing.
- 7.19 I find that the investigation was inadequate in the sense that it was not one open to a reasonable employer acting reasonably. I do not accept the respondent's assertion that the only matter to be considered was whether the claimant had exposed his penis and allowed the photograph to be taken. At the very least, it was necessary to consider if there had been any consideration of the photograph in 2016 and if not, why not. If there had been consideration, it was necessary to ascertain why no action had been taken then. That would be material to the fairness of the decision and a consideration of whether dismissal was in the band of reasonable responses.
- 7.20 In the circumstances, this was not an investigation open to a reasonable employer.
- 7.21 Further, in this case there are serious shortcomings in the procedure adopted. I do not accept the respondent's contention that it is a small employer. There has been reference to a human resources function. The respondent purported to have a sophisticated handbook. There are layers

of management. Pre-pandemic there were one hundred fifty members of staff. The company had a significant turnover. It has recently declared a one year dividend of £1.8 million. There were significant shortcomings in the investigation. There was a failure to tell the claimant adequately or at all what the allegation was. He was not told of his right to bring a companion to the hearing. The hearing itself was abrupt and inadequate. He was given no right of appeal.

- 7.22 I find that respondent acted unreasonably in treating this conduct as sufficient reason for dismissing.
- 7.23 The wages claim has been withdrawn and I dismiss it.
- 7.24 I find the claimant was entitled to receive accrued holiday pay on termination of employment. The holiday year started on 1 April. He took no holiday during the year. He was dismissed 14 September 2020. I must apply regulation 14.
- 7.25 The period of leave to which the worker is entitled was 28 days.
- 7.26 The proportion of the leave year which expire before the termination date was $167/365$ the period of leave taken is nil.
- 7.27 The claimant is therefore entitled to $167/365 \times 28 = 12.81$ days at the relevant rate. However, I do not have the evidence to find the rate. The parties are invited to agree the rate, if that is not possible they will need to plead their respective positions, so the matter can be resolved in a remedy hearing.
- 7.28 The claimant alleged wrongful dismissal. It is arguable that the claimant's action in 2016 related to his employment, as it appears that he was delivering takeaways at the time. The argument with the resident was largely about parking which related to the business use. The action of the claimant in showing his penis was possibly a fundamental breach of contract, although this is far from certain. It is not a matter I need to resolve given my findings on affirmation.
- 7.29 The matter came to the respondent's attention in 2016. I found that relevant managers saw the document and took no action at the time. They allowed the claimant to continue working in the knowledge of what he had done. In the circumstances, they affirmed the contract. By affirming the contract, they lost the right to terminate his contract without notice. The claim of wrongful dismissal succeeds. I invite the parties to agree damages. If they do not agree the damages, they must plead their respective positions and deal with the damages at a remedy hearing.
- 7.30 I have considered the respondent's written statement of particulars of the reason for dismissal. The letter is brief and informal. However, I am satisfied that it refers to the photograph and sufficiently and identifies the

essence of the alleged misconduct. It is compliant in my view with section 93. This claim fails.

- 7.31 The claimant was not issued with a contract of employment. I am satisfied that he did receive notification of change the terms of employment when furloughed which dealt with his change in his pay, this notice complied with section 4(1) Employment Rights Act 1996. However, that notice did not deal with all the relevant section 1 particulars. I find that at the time he was dismissed, the respondent was in breach of its duty pursuant to section 1(1), by not supplying all relevant particulars. Pursuant to section 38(2) Employment Act 2002, I must make an award of at least the minimum amount and I may make a higher award if I considered just and equitable in all the circumstances. I need not make an award if there are exceptional circumstances.
- 7.32 I received no argument to suggest there are exceptional circumstances. It is arguable that the question whether it is just and equitable to award more than two weeks is a matter for remedy. I will therefore reserve this decision and deal with it at a remedy hearing, unless it can be agreed by the parties.
- 7.33 Finally, I need to decide the application to amend.
- 7.34 The claimant has applied to substitute Poppies (Camden) Limited as the respondent in this case. The claimant relies on rule 34 Employment Tribunals Rules of Procedure 2013. I may add a substitute the respondent at any time. I may do so where it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the tribunal which it is in the interests of justice to have determined in the proceedings. I may remove any party apparently wrongly included.
- 7.35 The respondent objects to the substitution.
- 7.36 I have considered all the representations made by the parties after the hearing, including those which were not invited concerning the CPR procedure.
- 7.37 The ACAS certificate identifies Poppies Fish and Chips Limited. There is no suggestion this caused confusion or that the respondent was denied the ability to conciliate the dispute. The claimant was then constrained to issue against the entity on the certificate.
- 7.38 The difficulty in identifying the correct title of the respondent has caused no practical difficulty in this case. In no sense whatsoever has the respondent been disadvantaged in its ability to advance a defence.
- 7.39 It is unfortunate that the claimant has failed to heed the respondent's representations as to the correct employer. I have no reliable evidence explaining why the claimant was confused, other than the finding that he

did not receive a contract of employment. Even so, there is reference to the employer on the relevant tax documentation. I accept the claimant is not without fault in failing to either identify the correct employer, or to deal with the matter earlier. However, the respondent is not without fault. There is scope for confusion, particularly given the failure to provide a section 1 statement or to confirm the change in the identity of the employer. It follows that the action of the respondent has caused potential confusion. I accept the claimant was genuinely confused and the respondent contributed to that uncertainty.

- 7.40 To deny the substitution at this stage would be to prevent the claimant from having any remedy in claims which succeed on the merits. There is no hardship at all to the respondent. The respondent has never been confused about its obligations towards, or employment of, this claimant. The respondent has been able to prepare the case and to participate in full. To refuse the application would deny the claimant a remedy and would be a windfall for the respondent. It is in the interests of justice to allow the substitution. The respondent Poppies (Camden) Limited will be substituted as the sole respondent.

Employment Judge Hodgson

Dated: 7 January 2022

Sent to the parties on:

7 January 2022

For the Tribunal Office