



# EMPLOYMENT TRIBUNALS

**Claimant: Mr S Sigsworth**

**Respondent: Torque Logistics Limited**

**Heard at: Leeds**

**On: 30 January 2024**

**Before: Employment Judge Jaleel**

**Representation**

**Claimant: Mr S Sigsworth**

**Respondent: Mr John Robinson (Solicitor)**

## RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

# REASONS

## Introduction

1. This was a complaint of unfair dismissal brought by the claimant. The respondent says the reason was misconduct.
2. I had before me a Hearing bundle prepared by the respondent. The claimant had been provided with a copy of the bundle. The index to the bundle did not correlate and this was due to the additional documents that had been inserted since the creation of the original bundle. An updated index was provided during the morning of the hearing. The bundle ran to some 250 pages including index.
3. Having identified the issues, I took some time to privately read witness statements exchanged between the parties and relevant documentation.
4. I heard evidence from the respondent's witnesses, John Miller (Transport Manager) and Paul Jackson (Regional General Manager).
5. I then heard evidence from the claimant.
6. I found both due to time constraints and technical issues that any remedy applicable would be dealt with, if required, at a separate hearing. I confirmed that, on this basis and changed circumstances, I would consider any arguments either that compensation ought to be reduced to reflect the claimant's pre-dismissal conduct and/or on the basis that, if there had been a defect in procedure, it may not have made a difference to the outcome.
7. I have anonymised the identity of the employee who alleged that she was subject to the conduct complained of. I find, given the nature of the complaint and her request to her employer to maintain confidentiality during the internal processes it is in the interest of justice to do so.

## Unfair Dismissal

8. The claimant accepted that the reason for his dismissal was the potentially fair reason of conduct. I identified the issues to be determined and both parties confirmed their agreement as follows:
  - 8.1 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether;
    - 8.2.1 there were reasonable grounds for that belief;

- 8.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
  - 8.2.3 the respondent otherwise acted in a procedurally fair manner;
  - 8.2.4 dismissal was within the range of reasonable responses.
- 8.3 If the claimant's dismissal was unfair, what is the chance, if any, that he would have been fairly dismissed in any event?
- 8.4 If the claimant was unfairly dismissed, did he cause or contribute to his dismissal by his own culpable and blameworthy conduct?

## Facts

9. The respondent operates as a logistics company and employs over 1300 employees.
10. The claimant was employed as a Shipping Clerk from 21 June 2010 up until 18 July 2023.
11. On June 30 2023 the claimant, along with 9 of his work colleagues attended a social event in Leeds. The event was not organised by the respondent but between work colleagues of the same department. It was organised by department members with an intention to foster good relations, near to work premises and immediately after work. I found that there was a sufficient connection with employment and that it fell within the remit of course of employment.
12. On 3 July 2023 the respondent received an email from Phoebe Ellis about an incident that occurred during the evening of June 30 2023 (page 41). It was alleged that the claimant was involved in inappropriate conduct of a sexual nature towards another colleague, who I shall identify as 'AA'.
13. AA confirmed to the respondent that inappropriate conduct of a sexual nature involving the claimant took place.
14. The claimant was suspended as per the letter dated 3 July 2023 (pages 42-43) pending an investigation. He was advised that serious allegations had been brought to the respondent's attention namely:
- The allegations are; Grossly indecent or immoral behaviour in relation to an incident on 30<sup>th</sup> June 2023 whereby it is alleged you have made unwanted contact with another colleague.*

*The allegations potentially constitute gross misconduct.....During the period of suspension, you will continue to receive your basic salary and all contractual benefits....”*

15. Richard Cooper (Site Manager) carried out the investigation and Lauren Saville (HR) was the appointed note taker. All 10 employees who attended the social event were interviewed as part of the investigation process. They were asked if they were aware of an incident that occurred on 30 June 2023.
16. Out of the 10 employees AA and Phoebe Ellis stated that the claimant made inappropriate conduct of a sexual nature towards AA.
17. During her interview with Richard Cooper on 4 July 2023 AA described the claimant coming up behind her and touching her bottom. She stated that she was not playing pool with him at the time. When describing the claimant's actions, she “motions juggling with hands cupped”. She also stated that she felt uncomfortable and stated that she wouldn't even like her own friends doing that. She added that she had discussed the incident with Brian Wilson (Freight Manager) who advised that he would speak to the claimant on Monday morning in the office given that he had been drinking alcohol. Richard Cooper also enquired of her relationship with the claimant both at work and outside of it and AA confirmed that she had no contact with him and would only speak to him about work.
18. During the investigation Richard Cooper was open to seeking further information to try and clarify details regarding the incident. This is demonstrable by his further interview with AA that took place on 5 July 2023 during which she was asked to describe the layout of the area and drew a picture to demonstrate a visual of the area and the people present. She also described the incident in further detail and stated that the claimant's hand definitely touched her bottom and felt he had made contact twice.
19. Phoebe Ellis in her interview on 4 July 2023 described how she came back into the bar area with Kim after smoking and had witnessed the claimant run behind AA and touch her bottom. She went over to AA, stated ‘what the hell’ and pulled her away and went outside. She stayed with AA for the remainder of the evening.
20. Phoebe Ellis was also asked to clarify certain details in a further interview on 5 July 2023; she was also asked about the layout of the area and position of people. She drew a picture of the layout of the bar and pool area. During this interview she described the claimant's actions and in doing so did ‘a juggling motion with her hands’ and added that he did this a few times and ‘just went off’ sniggering to himself. She also stated that she had discussed the matter with Brian Wilson who was unable to do anything at the time as he had been drinking.

