



EMPLOYMENT TRIBUNALS

Claimant: Mark Sturgess

Respondent: Cambridge Country Club Ltd

Heard at: Watford by video

On: 9 & 10 November 2023

Before: Employment Judge K Hunt

Representation

Claimant: Miss Webber

Respondent: Mr Hine

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.
2. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the compensatory award payable to the claimant by 20% in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992
3. The claimant caused or contributed to the dismissal by blameworthy conduct and it is just and equitable to reduce the basic and compensatory award payable to the claimant by 40%.
4. The complaint of wrongful dismissal in breach of contract in relation to notice pay is well-founded.
5. The complaint in respect of holiday pay is well-founded. The respondent failed to pay the claimant in accordance with regulation 14(2) and/or 16(1) of the Working Time Regulations 1998.
6. As the judgment deals with liability only, a notice of hearing to determine remedy and any case management orders will be sent separately.

REASONS

Introduction

1. The respondent operates as a Country Club in Cambridge offering a number of leisure facilities including golf and spa facilities to visitors and members. The claimant was employed by the respondent as a professional golfer from 17 May 2010 to 7 June 2022. The claimant was dismissed by the respondent for gross misconduct. The claimant brings claims for unfair dismissal, wrongful dismissal and unpaid holiday pay.

Claims and Issues

2. The claimant brings the following claims: Unfair Dismissal, Wrongful dismissal and Holiday Pay.

1. The list of issues were agreed at the outset of the hearing as follows:

Unfair Dismissal

- 3.1 Has the respondent shown the reason for dismissal?

The respondent relies on gross misconduct as the reason for dismissal in that the claimant (para 33 of Response):

- a. 'Made unwanted advances of a sexual nature to fellow employees.'
- b. 'Made unwanted statements in reference to a fellow employee having a resemblance to Jimmy Saville.'

- 3.2 Was the reason a potentially fair reason of a kind that can justify dismissal under sections 98(1) and (2) of the Employment Rights Act 1996?

- 3.3 If so, was the dismissal fair or unfair within section 98(4), and did the respondent in all respects act within the band of reasonable responses?

Following the test in BHS v Burchell test:

- a) Did the respondent genuinely believe the claimant was guilty of gross misconduct?
- b) Did the respondent hold that belief based on reasonable grounds?
- c) Did the respondent carry out a reasonable and sufficient investigation?
- d) Was the decision to dismiss a fair sanction i.e. within the range of reasonable responses for a reasonable employer?
- e) Was the process procedurally fair?

A key issue is whether the Claimant's conduct was reasonably categorised as gross misconduct by the respondent in accordance with the respondent's disciplinary policy?

Remedy

- 3.4 Does the claimant wish to be reinstated or re engaged?
If there is a compensatory award – how much should it be?
What financial losses has the dismissal caused?

Has the claimant taken reasonable steps to replace lost earnings?

Polkey

- 3.5 If the dismissal was procedurally unfair, does the Respondent show that if there had been a fair procedure the Claimant would have been dismissed in any event and when (Polkey v AE Dayton Services Limited [1988] ICR 142)?

Acas Code

- 3.6 The claimant seeks an uplift for failure to comply with Acas Code – did the respondent unreasonably fail to comply in respect of:
- Carrying out all necessary investigations (para 5)?
 - insufficient notice of the disciplinary meeting (para 11)?
 - if found the dismissal was for reasons other than in the dismissal letter, not informing the claimant of all of the reasons for dismissal (para 22)?

If so, is it just and equitable to increase any award payable to the claimant?

Contributory conduct

- 3.7 If the dismissal was unfair did the Claimant contribute by culpable or blameworthy conduct?

The respondent says he breached the terms of his suspension and contacted others to remove items from the pro shop.

Wrongful dismissal

- 3.8 The claimant was dismissed without notice. He brings a wrongful dismissal (breach of contract) claim in respect of his entitlement to 12 weeks' statutory notice. The respondent says that it was entitled to dismiss him without notice for his gross misconduct.

What was the claimant's notice period?

Was he paid for that notice period?

If not, was the claimant guilty of Gross Misconduct such that the respondent was entitled to dismiss without notice?

