



EMPLOYMENT TRIBUNALS

Claimant

Mr Wayne Augustine

Heard at: London Central

Respondent(s)

AND

London Britannia Hotel Limited

On: 7 ,8 & 24 February 2017

Before: Employment Judge: Mr A Spencer

Representation

For the Claimant: In person

For the Respondent: Ms Eddy (Counsel)

RESERVED JUDGMENT

The Judgment of the tribunal is:

1. The claim for unfair dismissal is unsuccessful; and
2. The claim for wrongful dismissal/breach of contract is unsuccessful

REASONS

Introduction

1. The Respondent company runs the Millennium Hotel, Mayfair (the Hotel). The Claimant worked at the Hotel as a Guest Service Agent from 12th September 2006 until 17th June 2016 when he was summarily dismissed for alleged gross misconduct.
2. The Claimant initially brought three claims in these proceedings. They were a complaint of unfair dismissal, a complaint of breach of contract (or wrongful dismissal) for notice pay and also a claim for accrued holiday pay. The Claimant withdrew the holiday pay claim on the morning of the first day of the

hearing leaving the claims for unfair dismissal and wrongful dismissal to be determined.

3. The hearing was originally listed for four days from 7th to 10th February 2017 (inclusive). However, the hearing was postponed on 8th February upon the Respondent's application due to the unavailability of their witness Mr Patel and resumed on 24th February. I completed hearing the evidence and heard closing submissions on 24th February and agreed to give this reserved Judgment with the agreement of the parties as there was insufficient time to give Judgment on the day.

Witness Evidence

4. For the Respondent, I heard evidence from two witnesses:

4.1 Shailesh Patel, the Respondent's Cluster Financial Controller. Mr Patel conducted the disciplinary hearing and made the decision to dismiss the Claimant; and

4.2 Christian Van Dam, the Respondent's General Manager. It was Mr Van Dam who would have heard the Claimant's appeal against dismissal had it taken place.

5. For the Claimant, I heard evidence from the Claimant himself. The evidence in the Claimant's witness statement was redacted upon the application of the Respondent to remove paragraphs 35, 36 and 44 and 45 to remove reference to material that was without prejudice for the reasons I gave at the time.

6. All three witnesses gave evidence by verifying the truth and accuracy of their written witness statements. I had the benefit of seeing the evidence of all three witnesses tested under cross-examination.

Documents

7. I considered various documents including the Claim Form, the Response, the other documents on the Tribunal file and the written statements for each witness. There were two statements from the Claimant who produced a second witness statement concerning mitigation of loss at my direction before the final day of the hearing. I also considered an Opening Note from the Respondent's Counsel, the Respondent's chronology and a substantial Tribunal bundle which was supplemented by additional documents produced during the hearing. Both parties also provided written closing submissions and were given an opportunity to expand upon these orally. The Respondent also supported their submissions with an authorities bundle.

The Parties Respective Cases and the issues to be determined

8. Taking each claim in turn:

Unfair Dismissal

9. The Claimant was summarily dismissed for several acts of alleged misconduct. Specifically:

9.1 Knowingly removing an article of hotel property (namely a letter of complaint from a guest regarding the Claimant's conduct) and refusing to return it to the Respondent upon request; and

9.2 Refusing to complete statutory fire training when requested to do so on 27th, 28th April 2015 and 12th May 2015 and thereby breaching the Hotel's Health & Safety policy; and

9.3 Behaving in a "*wilfully discourteous and intimidating manner towards a work colleague*" named Laima on 17th April 2015; and

9.4 On 9th May 2015 entering a hotel room at the Hotel for 25 minutes to watch TV without authorisation or good reason; and

9.5 On 9th May 2015 watching a football match on his mobile phone while in the luggage room at the hotel whilst on duty.

10. The Respondent asserted that they had fairly dismissed the Claimant and that they were entitled to summarily dismiss him for gross misconduct.

11. It was agreed that the Claimant was summarily dismissed with effect from 17 June 2016. The Respondent accepted that the Claimant had the requisite length of service and had the right to bring his claim and had not lost that right by presenting the complaint out of time.

12. The disputed issues for me to determine were:

12.1 The reason for dismissal. The Respondent asserted that the reason was conduct related and was therefore a potentially fair reason to dismiss within the meaning of Section 98 of the Employment Rights Act 1996. The Claimant did not accept this. He asserted that the reason for dismissal was because he had made historical complaints against the Respondent and had also brought a previous set of employment tribunal proceedings against the Respondent in 2015; and

12.2 Whether the dismissal was fair (i.e. was it within the band of reasonable responses open to the employer in this case). That involved consideration of whether the dismissal was procedurally and substantively fair. The Claimant's specific allegations in this regard were:

- (a) The Respondent had omitted emails and CCTV footage he had requested; and
- (b) He had not been given details of the investigation; and

- (c) He had not been given an opportunity to respond to allegations or to carry out his own investigations; and
- (d) The Respondent had relied on evidence that was incorrect, fabricated or fraudulent; and
- (e) The Respondent had failed to follow its own disciplinary procedure by refusing to hear the Claimant's appeal against dismissal; and
- (f) It was wrong to dismiss the Claimant when he had a had clean disciplinary record; and
- (g) It was wrong to dismiss the Claimant when he did not commit the misconduct alleged; and
- (h) Making insufficient investigations; and
- (i) Not following a fair disciplinary procedure; and
- (j) The decision to dismiss was said to be influenced by the Claimant having taken legal action against the Respondent in 2015; and
- (k) The decision to dismiss was said to be predetermined.