21. The remaining colleagues were interviewed as part of the investigation did not witness the incident:

- a) Brian Wilson (Freight Manager) did not witness the incident but recalled Phoebe Ellis reporting to him that the claimant had slapped AA's bottom and asked him to have a word with him. He also confirmed that as he had a few drinks he told Phoebe Ellis that it was not the ideal time to address the situation and he would speak to the claimant later. He was also subsequently asked about the layout of the area, the pool area and whether he would have noticed anything untoward occurring.
- b) Ellie Clough (Air Freight Clerk) did not witness the incident but recalled Phoebe Ellis and AA approach her and Simon and stated that the claimant had touched her (AA). They had also described the claimant coming behind her and touching her bum.
- c) Joanne Kelly (Admin Clerk) stated that she had just come out of the toilet so did not witness anything but was with Brian when Phoebe reported the incident to him. She witnessed Brian advise that he could not do anything at that point as both he and the claimant had been drinking.
- d) Daniel Clarke (Sea Imports Operation Manager) stated that he did not witness the incident, but Phoebe Ellis had told him that the claimant had grabbed AA. Daniel also clarified that there was a group of lads at the other side but wouldn't have noticed anyone brushing past AA as this was likely to occur in such an atmosphere.
- e) Simon Tandy (Regional Import Manager) stated that he had not witnessed the incident but recalled Phoebe Ellis telling him and Ellie what had happened. He was aware that Brian had been told of the incident and felt he would handle the situation.
- f) James Miller (Purchase Ledger Clerk) did not witness the incident but recalled one of the girls telling Brian that the claimant had touched AA.
- g) Kimberley Wood (Air Import Clerk) stated that she did not witness the incident and had gone home early.

22. The claimant was interviewed on 4 and 5 July 2023. The meeting notes are at pages 46 - 55 of the bundle. He was advised that an allegation had been made whereby he had approached AA and touched her bottom. He was then asked to provide details of the evening. The claimant confirmed details of the venues that they had visited including times. In respect of the time the incident was said

to have taken place he confirmed that he was playing pool with a colleague Brian James but denied engaging in conduct of a sexual nature. He described the bar being busy and stated that he may have brushed past AA when taking a shot but did not recall doing so. He confirmed that he did not have any contact with AA outside of work and had no problems with her in the office. He also stated that he was more than happy to get CCTV footage but was advised by Richard Cooper, that as the police were not involved that would be a decision for him to take.

23. The alleged conduct 'juggling hands motion' was described to the claimant who vehemently denied this. The proximity of the area around the table was discussed and the claimant demonstrated how he would have to squeeze between AA and other persons in the vicinity.
24. Richard Cooper advised the claimant that two witnesses stated that the alleged conduct took place. However, he did not close off the possibility that physical contact may have been accidental and himself suggested that the matter may have been blown out of proportion. The claimant accepted that there was a possibility that he could have brushed past her and that this may well have been the case and the matter had been blown out of proportion.
25. The claimant stated that *'the only time I went near her was cause there was guys at the side I had to squeeze through'* and denied sitting with and/or having any conversations with AA.
26. The claimant was also specifically asked about being behind AA whilst she was taking her shot but stated that he was stood on the side with Brian and James.
27. The claimant found it strange that he was not approached directly on the evening as he felt he would have been able to address it there and then.
28. The claimant stated that he may have been targeted as he had previously been accused of inappropriate conduct in 2022 but this complainant withdrew her grievance and had apologised to him. He also added that he was not happy at the time that the matter had been escalated to a formal process without any informal meetings taking place.
29. The meeting was adjourned and reconvened on 5 July 2023. The claimant was asked to draw a picture of the area and where people were at the time of the incident. Richard Cooper highlighted that there were discrepancies between the pictures drawn by witnesses.
30. Further discussions took place regarding AA's positioning, the space between the table and the gap to go past her. The claimant protested his innocence of the alleged act but Richard Cooper stated that based on the evidence he had collected he had reason to believe grossly indecent behaviour took place; he

could not understand why the claimant had made the movement round the table as had been indicated when he could have approached from the other end to prevent any contact with AA and was therefore 'going to put to disciplinary'. Richard Cooper did not reach and express a conclusion that the Claimant had committed gross misconduct.