Holiday Pay – Working Time Regulations 1998

- 3.9 In submissions Ms Webber clarified the claimant's claim for holiday pay under the WTR. He claims the maximum of 1.6 weeks or 8 days that can be carried over by agreement from 2021, as agreed between the parties and claims 12 days accrued untaken holiday in 2022 to the point of dismissal on 7 June 2022, so 20 days in total.

Did the respondent fail to pay the claimant for annual leave that had accrued but was untaken when the claimant's employment ended?

Procedure and evidence heard

2. At the outset of the hearing, the parties agreed that the correct name of the respondent is Cambridge Country Club Ltd. The list of issues as outlined above was also agreed at the outset of hearing. I had before me

a bundle of documents of 168 pages. There were five witness statements and I heard oral evidence from the claimant and Ms Virgo for the claimant and for the respondent from Mr McDonald, who carried out the disciplinary investigation and dismissed the claimant, Mr Flanagan who was the appeal manager and Ms Violo-Hitch, Finance and HR Manager. I heard oral submissions from Mr Hine for the respondent and Miss Webber for the claimant.

Summary Findings of Fact

3. I set out the following findings of fact which I determined as relevant to the issues. I am not making findings of fact on all the points in dispute between the parties, only those that are relevant to the issues in the case as now identified.
4. The respondent operates as a Country Club in Cambridge offering a number of leisure facilities including golf and spa facilities to visitors and members.
5. The Claimant has been a Professional Golfers Association (PGA) Professional for 28 years, and was employed by the Respondent from 17 May 2010 to 7 June 2022 as a Golf Professional. The Claimant's duties included running the Golf Shop, providing golf lessons and repairing golfing equipment.
6. Prior to the disciplinary action taken in May 2022 leading to his dismissal on 7 June 2022, the claimant had a clean disciplinary record and had not been subject to any investigation or received any informal or formal warnings during his employment.

Grievances

7. On 26 April 2022 Ms Clark, then Front of House Manager, submitted a written grievance to Ms Violo-Hitch (at the time Accounts Assistant for the Respondent) relating to inappropriate comments made by the claimant, namely: on one occasion in the pro golf shop in front of other colleagues saying that she smelt so good he could 'lick [her] all over', and twice messaging her late at night at 11pm on social media. She also referred to him being unhelpful and rude to her the previous day, on 25 April 2022, relating to work matters.
8. On 11 May 2022 Ms Violo-Hitch, submitted a written grievance to Mr McDonald (General manager) relating to the Claimant's behaviour as being inappropriate and not very professional, referring to: a GDPR issue she raised with the claimant, resulting in an argument with him in the pro golf shop; and that on the evening of 10 May 2022, when she was having a drink in Spike's bar (which is a bar used by staff and members on the respondent's premises), the claimant made a loud comment across the bar about her and a member and that it was reported to her by another member that evening that the claimant had been making comments to others referring to her association with members and colleagues and her personal relationships.
9. On 12 May 2022 Ms Wilkins, receptionist for the respondent, submitted a formal complaint to Ms Ziolo-Hitch relating to inappropriate behaviour by the claimant in relation to: messages sent to her via facebook on 11

February 2022 insinuating that she was welcome round to his house for an evening; and that on the evening of 10 May 2022 when she was in Spike's Bar with her children, the claimant was sitting nearby with a colleague and members, speaking about liking children and making comments referring to Jimmy Saville that she felt he had taken it too far and that she generally felt uncomfortable due to his sexual innuendos, inappropriate jokes and comments about women.

10. All three grievances were brought to Mr McDonald's attention by Ms Viola-Hitch on 12 May 2022. Mr McDonald summarises the complaints raised at paragraphs 6, 7 and 8 of his witness statement and there were eight allegations in total under investigation that he put forward to the claimant. He also received screen shots of the messages between the claimant and Ms Wilkins (at page 64 of the bundle) and of the facebook message to Ms Clark (at page 65) from Ms Viola-Hitch on the same day.
11. Mr McDonald first stated in evidence at the hearing that he did not speak to the three individuals who raised the grievances, though later in evidence he said that once the allegations were raised, they gave him written statements and he spoke to them and spoke to the claimant. He did not have any notes of these conversations and confirmed that he did not take any notes. When challenged that if he had new information from these conversations, it was not provided to the claimant, he stated that there was no new information provided.

