

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr Philip Taylor

AND

Tradition Management
Services Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central (CVP)

ON: 23, 24 and 25 June 2021

EMPLOYMENT JUDGE: Mr N Deol (Sitting alone)

Appearances

For the Claimant: Ms G Churchhouse (Counsel)

For the Respondent: Ms D Masters (Counsel)

JUDGMENT

1. The Claimant's claim of unfair dismissal is not well founded and is dismissed.
2. The Claimant's claim of wrongful dismissal is well founded.
3. The Claimant's claim for being not being permitted to be accompanied at the hearing is well founded.
4. The issue of remedy in relation to the claims that are well founded is reserved.

EMPLOYMENT JUDGE DEOL
23 SEPTEMBER 2021

24/09/2021
JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS

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Date of Hearing: 23, 24 and 25 June 2021

REASONS OF THE EMPLOYMENT TRIBUNAL

Background

1. The Claimant was dismissed by the Respondent on 9 July 2020. He submitted a claim on 6 October 2020 complaining of unfair dismissal and other matters.
2. The Respondent denied the Claimant's claim in full. It argued that the Claimant had been dismissed for misconduct and that it had followed a fair procedure. It argued that the decision to dismiss fell within the range of reasonable responses open to an employer in these circumstances.
3. In the alternative the Respondent argued that if the dismissal of the Claimant was found to be unfair on procedural grounds any compensation should be reduced by 100% to reflect the fact that the Claimant would have been dismissed in any event and/or that he had fully contributed to his own dismissal.
4. The Claimant also pursued claims for wrongful dismissal, and for a failure to allow for him to be accompanied at a disciplinary hearing. He sought a 25% uplift to any compensation for the Respondent's unreasonable failure to comply with the ACAS Code of Practice on disciplinary action.
5. The Claimant's age discrimination had been withdrawn and dismissed at an earlier case management hearing.

The Hearing

6. The claim was heard over three days between 23-& 25 June 2021 and Judgment was reserved with written submissions from both of the parties.
7. Evidence was taken from the Claimant by way of a prepared witness statement along with evidence from Miss Emma Taylor and Miss Gabrielle Bear. The Tribunal also considered evidence for the Respondent from Mr Tristan de Saint

Ouen (Investigation/Hearing Manager), Mr Nico Fontaine (Appeal Manager) and Mr Mark Heneke. The hearing was conducted via CVP, and the Tribunal took the witness statements as read followed by questions of each witness under oath.

8. In relation to concerns raised about disclosure, the Tribunal was satisfied that the Respondent had understood and complied with its obligations to disclose all relevant documents in its possession.
9. The Tribunal had the benefit of an agreed bundle of documents, an agreed list of issues and detailed written closing submissions.

The Issues

10. The parties agreed that the Claimant was dismissed and his last day of employment was 9 July 2020. The issues before the Tribunal were, in the main, agreed as set out below:

Unfair dismissal

- (i) Can the Respondent show that the reason for dismissal was a potentially fair reason for dismissal under s.98(1) ERA 1996? The Respondent relies on misconduct as the reason for dismissal.
- (ii) If so, was the dismissal fair or unfair under s.98(4) ERA 1996 (having regard to the reason shown by the Respondent)? This depends on whether in the circumstances the Respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing the Claimant and shall be determined in accordance with equity and the substantial merits of the case. In particular, the tribunal will consider the following:
 - (a) Did the Respondent believe the Claimant was guilty of misconduct?
 - (b) Did the Respondent have reasonable grounds to believe that the Claimant was guilty of misconduct?
 - (c) Did the Respondent carry out a reasonable investigation?
 - (d) Did the Respondent follow a fair process?
 - (e) Did decision to dismiss fall within the range of reasonable responses available in the circumstances?
- (iii) Did the Respondent follow the ACAS Code of Practice? The Claimant relies upon the following breaches of the ACAS Code:
 - (a) The same officer, Tristan De Saint Ouen, carried out the investigation and the disciplinary hearing when it was reasonably practicable for different people to carry them out;
 - (b) The Respondent did not provide copies of written evidence to the Claimant prior to the disciplinary hearing;

- (c) The Respondent did not go through the evidence gathered during the disciplinary hearing;
 - (d) The Respondent did not give the claimant any opportunity to raise points about information provided by witnesses.
- (iv) To the extent that there was any breach, was it nonetheless reasonable in the circumstances?

Wrongful dismissal/notice pay

It is agreed that the Claimant was, by an express term in his employment contract, entitled to 3 months' notice and that he was dismissed without notice.

- (i) Did the Claimant act in such a manner that the Respondent was no longer required to retain him in employment ("the Repudiatory Breach")?
- (ii) Did the Respondent accept Repudiatory Breach by terminating the Claimant's employment contract?

Right to be accompanied (s.10/11 Employment Relations Act 1999)

- (i) Did the Claimant have right to be accompanied at the meeting on 9 July 2020 which was held for the purpose of communicating the decision to dismiss him?
- (ii) If so, did the Respondent deny the Claimant this right?