13. I drew these allegations from the Claimant's Claim Form and went through them with him at the outset of the hearing. He confirmed that they were a complete list of the grounds upon which he challenged the decision to dismiss him.

14. In contrast, the Respondent asserted that they held a genuine belief that the Claimant was guilty of misconduct and that belief was formed following a reasonable investigation and on reasonable grounds.

15. In relation to remedy, the Claimant sought compensation only. The Respondent raised several issues in relation to remedy. The Respondent asserted that if the dismissal was found to be unfair on procedural grounds, I should make what is known as a **Polkey** deduction to any award of compensation on the basis that if I found the dismissal was procedurally unfair, I should conclude that the dismissal would have taken place in any event had a fair procedure been followed. Secondly, the Respondent asserted that the Claimant's conduct had contributed toward his dismissal to such an extent that I should reduce any award of compensation by 100% to reflect that contributory conduct. Finally, the Respondent sought to argue that the Claimant had made insufficient efforts to mitigate his loss and that I should reduce any award of compensation accordingly.

16. After canvassing the matter with the parties, I decided to hear evidence in relation to liability and remedy together.

Wrongful Dismissal

17. It was common ground that the Claimant was dismissed without notice on 17 June 2016. The Claimant asserted that he was not guilty of gross misconduct and therefore the Respondent had breached his contract by dismissing him without notice. The Respondent asserted the Claimant was guilty of gross misconduct in the respects summarised above and that they were entitled to dismiss without notice.

18. The issues therefore for me to determine were firstly whether the Claimant was guilty of conduct which amounted to a repudiatory breach of contract entitling the Respondent to dismiss without notice and secondly, if the claim was upheld the appropriate amount of damages to award.

Applicable Law: Unfair Dismissal

19. I must be satisfied that the Claimant had the right not to be unfairly dismissed and that the claim was brought within the three-month time limit set out in Section 111 of the Employment Rights Act 1996 (ERA) as extended by Section 207(b) ERA. There is no dispute in this regard.

20. The Respondent accepts that the Claimant was dismissed and therefore the Respondent bears the burden of proving on the balance of probabilities that the reason for dismissal was one of the potentially fair reasons listed within Section 98 ERA. The Respondent asserted that the reason for dismissal was the Claimant's conduct which is one of those potentially fair reasons.

21. Where a Respondent demonstrates that a Claimant was dismissed for misconduct or some other potentially fair reason, I must go on to consider the fairness of that decision under Section 98(4) of the ERA. That section provides that the determination of the question whether the dismissal is fair or unfair having regard to the reasons 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 applying that test, I must also have regard to the ACAS Code of Practice on disciplinary matters. I also had regard to the decisions of the appeal courts in **British Home Stores Ltd v Burchell**, **Iceland Frozen Foods v Jones**, **Foley v The Post Office** and **Sainsbury v Hitt**. Essentially, the principles that can be drawn out of those cases are that:

21.1 Firstly, I should examine whether there was a genuine belief on the Respondent's part in the Claimant's misconduct; and

21.2 Secondly, I should examine where there was a reasonable basis for that belief; and

21.3 Thirdly, I should examine whether that belief followed a reasonable investigation on the part of the Respondent.

22. These cases also emphasise that it is not for the Tribunal to substitute its judgment as to what it would have done in the circumstances. The proper legal test recognises that in many cases there is a band of reasonable responses open to an employer. The proper question for me to ask myself is, did the employer's action fall within the band of reasonable responses that was open to the employer in this case? If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair. Further, the band of

reasonable responses test applies not just to the decision to dismiss but also the procedure by which that decision was reached.

Applicable Law: Wrongful Dismissal

23. The Claimant's statutory minimum period of notice under Section 86 ERA and under the express terms of his contract of employment was 9 weeks given his 9 complete years' continuous service. The claim for breach of contract arises under Regulation 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. The Respondent did not assert that this was an excluded claim or that the Claimant had lost the right to bring the claim by presenting the claim out of time.

24. A dismissal without notice is in most cases wrongful at common law since the employer's action is regarded as a fundamental or repudiatory breach of contract. The exception to this rule is where the reason for dismissal is for gross misconduct. In such a case the employee repudiates the contract themselves and the employer is entitled to dismiss summarily.

25. I must therefore reach my own conclusion from the evidence as to whether the Respondent was lawfully entitled to summarily dismiss the Claimant. In particular I must decide whether the Claimant was guilty of gross misconduct which amounted to a repudiatory breach of his contract of employment. In other words, was the Claimant guilty of behaviour that struck at the very heart of the contract of employment and was such that no employer could reasonably be expected to continue to employ him.

Findings of Fact

26. Having heard the evidence, I make the following findings of fact. Page references are to the corresponding pages of the Tribunal Bundle.

Introduction

27. The Respondent is a medium sized company which operates a number of hotels in central London including the Hotel. They employ 180 employees. The Claimant was employed by the Respondent as a Guest Service Agent from 12 September 2006. His main duties were welcoming guests and assisting with luggage on arrival and departure.

28. The Claimant was issued with a statement of main terms and conditions of employment which he signed on 13 September 2006 (pages 56-67). Relevant terms included:

28.1 A requirement to be aware of the legal responsibilities for fire precautions, attending training sessions and to follow the Respondent's procedures; and

28.2 An entitlement to one week's notice of dismissal for each complete year of service capped at a maximum of 12 weeks. However, the

Respondent reserved the right to dismiss without notice if the Claimant committed gross misconduct.

29. The Claimant signed a document entitled “Employee responsibilities – Health & Safety” on 12 September 2006 in which he confirmed he would cooperate fully with the Respondent in complying with the Health & Safety at Work Act 1974 and attend health and safety training sessions if requested to do so (page 234).