Suspension

12. On 20 May 2022, the claimant was suspended by Laura Stephens, Duty manager. He was given a letter confirming his suspension pending investigations into allegations of '*inappropriate conduct*'. In the letter, he was instructed "not to contact or to attempt to contact or influence anyone connected with the investigation in any way or to discuss this matter with any other employee or client". He was further advised that "if there is anyone whom you feel could provide a witness statement which would help in investigating the allegations against you, then please contact me and I will arrange for them to be interviewed."
13. On 23 May 2022, the claimant received a letter from Mr McDonald inviting him to a disciplinary investigation meeting. The letter set out the allegations under investigation as follows:
"It is alleged that whilst on duty, you made unwanted advances of a sexual nature to fellow employees. The company alleges that this allegation amounts to an assault of an indecent nature and, if substantiated in any way, represents a gross breach of trust and confidence and a breach of our duty of care to provide a safe working environment to our employees."
14. The letter was dated 23 March 2022 and referred to 24 March 2022 as the date of the investigation meeting. The claimant says this is evidence of an intention to get rid of him and the outcome of the disciplinary investigation being pre-determined. The respondent says this was a simple error. Having found that the grievances were brought to Mr McDonald's attention on 12 May 2023, on balance I do not find that such errors are evidence that dismissal was predetermined in March 2023 but rather that they show a lack attention to detail and of due care for the

process on Mr McDonald's part, as did similar errors later including dates in the letter inviting the claimant to the disciplinary hearing.

15. The claimant also contended that there was an intention to force him out as he had been requested and refused to take a pay cut and the respondent was in financial difficulties. Mr McDonald denied this. He agreed there had been discussions about changing the basis of the claimant's remuneration but that both parties had engaged in these discussions and the claimant put forward proposals that ultimately were not taken forward. He denied that there was any attempt to force out the claimant for refusing to take a pay cut and that in dismissing him, they had been without a professional golfer for several months and had lost income. I accept Mr McDonald's evidence on this.
16. On 24 May 2022, the claimant attended an investigation meeting with Mr McDonald. He was unaccompanied and there was no note taker accompanying Mr McDonald. The claimant was not provided with copies of the three written grievances or the screenshots of messages prior to or at the investigation meeting. The meeting was recorded and a transcript prepared by the Claimant's solicitors was accepted by both parties at pages 91-97 of the Bundle. A shorter transcript prepared by the Respondent was included at pages 77-90.
17. Mr McDonald explained to the claimant that he had received three complaints from different people about work related issues. He said the primary complaint was from Ms Clark and he related the allegation regarding the 'lick you all over' comment that she said had been made by him. The claimant denied that he had made the comment and stated that it was not true.
18. Mr McDonald related the second allegation made by Ms Clark that he had sent a couple of messages late at night on social media and that she had not responded but thought things had 'got out of hand'.
19. The claimant said when Ms Clark started he thought they were friends, and if talking about messages on social media, anyone could see them and there was nothing in that. He went on to say that he felt the complaint from Ms Clark was due to a clash of personalities 'business wise' and to a breakdown in their working relationship after Ms Clark was promoted, in relation to her trying to take charge in the shop and with the golf societies. He referred to emails of her getting involved in such matters and suggested to Mr McDonald that if he looked at the emails he would see that, as he was copied into them (emails dated 10 May 2022 pages 73-79).
20. Mr McDonald noted that the claimant acknowledged that there were messages and asked if he recalled saying anything. The claimant said 'no' and denied making the 'lick you all over' comment, asking if there was a witness or if he could tell him where it was and who was there. The claimant acknowledged complimenting Ms Clark once on the front of house staff looking smart and that she always looked smart and well turned out and was a great ambassador for the company. He referred to their working relationship breaking down and referred to an email when he had copied her in as the 'main receptionist' and that she had a go at him,

sending a reply pointing out that she was 'duty manager' (email dated 26 April 2022 page 70-71 of the bundle).