31. A disciplinary hearing was scheduled to take place on 10 July 2023 (pages 44 – 45). The claimant was also provided a copy of all evidence (namely the witness statements) as well as a copy of the disciplinary and poor performance procedure. The claimant was informed:

*“...The purpose of this hearing is to consider the following allegation:*

*Grossly indecent or immoral behaviour – inappropriate/unwanted conduct*

*Specifically, on Friday 30<sup>th</sup> June you attended an after work gathering with a number of colleagues who had booked an area in a bar. During the evening, whilst the group was congregated around the pool table area, it is alleged that you have approached your colleague AA, and hit her bottom a few times with your hands in quick succession as she was playing pool. This alleged event has made AA feel very uncomfortable as this was deemed unwanted, inappropriate contact.*

*In the Company's view, these allegations, if confirmed would constitute a gross misconduct offence. I must therefore inform you that the outcome of this disciplinary hearing could result in your summary dismissal....”*

32. The claimant attended the disciplinary hearing with his representative Louise Bywell (Compliance and Supply Chain Manager). John Miller was the disciplinary officer and notes of the meeting were being taken by Lauren Saville. The meeting notes are at pages 92 -99 of the bundle. These have been signed by the claimant confirming that he agrees with the contents albeit it with some minor amendments.
33. John Miller confirmed that he had considered the previous statements but was keen to allow the claimant to tell him his version of events again.
34. The claimant disputed the version of events presented by Phoebe Ellis and AA and focused on the drawings that they presented.
35. However, it transpired during the meeting that the claimant had been in contact with the General Manager from the bar who had provided him with a full description of the CCTV footage of 30 June 2023 via email dated 9 July 2023 (he had been unable to provide him a copy of the actual footage). The General Manager set out a list of times when the claimant made physical contact with a female member of the group. However, the email also stated 'I cannot be 100% certain that everything is included given the limited camera coverage'. The emails confirming the CCTV footage is at pages 86-90.

36. John Miller discussed the contents of the email with the claimant in detail. The claimant confirmed that the lady identified in the email as wearing a zebra print dress is AA; the claimant is said to have conversed with her and appears to be asking about her drink. He also briefly hugged AA at 21:46 and whilst she is playing pool "...there are a couple of times you lean over and hit the end of her pool cue to make her take a shot by mistake but there is no other contact at this time..." At 22:04 the claimant is said to have tapped AA on the back of her shoulders to get her attention but she was already talking to someone else. At 22.20 the claimant left the venue with a female and male from the group. The email concluded by emphasising "...as previously stated, this is all I can see from the camera footage and may not be fully inclusive of all the interactions that you have with the female members of this group...."
37. It was put to the claimant that he had denied having any contact with AA during the disciplinary hearing but the CCTV description showed that there was definitely contact between them.
38. The claimant stated that as per his recollection the only time he recalled going near AA when he was taking his shot. During cross examination the claimant suggested that the respondent's questions were not clearly worded during the investigation, and it is for that reason that he did not provide the additional details. He accepted that he had been playing pranks on AA on a few occasions, over a 30-minute period by nudging her cue when she was taking her shot. He maintained that the description of the CCTV footage did not confirm that he had touched AA's bottom as alleged.
39. During the disciplinary hearing claimant reiterated he would be willing to involve the police and explore legal options and this should have been put to AA and Phoebe Ellis on the basis that it may uncover that they have been lying.
40. The claimant also stated during the disciplinary hearing that he found AA's behaviour to be odd i.e., she did not react to draw attention when the alleged act was carried out and 'surely' she would have wanted support from someone hot headed (as she had described her dad) in the circumstances. The respondent did not accept this and stated that the claimant was speculating and could not determine what AA's reaction to the alleged conduct should entail.
41. The hearing was adjourned as it ran over two hours and the claimant's representative had to leave due to other commitments.
42. It was reconvened on 18 July 2023. During this hearing the claimant forwarded an additional email from the General Manager (page 86) which provided further details of the camera coverage in the area. Whilst the camera coverage is said to be extensive it was confirmed that if you are playing pool and you're by the side of the pool table a pillar obscures the view.



43. The respondent asked further questions relating to the claimant's contact with AA, which he had denied initially but were said to be to the contrary via the email from the General Manager. The claimant maintained that his recollection was as accurate as he could recall when giving his statement on 4 July 2023 and he may have brushed past AA. He went on to state that he had hit AA's cue as a practical joke but did not consider this to be relevant to the line of questioning adopted by the respondent. He accepted that he was positioned behind AA on more than one occasion as he was playing pranks when he would hit her cue.

44. The claimant questioned the version of events as suggested by Phoebe Ellis and emphasised that the CCTV footage description did not capture him running round the table as described. He also stated that the statements of AA and Phoebe Ellis contained discrepancies such as his reaction after the alleged incident, their immediate action after the alleged incident, - did they go outside or report the matter to Brian, AA had denied playing pool or interacting with the claimant, the number of times that he was alleged to have touched her bottom had changed.