Remedy

If the Claimant is successful in his claim the Tribunal will be concerned with matters of remedy including:

- (i) Justice and equity in all the circumstances;
- (ii) The causal effect, if any, of any proven unlawful conduct or unfairness as regards dismissal;
- (iii) If the Claimant was unfairly dismissed, whether he would have been dismissed fairly in any event and, if so, when ("Polkey");
- (iv) Whether the Claimant has taken reasonable steps to mitigate his loss;
- (v) Any breach of the Acas Code;
- (vi) Any contributory fault; and
- (vii) The sum of any compensation that should be awarded

Relevant Findings of Fact

11. The Respondent is a subsidiary of Compagnie Financière Tradition, an inter dealer brokers, listed on the Swiss Stock Exchange. Its business involves the employment of brokers who act as a point of contact for institutional clients buying and selling financial or non-financial products.
12. The Claimant worked in the Respondent's Finance department from April 2016 and his job title was Head of Financial Planning & Analysis.
13. The Tribunal heard evidence from Mr T De Saint Ouen, an Executive Director of the Respondent. Mr T De Saint Ouen was asked to carry out the disciplinary process that led to the Claimant's dismissal.
14. The incident that led to this disciplinary process was a "Zoom" call conducted between the Claimant and another employee (Employee X). During that Zoom call on 22 June 2020 it had been alleged that the Claimant had moved his laptop computer camera to reveal the lower region of his body to this employee, whilst wearing inappropriate clothing (tight underwear). The complaint made about the Claimant was accompanied by reference to potentially inappropriate Instagram messages from the Claimant to the same colleague which had made her feel uncomfortable.
15. The Claimant was invited to a disciplinary hearing to take place by way of a Zoom call on 30 June 2020. The invitation letter to him set out clearly the allegations against him, as summarised below:
 - a) an incident on a zoom call with a female colleague on 22 June, whereby the Claimant was alleged to have moved his laptop computer camera to reveal the lower region of his body to this employee, whilst wearing inappropriate clothing (the "Zoom Call"); and
 - b) offensive/inappropriate communications; both in the office and over Instagram messenger from the Claimant to the same colleague which have made her feel uncomfortable and/or distressed.
16. Some of the communications referred to in the allegations were attached to the disciplinary invite letter. The Claimant was also suspended at this point and advised that due to the seriousness of the allegations his employment could be terminated if the allegations were found. He was informed that he could bring a trade union representative or colleague.
17. The Claimant was offered the opportunity to provide any documentation that he considered relevant before the disciplinary hearing, and although the hearing was delayed, the Claimant had a very narrow window of opportunity to collate and prepare this information.

18. Prior to doing that Mr T De Saint Ouen contacted Employee X to clarify the nature of the allegations. Employee X confirmed to Mr T De Saint Ouen that the event had taken place.
19. This was followed with a formal meeting with Employee X on 29 June 2020 at which Mr T De Saint Ouen interviewed Employee X, in which Employee X was unequivocal that this camera movement was “in no way an accident” and that, in her view, was done entirely deliberately and that the Claimant “100%” wanted her to see his underwear.
20. Employee X said that the Zoom Call had left her in a state of shock and was a culmination of other uncomfortable interactions with the Claimant. Employee X’s perception of the incident was corroborated by text messages that she had sent Laura Gosney, immediately after the alleged incident, the detail of which was also shared with Mr T De Saint Ouen as part of the investigation/disciplinary process.
21. Employee X also shared Instagram communication with Mr T De Saint Ouen where the Claimant had said “you look like you need sausage” or “do you need sausage” and “sausage will make you feel better” to Employee X, which she said had made her feel highly uncomfortable.
22. In taking these steps Mr T De Saint Ouen had in effect carried out the investigatory steps of a matter that he would then go on to consider as a disciplinary hearing manager.
23. The day after receiving the disciplinary invite letter the Claimant submitted an email entitled “Disciplinary Response- Phil Taylor”, describing in detail the events on the Zoom Call and denying that he had acted inappropriately.
24. In his response the Claimant set out his explanation for the event. He stated that he was working in his dining room with two entrances: a door adjoining his kitchen, where his daughters are usually completing their schoolwork with the assistance of his wife in close proximity; and a door to the hallway. He was dressed in shorts (as it had been a hot day) and that, during the call of no more than 3 minutes with Employee X there had been a “melee” with his puppy, which caused his watch strap to get caught and pull down his laptop screen to an angle which revealed his shorts.
25. The Claimant also provided a number of photographs, depicting in a pictorial format, the movement of his screen and of his home working computer/desk set up. He also provided photographs of what appeared to be scratches on his hand and bite marks to computer cables – All of which he said were caused during this instance of a melee with his puppy.
26. The Claimant also attached a number of Instagram messages between him and Employee X, between 10 January and 1 June, in order to refute the second allegation against him; regarding offensive Instagram messages/comments by him to Employee X.