30. The Respondent’s disciplinary policy and procedure is clearly drafted with compliance with the ACAS Code of Practice in mind and confirmed that dismissal without notice would be the usual sanction for gross misconduct. It also gives examples of the instances of misconduct which would normally amount to gross misconduct (pages 264B -264C).

31. There was little evidence of this in the witness evidence but the documents indicate that the Claimant suffered a back injury in 2014 while he was working. The Claimant reacted badly to a letter he received from the Chief Concierge Nic Lander dated 11th October 2014 (page 126). The Claimant raised a grievance on 30th October 2014 regarding the Respondent’s failure to pay him for sick leave resulting from the back injury, Mr Lander’s letter and the Respondent’s failure to put procedures in place to prevent the back injury from occurring. The matter was heard through the Respondent’s grievance procedure. The grievance was not upheld (although the sick pay appears to have been paid) (pages 207- 209)).

The Investigation

32. The events occurring and the facts known to the Respondent before the Claimant attended an investigation meeting on 12th May 2015 with regard to the various incidents which led to his dismissal were as follows:

The Letter of Complaint

33. The Claimant had an altercation with the driver of one of the Hotel’s guests on 4th April 2015. The Claimant gave a written statement to the Respondent on 6th April 2015 regarding the altercation (page 213). He supplemented this on 7th April with second written statement in which he added that the incident involved racial and threatening behaviour (page 214).

34. The Hotel’s HR Manager Mark Sloane-Coulstock replied by letter dated 8th April asking the Claimant for details of the incident so he could investigate further (page 216).

35. The Claimant provided further written details on 9th April (page 218). They include a reference to the driver preparing a written complaint about the Claimant’s behaviour and handing the letter of complaint to the Claimant.

36. Mr Sloane-Coulstock replied by letter dated 22nd April 2015 (page 220). His letter included a request for the Claimant to bring the driver’s letter to him by 24th April 2015 as it should have been handed in upon receipt by the Claimant.

37. The Claimant did not provide the letter. Mr Sloane-Coulstock chased the Claimant by letter dated 6th May (page 221). In his letter, he notes that the Claimant has not replied and has not provided the letter of complaint. He also refers to having spoken to the Claimant on 28th April 2015 about the issue and the Claimant having accepted that he had the letter but saying that it was "*with my solicitor*". The letter concludes with Mr Sloane-Coulstock confirming that he had asked Makeda Christie (Cluster Safety, Health and Environment Manager) to investigate this and other matters that had been raised (page 221).

38. On 21st April 2015 Marietta Savva had given a written statement regarding the altercation between the Claimant and the driver on 4th April (page 236). She stated that the complainant (who she incorrectly refers to as a hotel guest) came to the reception desk asking for the duty manager and complained that the Claimant was rude and angry towards him. Ms Savva said that the Claimant appeared while she was resolving matters with the complainant and had been argumentative toward the complainant, was confrontational and was speaking in a loud voice. Ms Savva confirmed that the guest wanted to make a formal complaint and so she provided him with a pen and paper so he could write his complaint. The Claimant is said to have informed Ms Savva a short while later that he and the driver had settled the matter and apologised to each other. Ms Savva confirmed that the Claimant had not passed any complaint letter to her.

39. I have seen a copy of the complaint letter (page 277). It is important to note that it was not available to the Respondent until the Claimant's disciplinary hearing. It is handwritten by the complainant Mr Aghabra. It is written on the Hotel's headed notepaper and is addressed "*to whom it may concern*". It sets out complaints that the Claimant talked aggressively toward Mr Aghabra and approached him in a threatening manner. It concludes by saying "*I hope this matter gets investigated as we took this matter as a serious threat and unacceptable as [sic] being treated*".

40. On 6th May 2015 Kevin Downes (Assistant Head Concierge) gave a written statement regarding events which are said in the statement to have occurred on 22nd April 2015 (page 237). This date is plainly wrong as the statement gives an account regarding the altercation on 4th April. The driver is said to have complained to Mr Downes regarding the Claimant's aggressive behaviour towards him and about the Claimant's "*general non-professional attitude*". The driver is said to have told Mr Downes that he wanted to write a letter of complaint. Mr Downes left matter in hands of Ms Savva as he had other duties to attend to.

Grievance raised by a work colleague (Laima)

41. The Claimant was subject of written grievance dated 17th April 2015 which was raised by a work colleague named Laima. The grievance raised complaints about the way the Claimant behaved towards her on 16th April (page 235). Laima complained that the Claimant had shouted at her and waved his arms around and insulted her, calling her a "*stupid woman*". The Claimant was said to have made her feel intimidated and scared of him as a result of which Laima was unwilling to be alone with him.

Fire Training

42. On 5th May 2015 Nic Lander (Chief Concierge) had sent email to Makeda Christie regarding outstanding fire training in which he referred to the Claimant being the only outstanding member of his staff who had not attended fire training and the Claimant refusing to attend such training until "*the current situation with Mark is resolved*" (page 239) The email refers to the Claimant refusing to take training on two occasions on 27th and 28th April 2015. Ms Christie responded to Mr Lander on 6th May by confirming in no uncertain terms that the training was mandatory and must be completed (page 238).

The Incidents on 9th May: Access to Room 684

43. On 10th May 2015 the Front Office Manager Richard O'Keefe had become aware of a concern raised by the Housekeeping Supervisor, Natalie Popova, who expressed concern that Guest Bedroom Number 684 at the Hotel had been discovered to have been used on 10th May 2015 after it had been inspected as clean. Mr O'Keefe investigated the matter and obtained records from the Hotel security system showing that the Claimant had used his master key to access Room Number 684 at the hotel on 9th May at 17:06. The room is on the 6th floor of the Hotel.