45. The hearing was adjourned and on reconvening it the claimant was advised (page 104):

*"...My decision is based on all evidence which has been presented and in have taken into consideration about CCTV email which you have provided. As we add the pillar in this can deem CCTV doesn't fully cover area. There are two witness accounts AA and Phoebe which state this allegation and you have denied this allegation. Based on reasonable belief I have made my decision that on probability you have acted in the way alleged..."*

46. The claimant was advised that his length of service had been considered, but the allegation is serious, so he was being summarily dismissed for gross misconduct.

47. By way of letter dated 21 July 2023 (pages 107 – 109) the respondent summarily terminated the claimant's employment on the grounds of gross misconduct. The letter referred to the information that was gathered as part of the investigation and the disciplinary hearing:

- a) The claimant denied the allegation against him and had explained that due to the limited spacing around the pool this could have caused contact but he could not recall any contact with AA;
- b) The description of the CCTV footage which includes examples of physical contact with AA i.e. hugging her and playing a prank by knocking

the end of her cue. This was not mentioned by the claimant but was corroborated by AA's statement;

- c) A description of the drawings of the environment and the fact that part of the area had been obstructed by a pillar;
- d) The claimant's assertion that he would have had to run round the table and barge through a group of males to be near AA;
- e) The claimant had found it strange that he had not been informed of the incident and the fact that he would have expected someone else to witness the same, in particular Kim as she was with Phoebe at the time;
- f) The claimant had felt AA's reaction was not fitting with the alleged incident. It was reiterated that this was the claimant's perception and as had been explained at the hearing there is no standard behaviour that is expected in such situations;
- g) The claimant had raised that AA and Phoebe had changed their accounts but. Did not think this was the case, they had simply added further detail from the line of questions that was asked.

48. In conclusion it was stated:

*"...having carefully considered the representation that you made it was found that your explanations were insufficient and you have been unable to provide reasons which might mitigate the circumstances presented where 2 witness accounts depict version of events which oppose yours. This along with the limited view of the CCTV and the other contact you had with AA that evening adds probability and has given me reasonable belief that the incident occurred as depicted by the 2 witnesses.*

*I gave careful consideration to your employment as a whole and any mitigating factors, including your previous disciplinary conduct, employment position, length of service, experience and your individual circumstances whether a lesser sanction in place of dismissal may be appropriate, such as redeployment or a final written warning. Unfortunately, due to the nature of the allegation, I could not find any mitigating circumstances or appropriate alternatives to summarily dismissing you.*

*For this reason, I found that the appropriate course of action to take in response to your conduct was to terminate your employment on the grounds of misconduct.."*

49. The claimant was informed of his right to appeal within 5 working days of receipt of the letter.

50. Based on the oral evidence and documentary evidence I made findings about John Miller's involvement in the process and his decision making. He did not have a relationship with the parties involved in the matter and was for all intents and purposes independent. He was not aware of any previous issues involving the claimant including the grievance of 2022. I found that he approached the process with an open mind and considered all witness evidence including the drawings and additional evidence by way of emails from the General manager. In his evidence John Miller stated that he had two witnesses to the incident and the claimant had no one to corroborate his version of events. He highlighted that the summary of the CCTV evidence was inconsistent with the version of events that the claimant provided, namely that he had no contact with AA, when in fact he was seen to interact with AA, hug her and knocked her cue on more than one occasion. In doing so, he was situated directly behind her on several occasions. I found this to be a significant factor in John Miller preferring the evidence of AA and Phoebe Ellis over that of the claimant. He emphasised that the claimant was asked specifically if he had contact with AA but had omitted to provide key information; the claimant would have known that the respondent required details of all his interaction with AA, particularly those which involved him being in such a position, behind AA as per the description of the conduct alleged. However, he also conceded that the CCTV was not conclusive especially as a pillar obstructed the camera. Whilst, not included in his witness statement, John Miller stated that after the initial disciplinary hearing on 10 July 2023 he had also visited the bar to try and obtain the actual CCTV footage, but this was not released to him on the basis that it would require police involvement. This is consistent with the fact that the General Manager was not able to provide a copy of the footage to the claimant. John Miller stated that he made the decision on the balance of probabilities and reasonableness that the claimant did make contact with AA as had been alleged. He reiterated that he considered the claimant's length of service and alternative sanctions but felt he had no other option but to dismiss the claimant given the severity of the conduct. He made reference to the disciplinary policy. He emphasised that the respondent had a zero-tolerance approach to conduct of such a nature and if a lesser sanction was given it would give the wrong message to employees across the company. He offered an explanation of the weight attached to the evidence and at no point did he suggest that he had discarded the evidence of the colleagues who did not witness the alleged conduct. His evidence was consistent with his witness statement, oral evidence and documentary evidence and I found him to be a credible witness.
51. Given a key factor of John Miller's decision related to the CCTV description is consistent with my finding that he held an open mind throughout the process; this was evidence was only disclosed by the claimant during the disciplinary hearing and I found that he explored this as fully as possible with the claimant before making a finding. I did find that John Miller genuinely believed that the Claimant had committed misconduct.