27. The Claimant's view, at this stage, was that he and Employee X shared an entirely consensual exchange, none of the messages were inappropriate or would have caused distress and at no time did Employee X ask him to stop. He asked for further evidence about inappropriate comments that he was alleged to have made to Employee X.
28. The Claimant also provided further analysis of the messages between himself and Employee X, in particular, at what time of day (and whether or not on a working day) these messages were exchanged.
29. The Claimant clearly understood the nature of and the seriousness of the allegations made against him before his disciplinary hearing.
30. It's not necessary to set out the full detail of the disciplinary hearing itself which took place on 1 July 2020, save to say that the Claimant disagreed with the allegations and that he felt that the nature of his relationship with Employee X and his comments to her had been misrepresented or taken out of context. The meeting was lengthy, and the Claimant was given the opportunity to set out his position and rebut the allegations against him.
31. Mr T De Saint Ouen had by this stage, as part of his investigation, tried to replicate the movement described by the Claimant several times but had been unsuccessful in doing so. He explained to the Claimant that the laptop always moved sideways (rather than the screen alone moving down).
32. There were other discrepancies between the two accounts, for instance how the call had ended. Again, these differences were put to the Claimant and he was invited to respond.
33. The disciplinary investigation explored other issues, for instance that Claimant had asked Employee X to comment on his appearance, having asked her to comment on a picture of him in workout gear. The Claimant admitted to this and said that Employee X had previously does the same to him.
34. At the end of the hearing, the Claimant was asked if he wanted the Hearing Manager to make any other enquiries in order to corroborate what he had said to me. The Claimant said that he had "given everything he can" and mentioned his wife in relation to knowing that the dog had been teething but did not suggest that anyone else had witnessed the Zoom Call.
35. The Claimant had invited the Hearing Manager to his home, to see his home working arrangement. The Hearing Manager's evidence was that it wouldn't add anything to the investigation given the Claimant's detailed account, the photographs of the scene and the fact that meeting with him by Zoom would have given a better ability to assess the case from the visual perspective that Employee X would have had at the relevant time.
36. The Hearing Manager arranged a further meeting with Employee X, 3 July 2020. At this meeting Employee X denied that the Claimant had called her with a work-related query regarding TFS Edge as she explicitly recalled asking the Claimant

what he wanted, and he replied that he was just calling her as he had a few minutes to spare and saw her online.

37. Employee X completely disputed the Claimant's account of the incident, said that there was no puppy or even mention of a puppy on the call, no chaotic moments on the call and the Claimant had not moved at all during the call.
38. In relation to what Employee X saw on the Zoom Call, she was adamant that, although it happened quickly, the Claimant was definitely wearing light coloured underpants and not shorts and that, as a result, she was able to see the flesh of his thigh and groin.
39. Employee X insisted that she had no ulterior motive in making these allegations and, although she did not wish to have bad feeling with the Claimant and understood the impact it may have on his career, the Zoom Call made her very uncomfortable, was the culmination of many inappropriate contacts, and she did not now appreciate being made out as a liar.
40. The Hearing Manager pursued further questions about Employee X's relationship about why, if she took exception to some of the Claimant's communications, she had not ceased communication with him. The disciplinary Hearing Manager, faced with two conflicting accounts, was understandably delving further into the detail of that relationship.
41. Employee X's account was that she got on reasonably well with the Claimant when he was acting appropriately, and she preferred to remain on civil terms for the sake of their working relationship.
42. The Hearing Manager pushed further on this issue, in questioning that may well have been uncomfortable for Employee X and irrelevant to the specific allegations themselves. The extent to which the Hearing Manager pushed Employee X on these issues was a reflection of the seriousness with which he took the matter, both in relation to the alleged incident but also as regards the consequences for the Claimant of his findings.
43. A significant point that corroborated Employee X's account in the mind of the Hearing Manager was that Employee X had messaged her HR colleague, Laura Gosney, almost immediately after the Zoom Call.
44. The Hearing Manager interviewed Ms Gosney who confirmed that she was sent text messages by Employee X following an uncomfortable incident with the Claimant in which he had called her, showing himself "in his boxers/pants". Although Employee X was reluctant to make a formal issue of it, Laura considered that it wasn't appropriate behaviour and had encouraged her to report it.
45. Ms Gosney read out to the Hearing Manager an exchange of text messages between her and Employee X on 22 June, shortly after the Zoom Call, whereby Employee X describes the Claimant's actions in lowering the camera.