44. CCTV footage was also inspected which showed that the Claimant had entered the room at about this time.

The Incidents on 9th May: The Luggage Room

45. The Respondent obtained CCTV footage of the Hotel's luggage room on 9th May 2015 which showed the Claimant in the luggage room apparently inactive for a long period of time (circa 40 minutes). The footage also, shows the Claimant looking at a mobile phone which on one occasion was in his hand and on another was propped up on shelf for much of time. (pages 240-252).

The Investigation Meeting on 12th May 2015

46. Makeda Christie wrote to the Claimant on 7th May 2015 to invite him to an investigation meeting (page 222). No details were given of the subject of investigation other than stating that it related to "*several allegations that have been made relating to your conduct in the workplace*".

47. The Claimant attended the investigation meeting which was conducted by Makeda Christie on 12th May 2015. The Respondent has produced extensive notes of meeting (pages 223-229). I accept that these are accurate in all material respects.

48. Ms Christie began by questioning the Claimant regarding his apparent reluctance to attend Health & Safety Fire training. The Claimant's behaviour was evasive and obstructive. When asked a direct question as to whether he had ever refused to do the training he replied by saying "*I can get back to you on that*". The Claimant would not answer straightforward questions other than to say that he would get back to Ms Christie in writing. Despite asking several times, Ms Christie could not get a clear answer from the Claimant. The general impression given is that the Claimant did not want to do the training at that time, that there

was a reason for this but not one he was willing to disclose at the time (page 224).

49. Ms Christie moved on to question the Claimant about the altercation with the guest's driver on 4th April 2015 with particular emphasis on the letter of complaint. Again, the Claimant's responses were obstructive and evasive. However, it was clear that the Claimant accepted that he still had the letter in his possession. Again, the Claimant referred to coming back to the Respondent once he had taken legal advice from his solicitor. It was clear that the Claimant was unwilling to provide the letter (or a copy of it) to the Respondent at this stage. The Claimant also indicated that he considered the letter to be his property.

50. Ms Christie also questioned the Claimant regarding accessing the guest bedroom on 9th May. The claimant accepted that he had a master key to the rooms at the Hotel. He appeared to initially accept he had accessed the room but then backtracked and insisted on being shown evidence to prove that he did. Once again he was obstructive and evasive refusing to explain his reasons for being in the room.

51. The Claimant was then shown CCTV footage of the luggage room. When put to him that the device he could be seen holding was his phone he denied this and asserted that it was his phone charger. When asked to explain what he was doing his account was that he had just been handed a letter and might have spent the time been "*going through it in my head*".

52. At the conclusion of the meeting Ms Christie confirmed that the Claimant was suspended on full pay with immediate effect. This was confirmed to the Claimant in writing the same day (page 230).

53. After the investigation meeting on 12th May 2015 the Respondent obtained further evidence regarding some of the matters. With reference to the various issues that further evidence was as follows:

Access to Room 684

54. The Respondent obtained written statements from the following members of staff regarding Room 684:

54.1 Abdesiam Elbakkal (Floor Porter) confirmed that he visited room 684 on 9th May. When he left the room around 11.35am everything was in order and the TV was switched off (page 257); and

54.2 Roxana Lungu confirmed that she was working as a maid on 9th May. She went into room 684 at around 4:05pm to Hoover and dust and then left the room. When she left, everything was in order and the TV was switched off (page 255); and

54.3 Richard O'Keefe (Front Office Manager) gave a statement on 19th May 2015 to verify the security records which showed the Claimant accessing room 684 at 17:06 on 9th May (page 259). The information shows the time of

entry to the room but does not show the time spent in room (page 253 -254); and

54.4 Natalya Popova (Housekeeping Supervisor) gave a statement on 12th May 2015 to confirm she had returned to room 684 the following morning at 9:50am on 10th May and saw that the TV was on, the remote control was on the table, the magazines on the table had been moved and one of the armchairs was not in the correct position (page 256).

The Luggage Room

55. The Respondent obtained a written statement from Paulius Galgataicius (Luggage Porter) on 21st May 2015 in which he stated that at about 5:40pm on 9th May the Claimant was stood in the luggage room watching a football game on his mobile phone. He thought it was a game involving Man United. He also said that the Claimant was watching the match for a long time (he thought the entire first half of the match) (page 260).

The Disciplinary Hearing

56. On 21st May 2015 Mr Patel wrote to the Claimant to invite him to attend a disciplinary hearing on 29th May 2015 (pages 231-233). The letter complies with all aspects of the ACAS Code of Practice on Disciplinary Matters. The letter confirmed the time, date and venue of meeting, made it clear that the meeting was to be a disciplinary meeting and clearly set out the six instances of misconduct to be considered in such detail that the Claimant could be in no doubt what the allegations were. The letter was accompanied by 24 items of evidence relied on (including the statements referred to above and a copy of the CCTV footage), and confirmed the Claimant's right to be accompanied and that the Claimant would have the right to respond to the allegations at the hearing.

57. The Claimant did not attend the disciplinary hearing on 29th May 2015. It was at this point that the Claimant was signed off sick. He notified the Respondent by email on the morning of the disciplinary hearing (page 292). His subsequent Fitness to Work certificates indicates he suffered from back problems and stress and anxiety.

58. The disciplinary procedure was put on hold by the Respondent during the Claimant's absence which lasted for 12 months.