52. On 24 July 2023 the claimant requested an extension of time to submit an appeal. He also requested a copy of the disciplinary notes and documents relating to the complaint of 2022 (page 110).

53. The claimant submitted an appeal on 31 July 2023 (page 131) and highlighted:

- a) Only AA and Phoebe Ellis supported the allegation regarding the claimant's conduct;
- b) The incident occurred outside of work hours and was therefore not a work event;
- c) The claimant was subjected to a complaint in 2022 after an employee, Beverley Bell was coerced into making a complaint;
- d) Consideration was not given to his length of service and exemplary disciplinary record; and
- e) He was not afforded the opportunity to question the witnesses himself.

54. The appeal hearing took place on 7 August 2023 with Paul Jackson (Regional General Manager) and note taker was Craig Dunn (HR). The claimant did not make arrangements to be accompanied and the respondent therefore contacted Louise Bywell who attended the hearing. The notes of the appeal hearing are at pages 141 – 156 and 160 – 170).

55. Paul Jackson allowed the claimant to set out his concerns and went through the points as set out on the appeal letter. The claimant also suggested that there were no witnesses to the incident despite the statements of two witnesses AA and Phoebe Ellis. He also then alluded to what he perceived were relevant inconsistencies within the evidence provided by witnesses and felt they should have been questioned on certain elements again such as timings, movements of witnesses such as Phoebe Ellis. Paul Jackson alluded to the statements that were collected as evidence and highlighted that further statements had been taken from AA and Phoebe Ellis to clarify details – the claimant appeared to accept this point. He also referred the claimant to paragraph 8 of the disciplinary policy and highlighted that the claimant had the right to call witnesses but did not do so. The claimant confirmed that he had read the policy document but was expecting John Miller to give him the opportunity to do so. Paul Jackson went on to explain that the company had a duty of care to investigate the allegations and whilst it wasn't a company sponsored event it involved a number of work colleagues and presumed to be planned at work. The claimant did not dispute this. Paul Jackson also explained that the basis of any decision was on the balance of probabilities and not beyond reasonable doubt as would be the case in a criminal matter. The claimant referred to the complaint of 2022

and felt there was a link to the present claim in that he was being targeted. Paul Jackson explained that there was no link with this complaint, and he had not seen anything in respect of that matter. The claimant was not able to substantiate why AA would be coerced into making a complaint against him by Phoebe Ellis bar his feeling that this was the case.

56. The appeal meeting reconvened on 10 August 2023 to allow the notes to be typed up as requested by the claimant. The claimant remained aggrieved that findings had been made against him and the circumstances surrounding the event had not been investigated properly. He also suggested that the documents should have been reviewed in further detail before the matter progressed to a disciplinary. The claimant again referred to coercion, but this related to the 2022 complaint whereby he felt that it should have been followed up by the respondent.

57. The appeal was rejected on the basis that the claimant had failed to provide any new evidence and in conclusion it was stated:

*“..My rationale:*

*You did not bring any new evidence to the appeal meeting for me to consider, therefore I made the decision based on the evidence in front of me.*

*You place a lot of weight on the employee being coerced yet there is no evidence or indication from the victim that they did not come forward of their own free will.*

*You are taking commentary supplied to you by a worker at the venue where the incident took place as a given. When the commentary is reviewed it clearly states by the person supplying it that it cannot be verified or relied upon. The commentary was supplied at your request to you personally and sent to your personal email prior to you submitting it into evidence.*

*Given no new evidence was put forward in this case I feel I have no other course of action but to uphold the disciplinary decision.....”*

58. During cross examination Paul Jackson confirmed that he had only corresponded with the claimant by email on a few occasions and considered himself to be independent from the parties involved. He confirmed that he had no knowledge of a grievance raised against the claimant in 2022, was not a part of this and this did not form part of his decision making. I found Paul Jackson to be a credible witness.