46. Ms Gosney also gave evidence that she had witnessed the Claimant's inappropriate behaviour, which had become more frequent over the last year, in relation to: his interactions with Employee X e.g. potentially sexual innuendos made by him regarding the word "sausage"; and in a previous relationship with Employee Y, who had left the HR team just prior to Employee X joining. She too felt that the references to "sausage" had inappropriate connotations.
47. The Claimant raised a number of concerns about the process on 7 & 8 July 2020, including that he be sent a copy of the minutes of the interview with him and also any interviews that were held. He also asked why the investigation and Hearing Manager were one and the same.
48. On 9th July the Claimant was invited to a further meeting. The Claimant enquired what the purpose of the meeting was and asked whether he had the right to bring anyone with him. The response to him suggested that the meeting was "to discuss the outcome of the matter". The procedural concerns raised by the Claimant, set out paragraph 47 above, had not been addressed by this stage.
49. At the disciplinary meeting the Claimant was informed that he would be dismissed summarily for gross misconduct. The allegations of inappropriate behaviour (in person and on Instagram messenger) were found by the Hearing Manager to be proven and that in respect of the Zoom Call, given that there had been two such different accounts, the conclusion reached was that one of them had been fabricated. A significant factor was that Employee X's messages to a colleague (Laura Gosney), sent immediately after the incident, were "pretty powerful evidence" against the Claimant.
50. Following the meeting, the Claimant was sent a copy of the outcome letter by e-mail. The outcome letter itself sets out carefully the reasoning of the disciplinary Hearing Manager for reaching the conclusion that he had and why he had believed Employee X's account over the Claimant's.
51. The Hearing Manager concluded that as there was "*very little agreement between the two people on the call, from the reason to the call, to how it ended, to the clothes the Claimant was wearing, and whether or not he moved during the call*" it made it "*more likely to me that one of them had to have been giving false testimony. In circumstances whereby the Claimant has flatly denied the allegation against him and blamed a melee with his puppy, which would more than likely have been obvious to Employee X*", he could not accept the Claimant's account.
52. As regards the Zoom Call there was very different explanations of what happened. Without Employee X's evidence at this hearing and/or any witnesses to corroborate her version of events, the Tribunal makes no findings of fact on this matter other than to say that the Hearing Manager's reasoning for his own views was clear and detailed, and were reasonable in all the circumstances of the case.
53. As regards the interactions between the Claimant and Employee X, some of these were inappropriate, particularly as the Claimant was a senior member of the finance department and Employee X was a junior female employee. These

comments were also seen by the Hearing Manager to corroborate the case against the Claimant.

54. The Hearing Manager concluded that summary dismissal was the appropriate outcome.
55. The Claimant appealed the decision in writing on 1 July 2020. Amongst various grounds of appeal, the Claimant complained about the fact that the investigation and disciplinary processes had not been independent of each other and that he had not been provided with all of the information that was used against him in the disciplinary process.
56. The appeal was heard by Nico Fontaine, who also gave evidence. Although a relatively new recruit to the business Mr Fontaine was a senior manager and at an appropriate level to hear the appeal. Mr Fontaine was not aware of the Claimant's disciplinary matter or the issues leading up to it at the time he agreed to take on the appeal.
57. On 22 July 2020 the Claimant was invited to an appeal hearing, and with that invitation he was sent the minutes of the disciplinary investigation and the meetings held between the Hearing Manager and Employee X and with Ms Gosney.
58. Mr Fontaine made himself familiar with the documentation before the appeal meeting, which took place on 23 July 2020.
59. Mr Fontaine gave evidence that he considered the appeal meeting to be "*an opportunity for me to fully understand the Claimant's Appeal Grounds and provide him with every opportunity to expand upon any points of his Appeal*" although he also confirmed that his role was not to reinvestigate the disciplinary process but to investigate the Appeal points that the Claimant was making.
60. From Mr Fontaine's perspective he had three responsibilities:
 - (i) to consider the points the Claimant had raised in his appeal.
 - (ii) to consider whether there were any other aspects of the disciplinary hearing which struck him as being wrong.
 - (iii) to speak to those involved, including Employee X to get a direct account of what had happened.
61. The Claimant by this stage had a written grievance (the "Grievance"), which he was given additional time to amend to address any matters arising from the minutes of Employee X's and Ms Gosney's meetings with the Hearing Manager which he had only just received. The Claimant agreed that his grievance would be heard together and as part of his appeal.
62. Following that the Appeal Manager met with the Claimant followed by meetings with Employee X, Ian Filmer and the Hearing Manager. In doing so he put forward the Claimant's grounds of appeal/grievance and invited comments. The Appeal Manager demonstrated a forensic approach to the appeal, which effectively went

as far as rehearing the case against the Claimant rather than just reviewing the disciplinary outcome.