21. The claimant also said that if Mr McDonald interviewed other colleagues they would say there were tensions and he referred to Ms Virgo (who had recently left her job), who would speak to Mr McDonald privately.
22. The claimant suggested that as Ms Clark was leaving this was her way of 'having a go' at him. Mr McDonald said that he would be going back to speak to Ms Clark following this.
23. In his evidence at the hearing, Mr McDonald confirmed that he did not speak to Ms Clark after the investigation meeting. It was at this point in his evidence that he said he had spoken to all three individuals when the grievances were raised, as I refer to above. However, he confirmed that he never asked Ms Clark the date and time of the 'lick you all over' comment nor when it happened; he confirmed that he never spoke to any colleagues (as referred to in Ms Clark's written grievance), saying they were never identified; and he confirmed that he never asked her about them. He accepted that he had no independent evidence of this comment and that he did not independently verify it because he did not have the date and did not know who was on duty. He did not speak to Ms Clark after the investigation meeting because she had left by then.
24. Mr McDonald next related the complaint raised by Ms Wilkins regarding Spikes Bar and the allegation that the claimant made comments relating to Jimmy Saville that she said were inappropriate and that he was laughing with other people and it made her uncomfortable. The claimant recalled an occasion when he was in Spikes Bar with golf club members and friends and they were talking about the netflix programme about Jimmy Saville. He recalled that Joel Rickardson (another colleague) came to sit with them and asked if they were talking about Jimmy Saville and someone in the group cracked a joke about it but the claimant said that it was nothing to do with Ms Clark and was not aimed at her. He suggested that he could bring in witnesses to that.
25. Mr McDonald asked if he had ever messaged Ms Wilkins outside of work and the claimant confirmed that he had got messages and could provide these. He recalled an occasion in the bar when he had said he was going home for a takeaway and to watch a film and she said she would love to do that; that he had later sent a message saying she was always welcome to come round and when she did not reply, apologised if he had got the wrong idea and she said 'no need to apologise'.
26. He said it was just for a friendly drink or meal in response to their earlier conversation and that there was nothing out of hand and he felt there was nothing wrong with that. Under cross examination, the claimant maintained that he did not think it inappropriate for him as a senior employee to message a junior employee in this way, stating that Ms Wilkes socialised in the bar in social hours with management and with him and he did not see a problem with that.
27. Mr McDonald related the third grievance raised by Ms Violo-Hitch that the claimant had been saying she was involved with golf club members. The

claimant denied spreading rumours though said that he was aware of this as it was on CCTV and others had been talking about it.

28. Following the investigation meeting Mr McDonald confirmed he carried out further investigation into two points. Firstly, he looked at CCTV of Spikes Bar for the evening of 10 May 2022.
29. Secondly, on reviewing the CCTV, Mr McDonald identified a member, Mr Sloman, who was in the bar that evening. He called him and asked if he recalled that evening and asked him for a statement, which Mr Sloman provided in writing. Mr Sloman said in his witness statement (page 80 of the bundle) that the claimant was drinking with a group of friends on a table near Ms Wilkins and made a comment likening himself to Jimmy Saville which was targeted towards her.
30. Mr McDonald agreed that Mr Sloman was a friend of Ms Wilkins and when cross examined as to why he did not speak to others in the bar that evening, as seen in the CCTV footage, he said that he could not identify anyone else.
31. Mr McDonald said at the hearing that he spoke to Joel Rickardson about being in Spike's bar the day before the disciplinary hearing and that Joel did not recall whether or not he was in the bar and could neither confirm nor deny. Mr McDonald did not take any notes of this conversation.

Disciplinary Hearing

32. On 31 May 2022 Mr McDonald sent a letter to the claimant inviting him to a disciplinary hearing. The letter was dated 30 May 2022 and referred to a hearing on 31 May 2022. Mr McDonald accepted that the dates were wrong and explained that the letter was prepared and sent to him by their external HR advisers on 30 May 2022 and sent out by him to the claimant by email on 31 May 2022 at 1.19pm for a hearing to be held at 3pm the following day (on 1 June 2022).
33. The letter set out the allegations against the claimant as follows:

"It is alleged that on whilst on and off duty, you made unwanted advances of a sexual nature to fellow employees. The company alleges that this allegation amounts to an assault of an indecent nature and, if substantiated in any way, represents a gross breach of trust and confidence and a breach of our duty of care to provide a safe working environment to our employees."

"It is alleged that on 10th May 2022 whilst in the Spikes bar, you made unwanted statements in reference to a fellow employee having a resemblance to Jimmy Saville. The company alleges that this allegation amounts to bullying and harassment that has caused mental discomfort amounting to an assault and, if substantiated in any way, represents a gross breach of trust and confidence and a breach of our duty of care to provide a safe working environment to our employees."