59. While the Claimant was off work there was substantial litigation between the parties. The Claimant instigated a claim in the Employment Tribunal against the Respondent. The claim included complaints of disability discrimination, detriments for Public Interest Disclosures and detriments for raising Health and Safety concerns. The case progressed to a Preliminary Hearing before Employment Judge Gay on 16th February 2016. In a reserved Judgment dated 10th March 2016 Employment Judge Gay dismissed the disability discrimination claim and made deposit orders in relation to many of the other claims. It is clear from the Judgment (and a subsequent Judgment and Reasons relating to a costs application) that the Claimant was found to be a dishonest witness. The Claimant subsequently withdrew the claims. The Respondent successfully pursued an application for costs against the Claimant to seek to recover circa £38,000 of

legal costs they had incurred in connection with the claim. However, that costs application was not heard until after the Claimant was dismissed.

60. The Claimant notified the Respondent that he was fit to return to work in May 2016. (page 332). The disciplinary hearing was reconvened for 27th May 2016 and the Claimant was notified of this in writing (page 333-335). The Claimant was given the opportunity to be accompanied to the meeting by a work colleague or union representative but attended alone. The Respondent has produced minutes of the meeting and the Claimant (who recorded the meeting) has produced a transcript. I have worked from the Claimant's transcript on the assumption that this is accurate as the accuracy of this was not challenged by the Respondent.

61. The start of the disciplinary hearing was delayed. The Claimant wanted to record the meeting. Mr Patel initially refused to allow this but after considerable delay he relented and agreed to the Claimant recording the meeting. Mr Patel checked that the Claimant had received and read the documents (page 364) and then went through the six disciplinary allegations one by one putting each to the Claimant and giving the Claimant an opportunity to respond. In summary, the Claimant's response to each allegation was as follows:

The Letter of Complaint

62. With regard to the letter of complaint the Claimant stated that he did not remove hotel property. He claimed that the letter was his property and not the Hotel's. This was notwithstanding that the Claimant accepted that the letter was on the Hotel's headed notepaper and was handed to the Claimant while he was on duty. The Claimant accepted that he still had the letter. It was clear that he was still unwilling to give it to the Respondent. The Claimant did however show the letter to Mr Patel who was therefore aware of the contents by this stage.

63. With regard to an allegation that the Claimant caused a potential breach of data protection rules by retaining the letter of complaint the Claimant stated that the letter contained no sensitive guest information (page 373). Mr Patel was able to verify this by reading the letter.

Fire Safety Training

64. With regard to the issue of fire safety training the Claimant repeatedly stated that he had never refused to carry out the training and that he merely raised concerns as to whether it was the correct training (page 373-374). He said that he would do the training (page 374) although he then qualified this by saying that he was probably not in the best frame of mind to do it. As the discussion developed the Claimant began making assertions that another employee, Kevin Downes, had carried out an earlier training session in the Claimant's name (page 376) and that this was, in the Claimant's words "*fraudulent*". The discussion as shown in the transcript of the meeting is confusing but my understanding is that the Claimant objected to Mr Downes having carried out the training in his name on a previous occasion and a record being made to confirm that the Claimant has completed the training when he hadn't. In the Claimant's mind, he believed that this "fraud" as he put it would be erased or covered up if he undertook further training. As the Claimant put it "I *didn't* carry out this training! So, at the end of

the day you are putting something fraudulently forward in front of me and then you want me to go and take up another fire training so that that wipes out your old training that you fraudulently done. We need to sort it out before we address the new training....” (page 379). The Claimant also indicated that he had problems with the training but did not clearly explain what those problems were. He was plainly very reluctant to undertake the training despite earlier indicating that he would take it. The impression given was that the Claimant required his perceived issues to be addressed before he would take the training.

Behaviour towards Laima

65. With regard to the Claimant’s behaviour toward Laima his position was short and direct. After some time spent digressing by addressing the semantic differences between the description of the allegation as “threatening behaviour” or “intimidating behaviour” the Claimant simply asserted that Laima’s statement was untrue. When asked to elaborate and to explain what parts of her statement were untrue the Claimant would not be drawn into this and merely repeated his assertion that the entire statement was untrue. The Claimant did not give his own account of events. He simply asserted that the incident did not take place (page 388).

Accessing Guest Bedroom 684

66. With regard to the allegation about accessing the guest bedroom the Claimant again began by deflecting the discussion by addressing the semantics of describing the room as a “guest bedroom” as opposed to his description as an “out of service” room. His was concerned that the Respondent’s terminology implied that the room was in use by a guest at the time as opposed to an unoccupied room. After some time spent addressing this the Claimant accepted that he had gone to the room and, for the first time, gave an explanation as to why he had done so. He confirmed that he had received a call from his wife regarding a water leak at home and that as mobile phone reception at the Hotel was patchy and he needed a quiet place to make the calls he had gone to the room to make emergency calls to his wife and plumbers to resolve the problem (page 392). Despite giving this explanation the Claimant then challenged the CCTV footage which was relied on to show his movements. He challenged the fact that the times shown on the footage indicated that he was in two places at once.

The Luggage Room

67. Finally, with regard to the luggage room incident the Claimant denied watching football on his mobile phone (page 399) He accepted that the footage showed that he was on his phone (page 400) but denied that the footage proved that he was viewing football on his phone. When the Claimant was referred to Paulius’ witness statement he initially pointed to the fact that the CCTV pictures did not show Paulius in the luggage room implying that Paulius was not there and that his statement was untrue (page 401).

68. At the conclusion of the meeting the Claimant handed over a letter which I understand to be a Subject Access Request for information from his personnel file.

69. I accept the evidence of Mr Patel that the Claimant was difficult and uncooperative from the outset of the meeting. This is apparent from the Claimant's own transcript of the meeting.