63. The Appeal Manager by way of letter dated 4 August, provided the Claimant with my detailed reasoning in draft form so as to give him a final opportunity to review the reasons for his decision and to highlight any areas, in his view, that he may have missed. This again demonstrated a very diligent and thorough approach to handling the Claimant's appeal.
64. The appeal letter itself was very detailed, matching the detail of the Claimant's appeal and grievance. The reasoning for the Appeal Manager's decision was set out in a clear and comprehensive way.
65. The Appeal Manager was satisfied that the Hearing Manager had dealt with both the Investigation and the disciplinary process. In circumstances, where there were no witnesses, the principal issue was the credibility of Employee X and of the Claimant, his view was that it was appropriate for the same person to assess that evidence.
66. The Appeal Manager was satisfied that there had been a detailed and thorough investigation and that the Claimant had been given every opportunity to explain his interactions with Employee X and the events on the Zoom Call. He concluded that the investigation and hearing had been conducted properly and rejected the Claimant's allegations to the contrary.
67. The Appeal Manager was satisfied that a home visit would not have added anything either for the Hearing Manager or for himself.
68. The Appeal Manager considered that the evidence of Gabrielle Beare would not add anything to the assessment of the case, a conclusion the Tribunal agrees with having heard Miss Beare's evidence itself.
69. The appeal decision acknowledged that, ideally, the Claimant should have been sent notes of the Hearing Manager's first meeting with Employee X on 29 June 2020, so that he could have made submissions on them prior to, or during, his own first meeting. That said the Appeal Manager considered that the Claimant fully understood the allegations against him, as well as the seriousness of them.
70. The Claimant's grievance raised serious allegations against the HR manager and Employee X. The Appeal Manager interviewed the HR manager and concluded that there was no evidence of "neglectful, incompetent and deceitful" behaviour. The Appeal Manager also considered and rejected the criticisms made by the Claimant of Employee X.
71. On 7 August 2020, the Appeal Manager received an e-mail from the Claimant's wife, Emma Larner, who asked that he reconsider the findings in the draft Appeal Decision. The e-mail suggested that Mrs Larner had witnessed the Zoom Call and went into some detail as to what she had seen in support of the Claimant's account. The Appeal Manager responded to say that he would consider its content.

72. On the same day the Appeal Manager received a 12-page document with the Claimant's account on the draft grounds of appeal, repeating the points the Claimant had made in his grounds of appeal and his grievance.
73. One of the points made by the Claimant in this document was that his wife was a witness to the Zoom Call, who had not been interviewed during the disciplinary and that she had prepared a "Statement of Fact". That "Statement of Fact" was sent to the Appeal Manager with further comments, including confirmation from him that his wife was not present during the Zoom Call but in the next room with the door open.
74. The Appeal Manager received further correspondence from Mrs Larner, asking that all the evidence be reconsidered and confirming that the Claimant had himself sent her statement.
75. The Appeal Manager carefully considered this information, alongside the Claimant's own comments on the draft appeal outcome. Having done so the Appeal Manager wrote to the Claimant on 12 August confirming his decision to uphold the decision to dismiss the Claimant without notice. In doing so he confirmed why he believed that Miss Larner could not be considered an independent witness and why in event Miss Larner's evidence was inconsistent in part with the Claimant's own account, a conclusion that the Tribunal agrees with having heard Miss Larner's evidence itself.
76. The Appeal Manager found Employee X's evidence convincing as to what she saw and there was enough corroborating evidence from the Instagram messages and her text message exchange immediately after the incident with Laura Gosney to confirm that, more likely than not, her version, rather than that put forward by the Claimant, to have been more credible. The Appeal Manager was well placed and entitled to reach that conclusion given the detailed and thorough appeal process that he conducted.
77. Clearly both the Hearing Manager and the Appeal Manager were impressed with the evidence of Employee X set against the evidence of the Claimant. The Employment Tribunal did not have the benefit of that evidence or indeed the testimony of Ms Gosney in support of Employee X. Indeed, it has no direct evidence of the incident in question other than the Claimant's, so it cannot conclude that the Zoom Call incident took place as it alleged. That of course is a different question to whether the employer acted reasonably in investigating the disciplinary matter and in reaching the conclusion that the allegations against the Claimant were found and that the dismissal was fair in all the circumstances.
78. No findings of fact are made in relation to the evidence of Mr Mark Heneke. The events referred to by Mr Heneke post date the Claimant's dismissal and the connections drawn to the Claimant are tenuous and unproven.

The Law

79. The relevant legal provisions are set out in Section 98 of the Employment Rights Act 1996 ("ERA"). The Respondent must show the reason for the dismissal and

this must be one of the potentially fair reasons set out in Section 98(1) and (2) of the ERA. If the employer has a potentially fair reason for the dismissal, the tribunal must then determine whether the dismissal was fair or unfair under Section 98(4) and (4). It must determine whether the employer has acted reasonably for dismissing for the reason given.

80. Section 98(4) provides that the “determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined “in accordance with equity and the substantial merits of the case. In this regard there is no burden of proof on either party and the issue is a neutral one for the Tribunal to decide. An important aspect of this test is whether the Respondent has followed a fair process.
81. The Tribunal must not put themselves in the position of the employer and consider what they would have done in the circumstances. Instead the Tribunal should look at whether the employer’s action falls within the band (or range) of reasonable responses open to an employer. This test applies not only to the decision to dismiss but the procedure by which that decision is made. (Sainsbury’s Supermarkets Limited v PJ Hitt 2002 EWCA Civ 1588.)
82. The Tribunal had regard to the ACAS Code of Practice and the ACAS Guide. In particular the Tribunal noted the guidance that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing and 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. The Code states that it would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.
83. The ACAS Code also gives some guidance as to how a disciplinary hearing should be conducted. At a disciplinary hearing an 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.
84. The ACAS Code also makes references to the 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 at an appeal hearing. It also suggests that employees should be allowed to appeal decisions that they disagree with and that appeals should be heard without unreasonable delay and ideally at an agreed time and place.