"If these allegations are substantiated, we will regard them as gross misconduct. If you are unable to provide a satisfactory explanation, your employment may be terminated without notice."

34. The claimant was provided with copies of the original grievance statements from Ms Clark, Ms Wilkins and Ms Violo-Hitch and a statement from a member, Mr Sloman and abridged minutes of the investigation meeting largely excluding sections relating to the complaints raised by Ms Violo-Hitch (pages 87-90).
35. Also included was a screenshot of the messages with Ms Wilkins dated 11 February 2022 as follows:
Claimant: *"Have a good night out That invite of a film and takeaway is always there"*
Claimant: *"Oops"*
Ms Wilkins: *"Haha don't worry! X"*
Claimant: *"Sorry got wrong idea x"*
Ms Wilkins: *"No need to apologise x"*
36. And a screen shot of the facebook message to Ms Clark on 8 March 2022 at 22:58:
Claimant: *"I have a question How do you manage to look so good everyday"*
37. This was the first time that the claimant was provided with copies of the original complaints and the messages. The claimant was not provided with any CCTV footage.
38. The claimant was advised of his right to be accompanied and warned not to contact or influence anyone involved in the investigation but if there were any employees he felt could provide a witness statement he should advise Mr McDonald who would arrange for them to be interviewed. He was also warned that if he did not attend the disciplinary hearing without giving advance notice or good reason that would be treated as a separate act of misconduct.
39. The claimant emailed Mr McDonald at 15.13pm and given the short notice requested more time to prepare for the hearing and to give him enough notice to arrange for his PGA representative to accompany him. This request was denied by Mr McDonald, on the basis that he had given 24 hours' notice which was in line with the guidance and would not be able to bring a PGA representative only a member of staff or member of a trade union.
40. The claimant agreed to attend the meeting but noted that as the letter he received was dated 30 May 2022, it could have been sent to him the day before, giving him more time to prepare.
41. The disciplinary hearing went ahead on 1 June 2022 and was held by Mr McDonald and the claimant was unaccompanied. There was no note taker and the hearing was recorded. The transcript in the Bundle was subsequently prepared by the claimant's legal advisers for these proceedings.
42. Mr McDonald first addressed two messages sent to Ms Clark. The claimant explained that after becoming friends on facebook Ms Clark 'waved' at the claimant and he said 'hello how are you' or 'hi what are you

up to' and the second message (as detailed above), asking how she managed to look so good everyday. In his view the message contained no sexual innuendo and he was saying how good she looked because she was always well turned out. He did not think there was anything inappropriate about the messages that he sent. The claimant maintained this position when cross examined during the tribunal hearing.

43. Mr McDonald questioned him on the time that he sent the message pointing out that it was at 11pm at night and Ms Clark is married. The claimant explained that he got in from work at 8pm in the evening and would mess about and carry on working and to him it was not unusual to send a message at that time of night and that it was on facebook and on friends and she never said anything about it. Mr McDonald put it to him that Ms Clark told him that she brought it up with management because she felt uncomfortable. The claimant said there was no innuendo there.
44. Mr McDonald referred to the complaint about the 'lick you all over' comment and the claimant denied that he said this and again asked for details of the time and date. Mr McDonald asked if he was aware of making any other comments to Ms Clarke and the claimant responded 'never have, no'. He said that they used to chat as friends when she first came in. In evidence at the hearing the claimant said that had such a comment been made in front of witnesses in the shop, it would have been talked about and spread through the golf club and people would have known about it.
45. Mr McDonald asked about the message to Ms Wilkins inviting her for a takeaway and film. The claimant confirmed he sent it and again explained that it followed a conversation with her earlier in the evening from which he understood that she would like to go round for a takeaway and film. When he received no reply he acknowledged he had the wrong idea and he referred to her reply, 'no need to apologise' and said they left it there. He confirmed there were no further messages sent.
46. Mr McDonald pointed out they had a duty of care to staff to give them an environment where they could feel comfortable, happy, safe and that if you are in a management position and for whatever reason, if staff are made to feel uncomfortable, where the same thing happened previously a former colleague (previously mentioned by the claimant) sent inappropriate messages and was dismissed. In evidence at the hearing, he said the former colleague had resigned.
47. Mr McDonald referred to the complaint made by Ms Wilkins about comments made in Spikes Bar relating to Jimmy Saville. Based on the claimant's explanation at the investigation meeting that Joel was there when they spoke about Jimmy Saville and could confirm his explanation, Mr McDonald said that he had spoken to Joel who could not remember being there on the date and could neither confirm nor deny.
48. The claimant said that was because the conversation was not on the 10th May and that he had two witness statements that supported that. The claimant said that the date was wrong and that the conversation took place two weeks before that when they were talking about the netflix

documentary. That his witnesses could recall the conversation and would say they were there and that Joel was there.