70. Mr Patel wrote to the Claimant on 2nd June 2016 to confirm that he would be on leave from 3rd to 13th June and that the outcome of the disciplinary would be given in the week commencing 13th June 2016 (p413).

71. Before reaching a decision, Mr Patel reviewed the documents again and made further enquiries including:

71.1 Mr Patel undertook some further investigation into matters raised by the Claimant at the disciplinary hearing. He investigated the Claimant's allegation that Mr Downes had carried out fire safety training on the Claimant's behalf. He obtained a written statement from Mr Downes (p421) in which Mr Downes denied the allegation; and

71.2 He spoke to Richard O'Keefe regarding the apparent discrepancy over the timing of the CCTV footage that the Claimant had raised. The explanation was that the time clocks on the different groups of cameras did differ by some 5-6 minutes.

71.3 Mr Patel also reviewed the CCTV footage of the luggage room again and identified that Paulius had been present in the room on occasions during the time that the Claimant was alleged to be watching football on his phone.

71.4 Mr Patel also checked if any football matches had been showing at the time the Claimant was in the hotel room and the luggage room. He established that Manchester United had played Crystal Palace that day. The kick of time was 17:30 and so the TV coverage would have started before this.

72. Mr Patel wrote to the Claimant on 17th June 2016 to confirm his conclusions and to confirm his decision to dismiss the Claimant with immediate effect. His conclusions in relation to the disciplinary allegations were:

72.1 Mr Patel concluded that the letter of complaint was hotel property and that the Claimant had knowingly removed this from the hotel and had refused to return it. He concluded that this amounted to Gross Misconduct. (p414); and

72.2 Mr Patel did not uphold the second allegation that the Claimant's conduct in relation to the letter caused a breach of data protection rules. He noted that the Claimant had shown him the letter at the disciplinary hearing. He was satisfied that the letter did not contain sensitive guest information; and

72.3 With regard to the fire safety training Mr Patel concluded that the Claimant had refused to complete the fire training on 27th and 28th April and again at the investigation meeting on 12th May 2015. He concluded that his refusal amounted to gross misconduct. (page 415). Mr Patel also referred in his letter to his further enquiry with Kevin Downes regarding the Claimant's allegations and enclosed a copy of Mr Downes statement with his letter to the Claimant; and

72.4 With regard to the Claimant's behaviour towards Laima Mr Patel accepted Laima's account of events and concluded that the Claimant's conduct amounted to "*wilful discourtesy*" and amounted to serious misconduct (page 417); and

72.5 With regard to accessing room 684 Mr Patel concluded that the Claimant had entered room 684 for 25 minutes on 9th May 2015 to watch TV without prior authorisation or good reason. This was considered to be gross misconduct.

72.6 Mr Patel also concluded that the Claimant had watched the football match on his mobile phone in the luggage room from 17:48 to 18:26 on the same day. This he considered to be serious misconduct. (page 418).

73. Mr Patel also concluded that the Claimant had shown no remorse and had not apologised for his actions and did not believe that he was at fault in any way. He had no confidence that the Claimant would act differently in future.

74. In the circumstances, Mr Patel concluded that the damage to trust and confidence resulting from the Claimant's actions was so severe that the appropriate sanction was immediate dismissal without notice or pay in lieu of notice (page 419).

75. Mr Patel concluded his letter by confirming that the Claimant had the right to appeal against his dismissal and that he should write to Mr Van Dam within 7 days if he wished to appeal.

76. The Claimant sent an intemperately worded email to Mr Van Dam on 22nd June 2016 (page 430) to appeal. His grounds for appeal were given as: "*You were intrusted [sic] by your solicitor to dismissed [sic] me, which meant the disciplinary hearing was a waste of time!*" and "*You also instructed your solicitor to bully, threaten and bribe me to terminate my contract which I declined!!*". This was a reference to the communications regarding the litigation between the parties (see paragraph 59 above). By this stage the Claimant's claims in the litigation had been dismissed or withdrawn but the Respondent's application for costs was outstanding.

77. Mr Van Dam replied by letter dated 24th June 2016 (page 431) to invite the Claimant to an appeal hearing on 13th July 2016. The letter also invited the Claimant to provide full grounds of appeal by expanding on his two points.

78. The Claimant responded by email on 24th June 2016. He confirmed that the Respondent should contact their own solicitor to obtain the details of his appeal but referred Mr Van Dam to an email dated 27th April 2016. This is an email passing between the parties legal representatives. That email was “without prejudice”. The Claimant also stated that he would not be available from 7th July to 7th October 2016 (inclusive) and asked for the appeal hearing to be brought forward. (page 432). No reason was given for his unavailability. I pursued this point with the Claimant when he gave evidence. When asked why he could not attend an appeal hearing for a full 3 month period he said that he was spending some time each day attending to the care needs of a close family member. It transpired that he needed to visit the family member twice a day, once in the morning and again in the afternoon or evening. It was clear to me that the Claimant could have asked for an appeal hearing to be arranged around those commitments and that contrary his statement to the Respondent he was in fact available to attend an appeal hearing in the three months concerned. The Respondent was however unaware of the Claimant’s reasons at the time.

79. Catherine Rake (the Respondent’s Director of HR) replied to the Claimant on behalf of Mr Van Dam on 29th June 2016 to refer to the fact that the email dated 27th April was sent on a without prejudice basis and so it could not, in the Respondent’s view, be a valid ground for appeal. No mention was made about the Claimant’s request to bring the appeal hearing forward (page 433). Ms Rake decided not to hear the Claimant’s appeal on the basis that his grounds for appeal relied on matters that were without prejudice. This was also confirmed in Ms Rake’s letter to the Claimant dated 29th June 2016 (p433).