59. In his evidence and during cross examination the claimant alluded to a formal grievance that was made against him in 2022. He stated that the complainant withdrew the complaint, apologised to him, and stated that she had been coerced into bringing the complaint in the first instance. He suggested that this was evidence that the respondent was keen to terminate his employment. Having considered the minutes relating to this meeting on 1 August 2022

(pages 127 – 129) the complainant uses the term coercion but then qualifies this by stating ‘it was the wording that they used’ but then does not name an individual. I did not have the benefit of witness evidence from the complainant so I am unable to make a finding in respect of the particular circumstances that existed at that time i.e. was she referring to wording used in correspondence or the behaviour of a specific individual(s) within the company. The claimant contended that AA had been coerced into making the complaint against him and he was being targeted by the respondent. He suggested that AA may have been approached prior to the evening and he had been set up. However, the claimant was unable to offer any evidence of a conspiracy of sort beyond his feeling this was the case. Further, the claimant was unable to identify the person who had been alleged to coerce the complainant beyond suggesting that someone from ‘bookings’ was always involved. His evidence was vague on this point and not supported by his own lack of efforts in pursuing this in 2022. I did not find that AA had been coerced into pursuing a complaint and/or that the claimant was targeted by the respondent. AA had provided two statements and confirmed that she had felt uncomfortable by the claimant’s conduct. She had no ill feeling towards him prior to the evening and their interactions at work were limited. There was no evidence of animosity between AA, Phoebe Ellis and the claimant. The fact that I found John Miller to rely heavily upon the evidence that was in fact disclosed by the claimant in making his findings lends weight to the argument that he was not targeted as suggested. For avoidance of doubt, I accepted that both John Miller and Paul Jackson did not have any knowledge of the 2022 grievance at the time, and this did not factor into their respective decision making.

60. I have also considered the respondent’s disciplinary and poor performance policy. I consider this to be a comprehensive policy (pages 131f – 131k). This document sets out the process through which the respondent addresses any concerns relating to an employee’s conduct or performance. It details the matters that may amount to disciplinary offences and provides details of the process and sanctions that may apply. The document also includes a section on gross misconduct:

*“10. Gross Misconduct*

*Gross misconduct is act of misconduct of such serious and fundamental nature that it breaches the contractual relationship between an employee of the Company. In the event an employee is found to have committed an act of gross misconduct, the Company will be entitled to summarily terminate their contact of employment without notice or pay in lieu of notice.*

*Matters that the Company considers may amount to gross misconduct include (but are not limited to):*

- *Grossly indecent or immoral behaviour*

- *Any incident of bullying and/or breach of the Equal Opportunities Policy, including but not limited to discrimination or any harassment of fellow employees of contractors or members of the public that you may come into contact within the course of your employment.....*

*This list is not exhaustive and offences of a similar nature will be dealt with in the same way.....”*

61. During cross examination the claimant agreed that the conduct he was accused of (which he denied) would amount to grossly indecent or immoral behaviour if found to be proven.
62. A separate section also confirms that employees may appeal against any disciplinary sanction imposed on them. Any appeal must be lodged within 5 working days of the disciplinary sanction being imposed on them. It also helpfully lists potential grounds of appeal and confirms that an appeal will be heard by a manager who was not involved in the decision to impose the original sanction upon the employee.

### **The Law**

63. In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct under Section 98(2)(b) of the Employment Rights Act 1996 (“ERA”). This is the reason relied upon by the respondent.
64. If the respondent shows a potentially fair reason for dismissal, the tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:
- “[Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
- depends upon whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case”*
65. In cases of misconduct, a tribunal must determine whether the employer genuinely believed in the employee’s guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard see **British Home Stores Ltd v Burchell [1980] ICR 303** and **Boys and Girls Welfare Society v MacDonald [1997] ICR 693 EAT**.

66. The tribunal must not substitute its own view. The tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.
67. A dismissal, however, may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. The tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. In respect of the investigation where an employee admits an act of gross misconduct and the facts are not in dispute, it may not be necessary to carry out a full-blown investigation. In **Boys and Girls Welfare Society v MacDonald** the claimant admitted the misconduct and was dismissed. The EAT said that it was not always necessary to apply the test in **Burchell** where there was no real conflict on the facts.
68. If there is such a defect sufficient to render dismissal unfair, the tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142**, determine whether and, if so, to what degree of likelihood the employee would still have been fairly dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects. Guidance on how to approach that issue is set out in the case of **Software 2000 Ltd v Andrews [2007] IRLR 568**.

*Exception to Polkey*

69. However, in **Polkey v A E Dayton Services Ltd [1998] ICR 142** it was also stated that if an employer could reasonably have concluded that a proper procedure would be 'utterly useless' or 'futile', it might well be acting reasonably in not putting one in place. This would be a matter for the tribunal to consider in the light of the circumstances known to the employer at the time of the dismissal.
70. The determination of reasonableness is a question of fact, and the focus must be on what the employer has actually done. Thus, the tribunal must ask whether an employer, acting reasonably, could have failed to follow a proper procedure in the given circumstances **Duffy v Yeomans and Partners Ltd 1995 ICR 1, CA**.
71. Cases where it has been held that the circumstances were exceptional enough to 'excuse' the employer from following the proper disciplinary procedure include **MacLeod v Murray Quality Foods Ltd EAT 290/90**, **Campion v Emsec Security Ltd ET Case No.1800834/17** and **Gallacher v Abellio Scotrail Ltd EATS 0027/19**