49. Mr McDonald said that he had gone back and reviewed CCTV and that Joel was not there on 10th May. The claimant repeated that it was because it was not the 10th and the date was wrong. Mr McDonald noted that he had spoken to one of the members who was there (Mr Sloman) who confirmed it.
50. Mr McDonald asked the claimant where the claimant and his group were sitting on the date he recalled and where Ms Wilkins was sitting. The claimant confirmed she was sitting with her children and Ms Violo-Hitch, in the 'usual corner' on the left and that he and his group were sitting in the bar at a table near the booths, about a table and half away from Ms Wilkins. The claimant said that every Tuesday the members come down for the 'drinkers club' and they had signed statements and could confirm the dates and what happened and place Joel there and that they were talking about Jimmy Saville and that one of the guys had made a joke when Joel walked in. He reiterated that the respondent had the wrong date.
51. Mr McDonald responded that he had reviewed the CCTV and that the story did not stack up. He had received a grievance saying this is the time and date, he had reviewed the CCTV, spoken to someone he could see on the CCTV and said that they had confirmed the same thing to him, referring to the statement from Mr Sloman.
52. Mr McDonald confirmed that there was no need to go through the complaints raised by Ms Violo-Hitch. In his evidence at the hearing, he explained that he did not pursue the third complaint from Ms Violo-Hitch because there was not enough evidence and it was an instance of 'he said/she said', so he disregarded it.
53. They discussed the claimant's suggestion that he had already been replaced in his role by Mr Flannagan, who was in the Golf Pro shop and dealing with suppliers. Mr McDonald denied that was the case and that Mr Flannagan was appointed as the General manager and was in charge of the whole building including dealing with the shop. I accept his evidence on this.
54. Mr McDonald asked to go through the evidence that the claimant had brought with him to the hearing. The claimant submitted a written defence statement setting out his position on all of the complaints and referenced the emails with Ms Clark (referred to above) showing the breakdown in working relationship.
55. He also submitted statements from witnesses including Mr Arkesden (a member), Mr Virgo (a former member) and three statements from Ms Virgo (a former colleague and former member). Two related to the conversation in Spikes bar, with two witnesses recalling a conversation about Jimmy Saville in April 2022, when a comment was directed towards Joel Rickardson. Ms Virgo's second statement related to the deteriorating breakdown in working relationships between the claimant and herself with Ms Clark and two statements (Ms Virgo's and Mr Virgo's) relating to Ms

Violo-Hitch's complaints that were no longer under investigation. The claimant also said that he had three more statements to come because people were away which is why he wanted to [respect] the meeting.