85. The "size and administrative resources of the employer's undertaking" must be taken into account (ERA 1996 s.98(4)(a)). For instance the failure by small employers to have a formal disciplinary procedure may be treated less seriously than if the employer is a large company (Shiner Ltd v Raymond Hilton 2001 IRLR 727, EAT).
86. The Tribunal had reference to a number of other relevant authorities. In Ms S Hussien v Sheraton EAT/561/96 the importance of an employer considering all the relevant facts including the nature and cause of the breach, including the degree of its gravity, the existence of any dishonesty and remorse shown by an employee being disciplined was emphasized.
87. Similar guidance was provided by Court of Session in Ladbrooke Racing Ltd v Arnott & others 1983 IRLR 154 in which it was suggested that Tribunals should look to whether managers who take decisions to dismiss have considered all of the relevant factors such as whether the infringement of a rule is relatively minor, the degree of culpability of the employee and whether the employee has advanced sufficient mitigation.
88. The net effect of these cases is that it is not enough for the Respondent to say that if certain behaviour amounts to gross misconduct, it follows that an employee who is guilty of that behaviour must be dismissed. The Tribunal should take a critical approach at determining whether the Respondent has acted fairly in all the circumstances of the case, taking all those circumstances into account.
89. In the case of Whitbread Plc t/a Whitbread Medway Inns v Mr J Hall EAT/1233/98 the importance of a following a fair disciplinary process was emphasized, not least the need to consider options other than dismissal and hear what the employee wishes to say in their defence, explanation or mitigation, even in cases of alleged gross misconduct.
90. The Tribunal also had reference to the legal principles in relation to the Respondent's argument that if the Claimant was successful with his claim on the basis of a procedural defect, any award should be reduced to take into account that he would have been dismissed in any event and that any procedural errors would make no difference to the outcome. This is commonly referred to as the Polkey deduction or reduction. This does not mean that the unfair dismissal is rendered fair. A procedurally unfair dismissal is still unfair and the principle allows the Tribunal to make a realistic assessment of loss according to what may have occurred in the future.
91. The EAT provided useful guidance on this point in the case of Software 2000 Ltd v Andrews & Others. The question is not whether the Tribunal can predict with confidence all that would have occurred: rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened using its common sense, experience and sense of justice. In Scope v Thornett the Court of Appeal has held that in an unfair dismissal case tribunals may still make a Polkey deduction even where its assessment of whether employment would have terminated fairly in any event may involve "speculation". The assessment of compensation will often involve a certain amount of speculation but the tribunal

must not shy away from the task on this account, unless the employer's failure "was such that one cannot sensibly reconstruct the world as it might have been".

92. That said the Tribunal should consider carefully whether any unfairness can properly be described as procedural, or substantive. What may appear to be a procedural matter may go to heart of the issue of substantive fairness in which case a Polkey deduction may be inappropriate. *Steel Stockholders (Birmingham) Ltd v. Kirkwood*
93. If the claim is successful the Tribunal must consider which remedy is appropriate pursuant to Chapter 2 of the ERA.
94. In relation to compensation the Tribunal's duty is to award such amount that is just and equitable and to take into account all of the factors when making this decision including the Claimant's evidence, the Respondent's evidence and any submissions that had been made by each of the parties.
95. Specifically the statutory provisions for the calculation of the Basic Award can be found in Sections 119 and Section 122 of the ERA (Basic Award reductions).
96. In relation to the compensatory award the Tribunal has the discretion to award such amount as they consider just and equitable in all the circumstances, having regard to the loss sustained by the Complainant in consequence of the dismissal in so far as the loss is attributable to action taken by the employer. (Section 123 ERA). Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.(Section 123(6) of the ERA).
97. The Tribunal also had regard to the detailed submissions and authorities provided by and referred to by the parties. Of particular relevance is the case of *Salford Royal NHS Trust v Rouldan* [2010] ICR 1457 which confirmed that where conflicting accounts of an alleged incident are presented with little or no corroborating evidence, an employer is not obliged to believe one employee over another.

Conclusions

98. The parties agree that the Claimant was dismissed and his last day of employment was 9 July 2020. The Claimant was dismissed for misconduct and this clearly the reason for the Claimant's dismissal. The challenge that the evidence was "layered up" against the Claimant so that he could be dismissed for an ulterior motive is without any foundation or basis.
99. Both the findings of the Hearing Manager and Appeal Manager show that the Respondent had a clear and well-reasoned belief that the Claimant was guilty of misconduct.
100. The Respondent had reasonable grounds for this belief, based on the complaint from Employee X, and the corroboration from the exchange between Employee

X and Miss Gosney against the background of the previous exchanges between the Claimant and Employee X. The Respondent had a clear and cogent explanation for preferring the credibility of Employee X's evidence over that of the Claimant. The challenges made by the Claimant to the inconsistency of Employee X's evidence did not undermine this explanation.