Observations on the Witnesses: Credibility

80. Much of the evidence in this case is recorded in contemporaneous documents. However, there are inevitably areas where I must make an assessment of the credibility of the witnesses. I found the Claimant to be an unreliable witness. Throughout the disciplinary process he had been evasive and obstructive. To an extent that continued during the evidence before me. The Claimant was also prone to contradicting himself. For example, he surprisingly made the assertion during his evidence before me that he had never in fact entered room 684 at all when this flatly contradicted his evidence during the disciplinary proceedings. In contrast I found Mr Patel and Mr Van Dam to be reliable and consistent witnesses whose evidence I accept where there are key conflicts of evidence.

Conclusions: Unfair Dismissal

81. My conclusions in relation to the various issues are as follows:

82. Firstly, I find that the reason for dismissal was clearly misconduct. I am not persuaded by the Claimant’s assertion that his historical grievances or his litigation against the Respondent were factors in the dismissal (let alone the principal reason for dismissal). I accept the evidence of Mr Patel and Mr Van Dam that they were not swayed by such matters and had very limited knowledge indeed of the litigation. I accept the evidence of Mr Patel that he dismissed the

Claimant due to his conduct and therefore it follows from this that the reason for dismissal was a potentially fair reason within section 98 ERA.

83. Turning to the fairness of the dismissal, I conclude that the Respondent did hold a genuine belief that the Claimant had committed the misconduct concerned. I accept Mr Patel's evidence in this regard.

84. I conclude that the Respondent's belief was formed having followed a fair and thorough investigation and disciplinary process and one that complied with the ACAS Code of Practice in all respects. The investigation was particularly thorough and involved obtaining numerous witness statements, CCTV evidence, the details from the security system and the holding of an investigation meeting. I am satisfied that Mr Patel conducted the disciplinary process fairly and reasonably. He carefully reviewed the evidence. He gave the Claimant the opportunity to present his case. He pursued and investigated points raised by the Claimant before making a decision and reached a measured and carefully considered set of conclusions which were carefully and fully explained to the Claimant in the dismissal letter.

85. With regard to the Claimant's complaints about the procedure at the disciplinary stage I conclude:

85.1 I am not satisfied that the Respondent had omitted emails and CCTV footage he had requested. The Claimant has not satisfied me that there was any material evidence that was unreasonably omitted; and

85.2 I accept that prior to the investigation meeting on 12th May 2015 the Claimant was not given details of the specific subject matter of investigation. However, this is not required. The ACAS Code of Practice does not require the provision of details of the allegations at the investigation stage. Such details must be provided prior to the disciplinary hearing. The Respondent did so; and

85.3 I do not accept that the Claimant was not given an opportunity to respond to allegations. He was given extensive opportunities to do so during both the investigation and disciplinary stages. Further, the Claimant had ample opportunity to carry out his own investigations and has not identified anything that he says he could have done in this regard that the Respondent prevented him from doing; and

85.4 I do not accept that the Respondent's investigations were insufficient. They were particularly thorough. I repeat paragraph 84 above; and

85.5 I do not accept that the Respondent relied on evidence that was incorrect, fabricated or fraudulent. There were some minor errors in the witness statements such as incorrect dates or referring to the guest's driver as a guest. However, the Respondent acted reasonably in relying on the evidence and had no reason to believe that it was fabricated or fraudulent; and

85.6 The Respondent followed a fair disciplinary procedure that complied with all the essential requirements of the ACAS Code of Practice and the requirements of natural justice.

86. I was a little less impressed with the Respondent's conduct of the appeal process. The Respondent backed out of hearing the appeal a little too readily and perhaps approached matter of the without prejudice material over legalistically. It was open to them to simply agree to hold an appeal hearing and to make it clear to the Claimant that they would not consider grounds of appeal based on without prejudice material. Instead they simply indicated that they would not hear the appeal. Whilst the Respondent was quick to take this decision I remind myself that the band of reasonable responses test applies equally to the procedure followed as well as the substantive decision to dismiss. It is not, in my view, outside the band of reasonable responses for the Respondent to have taken this course of action. The Respondent did offer the Claimant the right to appeal, they did convene an appeal hearing and they did seek to get the Claimant to expand upon his grounds for appeal. I also take into account that the Claimant had effectively stated that he would not attend an appeal on 13th July in any event and was, once again being obstructive about the process by refusing to attend an appeal hearing for a full three month period. Whilst another employer might have done things differently the Respondent's conduct was not outside the band of reasonable responses open to a reasonable employer. In any event, even if the Respondent had held an appeal hearing I take the view that it is likely that the Claimant would not have attended and that the appeal would have correctly been rejected on the grounds raised.