56. The claimant provided copies to Mr McDonald, explaining their relevance to the different allegations (as above) and Mr McDonald read these during the hearing.
57. The claimant added in his defence that in 12 years of being there and 30 years of being a pro he had never had an allegation against him. Mr McDonald said that he would go away and check and the claimant offered that any of his witnesses would be willing to come forward. Mr McDonald stated in response that from his perspective, a witness statement from Ms Virgo or Mr Virgo, with whom the claimant was close, *'would be taken with a pinch of salt'*.
58. In closing the hearing, Mr McDonald said he would need to check the dates and that everything does check out and that he would try to do so that evening rather than it dragging on.
59. In his evidence at the hearing, Mr McDonald confirmed that he reviewed the CCTV footage of Spikes Bar again after the disciplinary hearing and looked at footage for Tuesday 12, 19 and 26 April and Tuesday 3 and 10 May. There is one still photo from the CCTV footage for each evening (at varying times between 18.00 and 19.00) included in the bundle at pages 67 and 68. Mr McDonald confirmed in evidence at the hearing that he had reviewed the footage of the whole evening in each case and confirmed that the CCTV did not contain any sound. Mr McDonald also confirmed in evidence that he did not speak to the claimant's witnesses.
60. A letter confirming the decision to dismiss the claimant with immediate effect and the reasons for this was sent by Mr McDonald to the claimant on 7 June 2022. The letter set out the decision with reference to the two allegations set out in invitation letter (above). The finding on the first allegation was that whilst on and off duty the claimant made *'unwanted advances of a sexual nature to fellow employees'* and that *'the communication taken place amounts to an assault of an indecent nature'* and represents *'a gross breach of trust and confidence and breach of our duty of care to provide a safe working environment to our employees.'*
61. On the second allegation the finding was that in Spikes Bar the claimant *'made unwanted statements in reference to a fellow colleague having a resemblance to Jimmy Saville'* and that this *'amounts to bullying and harassment that has caused mental discomfort amounting to an assault'* and represents *'a gross breach of trust and confidence and breach of our duty of care to provide a safe working environment to our employees.'*
62. The letter included specific findings on three allegations that were relied on as the reason for dismissal, and as confirmed by Mr McDonald in his evidence at the hearing, as follows:
 - i) the facebook message sent to Ms Clark at 11pm on 8 March 2022;
 - ii) the 'lick you all over' comment made to Ms Clark; and
 - iii) the behaviour of relating a fellow member of staff to Jimmy Saville.

63. Mr McDonald's findings on each of the grounds relied on, as explained in the letter were that:

i) the claimant did send the facebook message to Ms Clark at 11.30pm (though accepted at the hearing it was 11pm) and that although the claimant's explanation was that there was no innuendo, regardless of if the message contains any innuendo, the time it was sent and the content made a fellow employee feel uncomfortable;

ii) due to the fact that the above event took place and the claimant's lack of vision on what impact this could have on an individual and their personal relationship, it was his reasonable belief that the denied comment also took place;

ii) the claimant accepted the Jimmy Saville comment did take place but said that the date was incorrect; that he had reviewed the CCTV for the dates in April as suggested by the statements the claimant provided and that they were not in the place indicated and Ms Wilkins was not in the bar on any of those dates, which indicates that they refer to a separate incident or contain false and misleading information.

64. In conclusion Mr McDonald states in the letter that the claimant's conduct has resulted in a fundamental breach of his contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. He states the appropriate sanction for this breach is summary dismissal and that he has referred to the company's disciplinary procedure when making his decision, which does not permit recourse to a lesser disciplinary sanction. I find that Mr McDonald did not consider any lesser sanction and there was no evidence that he considered the claimant's mitigation mentioned at the disciplinary hearing regarding his length of service of 12 years and clean disciplinary record with no previous misconduct, when making his decision

65. At the hearing, in relation to the 'lick you' comment, Mr McDonald accepted that there was no independent evidence and this was also a case of 'he said/she said' and in pursuing it nonetheless said there was evidence both ways in that the claimant had accepted that comments had been made and there was the message on facebook.

66. When first put to him that the claimant was dismissed for making the 'lick you all over' comment, Mr McDonald said he was not dismissed for that comment but for making 'unwanted advances'. When cross examined on the findings in the dismissal letter that there were two allegations by Ms Clark relied on and that Mr McDonald found the two complaints were well founded, he then agreed stating that the claimant admitted them. He qualified his evidence accepting that the claimant denied the specific comment, that is he did not use that exact wording but that he had admitted to making comments about Ms Clark's appearance.

67. Mr McDonald accepted and I find that there were several matters he never asked about or put to Ms Clark including the claimant's questions on the time and date of the comment and witnesses to it; and the reason for the breakdown in their working relationship and the timing of raising her

complaint. He accepted that the grievance was raised on the same day that the claimant referred to Ms Clark in an email as 'the receptionist' and that by the time the grievance was raised by Ms Clark their working relationship was not good. He said he took into account that their relationship was poor but did not ask her about this. He believed it was a genuine grievance.