101. The allegations against the Claimant were serious and deserved the attention that they received.
102. The Respondent reached the view it did after a reasonable investigation, which consisted of interviews with Employee X, the Claimant and Miss Gosney and the review of documentary evidence, such as the exchange of messages between the Claimant and Employee X, which pointed to inappropriate conduct. In so far as the disciplinary investigation extended to this exchange, this was reasonable and fair to give some context to the relationship and previous dialogue between the Claimant and Employee X.
103. The Respondent, faced with the challenge of assessing the evidence without witnesses, and where the incident took place outside of work, took reasonable steps to assess the credibility of the witnesses. The specific incident on the Zoom Call took place over just a few seconds, and this would not have been an easy assessment for the Respondent to make. It was open to the Respondent to make no conclusion and indeed it may have done so, had the Zoom Call been the only issue. However, against the backdrop of the Instagram exchange, and the evidence of Miss Gosney, it was reasonable and indeed proper for the Respondent to go further and examine the evidence more fully.
104. The Hearing Manager took further reasonable steps to get the full picture by trying to re-create the incident, whilst giving a reasonable explanation for not undertaking a home visit, explaining why it wouldn't have made a difference.
105. That said the Respondent failed to follow a fair process at the disciplinary stage in two respects:
 - (i) the Claimant was given very limited time to prepare for the disciplinary hearing and did not have access to the interviews conducted with others before a decision was made. It follows that he would not have been able to comment on the content of those interviews or verify that the record of his own interview was accurate. There was some suggestion that the evidence of text messages between Laura Gosney and Employee X, which appeared to be critical to the decision of the Hearing Manager in determining the credibility of Employee X, had not properly aired in the disciplinary process.
 - (ii) the Hearing Manager conducting the disciplinary was one and the same as the manager conducting the investigation. Given the seriousness of the allegation, and the size of the Respondent one would expect that allocating different managers for each function was well within the range of what could be reasonably achieved. The fact that the Hearing Manager conducted further investigation after his meeting with the Claimant, but

then did not seek the views of the Claimant upon that investigation compounded this issue

106. These issues would, on the face of them, rendered the disciplinary process unfair and short of the standards set out in the ACAS Code of Practice.
107. The Respondent was able to then conduct what can only be described as a very thorough and complete appeal process. Whilst it does not follow that this would remedy a defective disciplinary hearing, the Tribunal must assess fairness in the ordinary way by looking at the whole of the process and its reasonableness.
108. In this case the appeal process remedied the previous defects of the disciplinary process for the following reasons:
 - (i) the Claimant was provided with all of the evidence collated in advance of the appeal hearing.
 - (ii) the Claimant and other witnesses were re-interviewed.
 - (iii) the Claimant's grievance was considered alongside his appeal.
 - (iv) the Appeal Manager considered each and every aspect of the Claimant's appeal and evaluated the evidence for himself.
 - (v) The Appeal Manager interviewed the Hearing Manager and tested his rationale for his decision.
 - (vi) the Appeal Manager provided draft conclusions for the Claimant's consideration and comment.
 - (vii) the Appeal Manager provided a comprehensive outcome letter in which his decision is carefully reasoned, leaving the Claimant in no doubt as to why Employee X's evidence was preferred over his own.
 - (viii) the Appeal's evidence at this hearing demonstrated the seriousness with which he undertook his responsibilities and his analysis of the evidence.
 - (ix) The Appeal manager considered, evaluated and explained why the "new evidence" of Miss G Beare and Miss E Taylor did not influence his decision.
 - (x) The Appeal Manager was of sufficient seniority to consider the appeal against the decision of the Hearing Manager.
109. The Appeal Manager's interview with the HR manager dealt specifically with the suggestion by the Claimant that the Respondent was looking to "layer up" allegations.
110. The evidence of the Appeal Manager (and indeed the disciplinary Hearing Manager) show a firm but inquisitorial style, with relevant questions and challenges where appropriate with both the Claimant and the other witnesses. There was no evidence of pre-judgement or a style that suggested the outcome was pre-determined.
111. The suggestion that the viewing of the Claimant's public Instagram account was inappropriate or that it any way undermined the disciplinary process is unfounded. In circumstances where some of the allegations centred on "sexualised" communications between Employee X and the Claimant via Instagram, this line of enquiry was entirely reasonable and proper.