87. I also considered whether the Respondent had reasonable grounds to conclude that the claimant was guilty of the misconduct concerned. There is nothing that would have led a reasonable employer to reach any other conclusion than that reached by Mr Patel. Taking each allegation that was upheld in turn:

87.1 It was entirely reasonable for Mr Patel to conclude that the letter of complaint was hotel property and that the Claimant had knowingly removed this from the hotel and refused to return it. The letter was clearly a letter of complaint about the Claimant's actions during the course of his work and was handed to the Claimant in his capacity as a representative of the Hotel while he was on duty in circumstances where the Claimant knew full well that it was a complaint about his conduct and was intended by the complainant to be acted upon by the Respondent. There was no sensible basis on which to conclude that it was anything other than the Hotel's property. It was plainly reasonable for Mr Patel to conclude that the Claimant's conduct in deliberately concealing and refusing to hand over the letter was a very serious act of misconduct and was dishonest; and

87.2 It was also reasonable for Mr Patel to conclude that the Claimant had refused to complete the fire training. The Claimant had been obstructive and evasive about this at the investigation and disciplinary stages. It was clear that he was not willing to undertake the training unless his perceived issues were resolved first. Mr Patel investigated those issues and reasonably concluded on the evidence that they were groundless and did not justify the

Claimant's refusal to comply with a reasonable, straightforward and important management instruction; and

87.3 With regard to the Claimant's behaviour toward Laima it was reasonable for Mr Patel to conclude that the Claimant's conduct amounted to "*wilful discourtesy*". There was a straightforward conflict of evidence between the Claimant and Laima as to what had happened. Mr Patel acted reasonably in preferring the evidence of Laima given that no reason was presented as to why she should fabricate the allegation and the Claimant had been evasive and dishonest in other respects. It was plainly within the band of reasonable responses for Mr Patel to prefer the evidence of Laima in the circumstances; and

87.4 With regard to accessing room 684 and the luggage room incident it was reasonable for Mr Patel to conclude from the evidence that the Claimant had entered room 684 for 25 minutes on 9th May 2015 to watch TV without prior authorisation or good reason. The evidence in this regard was overwhelming. It was also, in my view, reasonable for Mr Patel to reject the Claimant's assertion that he had not been watching TV in the room and had merely gone there to make an emergency call. This account was raised late in the day, it did not explain the evidence regarding disturbance of the room and it was in any event implausible that the Claimant would have gone up 6 floors to find a quiet room to make his calls when the Claimant could clearly have made the calls from the luggage room.

88. I also considered whether the sanction of dismissal was a reasonable sanction in the circumstances. In my view this was clearly a conclusion which a reasonable employer could have reached in the circumstances. Some of the misconduct would, in isolation have amounted to misconduct warranting dismissal. For example, the Claimant's behaviour regarding the letter of complaint and watching the football match. However, when all the misconduct was taken together and given the Claimant's total lack of insight and remorse about his behaviour, his dishonesty and his evasive and obstructive behaviour it was plainly within the band of reasonable responses for the Respondent to conclude that the appropriate sanction was summary dismissal for gross misconduct notwithstanding the fact that the Claimant had a clean disciplinary record.

89. For those reasons I conclude that the dismissal was fair and therefore it follows that the complaint of unfair dismissal fails. In the circumstances it is not necessary to determine the issues relating to remedy.

Conclusions: Wrongful Dismissal/Breach of Contract

90. I remind myself that the legal test I must apply to this claim is different. Here, I must reach my own findings as to what happened based on the evidence presented to me at the hearing. I am conscious that the only live evidence before me as to what happened on many of the dates in question came from the Claimant and I have only seen the Claimant's evidence on the key events tested through cross-examination. Although I have taken into account the written

statements from the Respondent's staff I have placed less weight on them when they have not given evidence before me under oath and I have not seen that evidence tested under cross-examination. Notwithstanding this I find as follows on the evidence before me:

- 90.1 I find that the Claimant did remove the complaint letter from the Hotel, that the letter was Hotel property and that the Claimant unreasonably refused to provide it to the Respondent when reasonably instructed to do so. In doing so I find that he was dishonestly trying to conceal from the Respondent the fact that there was a serious complaint against him. This is apparent from the contemporaneous documents and the transcripts/notes of the investigation and disciplinary hearing; and
- 90.2 I find that the Claimant did refuse to undertake the fire safety training. This is clear from the transcripts/notes of the investigation meeting and the disciplinary hearing; and
- 90.3 I find that the Claimant did behave towards Laima in the manner alleged. I reached this conclusion with some caution given that Laima did not give evidence before me and the Claimant asserted that her account and complaint was entirely false. However, I found the Claimant to be an unsatisfactory witness in many respects and there was no good reason for a work colleague to have made such serious false allegations. I consider that it is more likely than not that Laima's account as set out in her witness statement is true ; and
- 90.4 I find that the Claimant did enter bedroom 684 as alleged on 9th May and did spend time watching football. The evidence that the Claimant entered the room is compelling. The records of the room access clearly demonstrate this and there is no reason to doubt the accuracy of those records. Furthermore, the Claimant accepted that he had done so during the disciplinary process (even though he denied it when giving evidence before me). I must also reach conclusions as to what the Claimant did while in the room. I was not persuaded about the Claimant's reasons for entering the room. They were raised late in the day. They did not have a ring of truth about them. It is implausible that the Claimant would have gone up 6 floors to access the room when he could have made the call in the luggage room. Furthermore, the Claimant's explanation does not explain the disturbance to the room reported by the other employees. I find it more likely than not that the Claimant did access the room for the purposes of watching football; and
- 90.5 I also conclude that the Claimant did watch football in the luggage room as alleged. The stills from the CCTV footage clearly show him watching something on his mobile phone for a prolonged period of time. Indeed, the Claimant accepted that he had been looking at his phone after initially making out that the device was his phone charger. The only direct evidence available to me that it was football

that the Claimant was watching is the evidence of Paulius who did not give evidence before me. However, I found the Claimant to be such an unreliable witness that I accept that he was watching football in the luggage room as alleged.

91. I conclude that the Claimant's conduct was so serious as to amount to a fundamental breach of the duty of trust and confidence between employer and employee and that in the circumstances the Respondent was entitled to dismiss the Claimant without notice. It follows from this that the claim for wrongful dismissal also fails.

Employment Judge Mr A Spencer
21 March 2017