72. Under Section 122(2) of the ERA any basic award may be reduced when it is just and equitable to do so on the ground of any kind conduct on the employee's part that occurred prior to the dismissal. In addition, the tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the claimant and its contribution to his dismissal – ERA Section 123(6). There is no requirement for the conduct or action of the claimant in question to amount to gross misconduct for it to be relevant conduct or action for the purposes of s122 or s123 ERA 1996. All that is required is for the conduct to be culpable, blameworthy, foolish or similar and this includes conduct that falls short of gross misconduct, and need not necessarily amount to a breach of contract. In **Hollier v Plysu** [1983] IRLR 260 the EAT suggested broad categories of reductions: 100% where the employee is wholly to blame; 75% where the employee is mainly to blame; 50% where the employee is equally to blame and 25% where the employee is slightly to blame.

#### Events away from work

73. The Employment Appeal Tribunal (EAT) held that an employer was vicariously liable for an act of sexual harassment committed by an employee in a pub outside working hours, stating that social events away from the office involving employees from work either immediately after work, or during an organised party, fell within the remit of '*course of employment*' (**Chief Constable of the Lincolnshire Police v Stubbs and others**).

#### Submissions

74. Both parties were given the opportunity to provide oral submissions.

75. Mr Robinson on behalf of the respondent stated that the respondent had dismissed the claimant for a fair reason, namely misconduct and had acted reasonably as per *British Home Stores Ltd v Burchell* [1980] ICR 303. Mr Robinson referred to the claimant's conduct as inappropriate sexual behaviour/inappropriate gesture which constituted grossly indecent or immoral behaviour under its disciplinary policy. He emphasised that when it was put to the claimant, he accepted that the allegations constituted the aforementioned. It was also pointed out that the claimant made no admittance and denied contact with AA but only changed his position in this regard after John Miller reviewed the email describing the CCTV footage.

76. Mr Robinson made reference to the reasonableness of the dismissal and highlighted the disciplinary and appeal process, interviewing of all witnesses, John Miller making attempts to obtain the CCTV footage and the claimant having the opportunity to state his case throughout. He also stated that the claimant's argument that the respondent was not willing to reference police involvement to AA and Phoebe Ellis was irrelevant, this was an internal matter and a hypothetical question of this nature was unnecessary. In any event, the claimant had the right to report the matter to the police himself.

77. It was contended that it was not in dispute that AA was playing pool and the claimant was standing behind her on several occasions in a position to commit the offence in question. There was no reason as to why AA or Phoebe Ellis would be coerced into making a complaint and the claimant's assertions regarding this were nothing more than a conspiracy theory and were not supported by evidence.
78. Mr Robinson reminded the Tribunal that John Miller or Paul Jackson were not involved in the previous complaint had relied on the witness statements, took account of the CCTV evidence and reached their decision on the balance of probabilities.
79. In respect of the sanction, it was contended that this was a most serious offence whereby someone would be reasonably dismissed; the respondent took offences of this nature very seriously, there was no way it could condone this behaviour and the offence is at the top of the list when considering examples of gross misconduct.
80. Mr Robinson also respectfully reminded the Tribunal of its duty and emphasised that it must not substitute its own view for the employer.
81. Mr Robinson concluded his submissions by stating that if the Tribunal found against the respondent a reduction of 100% be applied for contributory fault; the claimant's behaviour was reprehensible, he admitted to misleading the investigation and had made contact with AA by interfering with her cue.
82. The claimant in his submissions stated that he was being made out to be something he wasn't. He referred back to the 2022 grievance and stated that someone from the booking department was always involved. He contended that the respondent failed to follow this up on both occasions. A duty of care was missing and there was a high level of bias throughout the entire process. He maintained that the witness accounts did not see anything, and he had been targeted by someone but was unable to identify who this was. The claimant emphasised that the respondent should improve its policies as employees were at risk of complaints being brought against them. He argued that if successful in his claim for unfair dismissal there be no reduction as he was falsely accused of something that he did not do and the respondent had taken the word of 2 out of the 10 witnesses.

## Conclusions

### Application of the law to the facts

83. Applying these principles to the facts as found, I reach the following conclusions.

#### *Unfair dismissal*

84. The respondent alleges conduct as its primary reason for dismissing the claimant. The claimant accepted that the reason for his dismissal was the potentially fair reason of conduct.

85. I found that the respondent held a genuine belief that the Claimant had committed misconduct on 30 June 2023 and his employment was terminated for that reason.

86. As set out above I found John Miller to be a credible witness. He gave a clear and straight forward account of what he did in investigating the issues. He had reviewed witness statements of those who attended the social event, allowed the claimant to provide his version of events and to submit further evidence. He weighed up the evidence before him, including a description of the CCTV evidence and considered the claimant's explanation. He held a genuine belief that the claimant had committed misconduct by touching AA's bottom.