112. The Appeal Manager was an independent and impartial manager, who took his responsibilities very seriously. He considered the appeal fully, effectively re-hearing aspects of the Claimant's case rather than just reviewing the outcome of the Hearing Manager. He was a member of the Executive Committee team and had sufficient "seniority" to properly hear the appeal.
113. The Tribunal also accepts the Respondent's argument that had some of procedural matters at hearing stage been remedied this would not have changed the Claimant's evidence in relation to Employee X's version of events, in other words it would not have made any difference to the eventual outcome.
114. Taking all of these matters into account the Tribunal's view is that the Respondent acted reasonably in finding that the Claimant was guilty of misconduct and then treating that misconduct as a sufficient reason for dismissing the Claimant summarily, taking into account the equity and the substantial merits of the case? The breach of the ACAS Code of practice and the defects at hearing stage were remedied at the appeal hearing.
115. The Respondent was reasonable in concluding that Claimant's own account of the Zoom call incident was implausible, even more so after looking to recreate the Claimant's version of events. Through this analysis the Respondent had a genuine and reasonable belief that the incident could have only occurred by way of a deliberate, rather than an accidental event and that there was no mistaking the Claimant's shorts for his underwear.
116. The Claimant suggests that the Hearing Manager's admission that "*it could very well be that PT did go on the call and exposed something that he didn't expect to show himself.*" That one comment assessed against the evidence the Hearing Manager gave at this hearing, alongside the evidence of the Appeal Manager should not be taken out of context. There was no need for the managers to be "absolutely sure" or "convinced" that the Claimant had committed the alleged misconduct, simply that they had a genuine and reasonable belief on the evidence available. The Hearing Manager was honest in admitting that his own belief may well have limitations, but this does not undermine the strength and reasoning of his evidence.
117. The Respondent acted entirely within the range of reasonable responses in concluding that the events of the Zoom Call was an escalation of previous inappropriate behaviour as evidenced in communication between him and the Claimant. The Claimant's explanation for the content of that communication did not hold up to cross examination – it was clearly inappropriate, even more so given the position that the Claimant held and his seniority, relative to the position held by Employee X.
118. Overall the Respondent have reasonable grounds to believe that the Claimant was guilty of misconduct and reached this conclusion after a reasonable investigation and disciplinary process when factoring in the appeal hearing. The decision to dismiss, based on these conclusions, fell within the range of reasonable responses. It was open for the Respondent to consider lesser sanctions but given the seriousness of the offence it was certainly a reasonable

outcome to dismiss summarily. The Claimant's claim for unfair dismissal is unfounded.

119. In the alternative, had the Claimant's dismissal been procedurally unfair because the appeal hearing had not remedied the earlier defects, the Tribunal would have concluded that no compensation was due on the basis that the Claimant would have been dismissed in any event, or that any compensation should be reduced on account of the Claimant's conduct in relation to the disciplinary allegations only.
120. As regards the wrongful dismissal aspects of the Claimant's claim, the Tribunal needs to go one step further to assess whether the Claimant did indeed act in such a manner that the Respondent was no longer required to retain him in employment. This is made challenging by the fact that there is no live evidence from Employee X or indeed from Ms Gosney, whose evidence was so critical to the Respondent's conclusion.
121. The assessment and evaluation of Employee X's evidence as part of the disciplinary process is not the same as Employee X's direct evidence on this point (or other direct evidence to corroborate that view). In the absence of that direct evidence the Employment Tribunal cannot conclude that the Claimant did what was said he had done on the Zoom Call.
122. It is questionable whether the Claimant would have been summarily dismissed but for the Zoom Call, so the Tribunal's conclusion is that the claim for wrongful dismissal succeeds.
123. Finally, in relation to the Claimant's claim that he was denied the right to be accompanied the issue turns on whether the meeting on 9 July 2020, which was held for the purpose of communicating the decision to dismiss him, amounted to a hearing at which the right to be accompanied applied. The invitation suggested that the meeting was to "discuss the outcome" which was sufficiently broad enough to suggest that further discussion was a possibility, even more so as by this stage the Claimant had not been presented with much of the evidence against him. The Respondent's failure to respond to the Claimant's direct question about representation was therefore unreasonable. The Claimant did indeed bring a representative to the appeal hearing, so the Respondent's suggestion that it would have made no difference is not accepted.

Remedy

124. In relation to the wrongful dismissal claim the Claimant would receive 3 months of pay. In the absence of any evidence as to his entitlement and any mitigation, the parties are to co-operate to agree the level of damages.
125. In relation to the right to be accompanied the Claimant is award compensation of two weeks' pay (subject to the current statutory cap for a week's pay).

126. Within 21 days of this Judgment, the parties are to write to the Employment Tribunal confirming whether the issue of remedy has been agreed, and if so setting out the terms of a consent order.
127. The parties are at liberty to apply for a remedy hearing if remedy cannot be agreed.

**EMPLOYMENT JUDGE DEOL
23 SEPTEMBER 2021**

**24/09/2021.....
REASONS SENT TO THE PARTIES ON**

.....
AND ENTERED IN THE REGISTER

.....
FOR SECRETARY OF THE TRIBUNALS