87. I am not convinced that the claimant has shown that there was a conspiracy of sort, coercion and/or a vendetta for his dismissal as opposed to the genuine belief by the respondent that the claimant was guilty of misconduct.

88. I then turn to the question of whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The reasonableness of the investigation, the reasonableness of the grounds for believing in misconduct and the fairness of the procedure all overlap and I consider them together. I make the following observations:

- a. The respondent conducted an investigation; this included taking witness evidence from all persons present during the social event shortly after. It is also significant that witnesses were asked to provide further clarification on points that had been raised. It was therefore clear to the Tribunal that the investigation was even handed and set out to discover all of the material facts rather than to simply gather evidence pointing to the claimant's misconduct. There was no evidence of bias or that AA was coerced into making a complaint – she was interviewed twice and explicitly stated that the claimant had made her feel uncomfortable;
- b. The details of the allegations against him were explained to the claimant and he did have the opportunity to and did respond. The respondent provided the claimant with evidence in advance of any meetings. The

Tribunal was ultimately satisfied from the content of the witness statements were shared with him and the minutes produced of the disciplinary and appeal hearings that the claimant knew the case against him and was given every opportunity to answer it at each stage of the procedure. He was provided with a copy of the disciplinary process and was aware that he had the right to question witnesses;

- c. The disciplinary process engaged with the claimant and gave him a further opportunity to provide a response to the allegations against him. I found that John Miller remained open minded during the hearing and gave adequate weight to evidence with reasoning as set out above;
- d. The claimant was allowed to submit additional evidence during the disciplinary process. This resulted in the claimant providing the email from the General manager who provided a description of the CCTV footage;
- e. I find that the employer had carried out as much investigation as was reasonable in the circumstances at the time it formed the belief that the Claimant was guilty of misconduct. Witness statements were taken from all of those present or nearby at the time of the incident. As part of the disciplinary hearing John Miller adopted an open mind and allowed additional evidence to be disclosed by the claimant. The email containing the CCTV footage description was examined and investigated fully and the claimant was given the opportunity to provide a full response. As set out in my findings of fact, John Miller preferred the evidence of AA and Phoebe Ellis on the basis that their statements corroborated each other in the main. A key consideration on part of John Miller in respect of the evidence was that the claimant had denied interacting with AA until the disclosure of the email from the General Manager regarding the CCTV. He found that the claimant omitted/withheld key details of his interaction with AA during the evening, including hugging her and in particular, that he was purposefully playing pranks by knocking her cue on more than one occasion, which placed him directly behind her, on more than one occasion. This also corroborated with AA's statement of the claimant's actions when the incident took place. John Miller also attempted to obtain a copy of the footage itself although he was unsuccessful in this regard;
- f. There was a proper consideration of sanction and why summary dismissal was appropriate. John Miller concluded that the claimant's conduct amounted to gross misconduct. The conduct was of a sexual nature and was so serious that the respondent was entitled to treat the claimant's conduct as gross misconduct. The disciplinary policy expressly stated that the conduct in question amounts to gross misconduct and the claimant also accepted (that if proven) his conduct

constituted grossly indecent or immoral behaviour. John Miller went on to consider whether the claimant's conduct warranted summary dismissal. He considered the claimant's length of service and employment history. The respondent had a zero-tolerance approach to conduct of such a nature and impact on the wider business was also considered. The claimant had also made clear throughout the process that he did not consider that he had done anything wrong and therefore offered no mitigation for his actions;

- g. There was a suggestion by the claimant that he was being targeted and made reference to a grievance against him in 2022 (which I have referred to above). However, I found that John Miller and/or Paul Jackson were not aware of the 2022 complaint and this had no bearing on their decision;
- h. The claimant was informed in writing, as required by the ACAS code, of his right to appeal. The Claimant was afforded an appeal and an appeal hearing at which his grounds of appeal were considered in detail. In respect of the Appeal hearing, it was the respondent who sought to ensure that the claimant was accompanied by a colleague;
- i. The overall procedure which the Respondent followed was fair. The claimant was notified of the allegations against him and advised that the outcome of the disciplinary hearing may result in the termination of his employment. The procedure that was followed by the respondent in my view was a process that a reasonable employer could consider appropriate.

89. The ACAS code is not a prescriptive statute. It sets out a standard of behaviour that employers ought to have regard to and informs a tribunal's assessment as to the fairness of the employer's decision to dismiss. The code itself at paragraph 3 acknowledges that it sometimes may not be practical to follow all steps. It does also say that whilst in cases of gross misconduct it may be appropriate to dismiss without prior warning or notice, a fair disciplinary process should always be followed.

90. I have reminded myself that it is not for me to substitute my view, either as to procedure or as to substance. On balance, given the findings of fact above, I find that in the circumstances the decision to dismiss was a reasonable decision in the circumstances, taking all into account, having regard to the test in s98(4).

Employment Judge Jaleel

Date 01 March 2024