68. Mr McDonald accepted in evidence at the hearing when referred to the company disciplinary policy (pages 59 and 60) that if considering the facebook message to Ms Clark alone, it would not meet the threshold of gross misconduct. He confirmed that he would have regarded it as serious misconduct because of the time of the message and content and that it would be a level down as an isolated incident. Under the respondent's disciplinary policy the sanction for which is a final written warning. He stated that in relation to the disciplinary policy it was his view that sexual harassment falls within gross misconduct, because safe-guarding staff is one of the most important obligations that you have as an employer.
69. It was put to Mr McDonald in cross examination that he had received and investigated a complaint about the claimant likening himself to Jimmy Saville and dismissed the claimant for a different complaint of likening a fellow employee to Jimmy Saville.
70. Mr McDonald accepted that there were two different comments and that Mr Sloman's statement did not align with the reason for dismissal. His reasoning was that the claimant said in his statement that he was not referring to himself but to a colleague, so in his view he was talking about himself or Joel as like Jimmy Saville and the intent was the same and that given the claimant had such statements from his own peers, Mr McDonald was inclined to go with that interpretation. I find that based on the written evidence in the bundle the claimant did not say in his statement or during the disciplinary investigation that he referred to his colleague but that one of the group he was with referred to Joel.
71. It was put to Mr McDonald that there were multiple accounts saying something slightly different. Mr McDonald disagreed that there were differences between Ms Wilkins' and Mr Sloman's account. He accepted there were variations in relation to the claimant's evidence that a comment at Joel's expense was made when the 'drinking club' met on a Tuesday in April. In his view this showed the frequency that Jimmy Saville was brought up, and that 'yes, someone made a comment about Joel' but he did not think it was relevant because it was another incident. In his view the claimant's witnesses were not talking about the same thing and there was clearly more than one occasion the drinking club were talking about Jimmy Saville.
72. The claimant denied in evidence that he and the drinking club spoke frequently about Jimmy Saville and denied that they did so on 10 May 2022, and that the conversation about Jimmy Saville and comment about Joel occurred on 12 April 2022, when the drinking club including Joel met in Spike's bar, as could be seen on the CCTV footage.
73. In his witness statement Mr McDonald stated that the claimant's witnesses were not independent and were good friends of the claimant. In his

evidence at the hearing he denied that he took into account evidence from Mr Sloman as a friend of Ms Wilkins but not of the claimant's friends, saying that he took both sets of evidence at face value, which is why he went back and watched hours of CCTV footage for earlier dates in April, as suggested by the claimant's witnesses. He stated that the reason he did not place any weight on their evidence was because it was factually incorrect.

74. On it being put to him that it was the claimant's case that all the relevant people were in the bar on 12 April 2022 and that Ms Wilkins was there that evening, Mr McDonald disagreed. In reference to Ms Virgo's statement provided by the claimant in which she said that Ms Wilkins was sitting across the bar when the conversation happened in April, Mr McDonald said that he had watched the CCTV and Ms Wilkins was not there and Mr Sloman was not there on the evening in April. Therefore he could factually disprove the statements and that was why they carried no weight and he was not saying they were false but that he believed that they referred to another occasion on 12 April 2022 when Joel walked into the bar, rather than to 10 May 2022.
75. It was put to Mr McDonald that in her grievance statement, Ms Violo-Hitch said that she was in Spike's bar after work on 10 May 2022 and when asked whether he ever asked her about it, he said in his evidence: *'no because she was not there at the time the conversation took place, so whilst there earlier [he] did not believe she was there when the comment was made'*.
76. In giving her evidence at the hearing, Ms Violo-Hitch confirmed with reference to the CCTV footage of 10 May 2022 that she was the person sitting at the table with Ms Wilkins and her children. When asked about whether the claimant made any comments, she said it was a reference to him likening himself to Jimmy Saville and said that she was in the room when the comment was made.
77. When asked if Mr McDonald asked her any questions about this, she said that once Ms Wilkins' statement was given he did.
78. There is a conflict of evidence on this point. Ms Violo-Hitch's evidence that she was asked questions about this by Mr McDonald, is directly contradicted by Mr McDonald's evidence.
79. In raising her grievance, Ms Wilkins submitted her complaint to Ms Violo-Hitch, which Ms Violo-Hitch made reference to in her witness statement in these proceedings. In her witness statement, Ms Violo-Hitch also referred to her own grievance and alleged comments made towards or about her by the claimant on 10 May 2022 in Spike's bar and to other comments made by the claimant that evening about staff in general. She did not make reference to Ms Wilkins nor to any comments relating to Jimmy Saville made by the claimant that same evening nor to being asked about this by Mr McDonald. The first time she mentioned it was in giving evidence at the hearing.
80. Given the lack of any notes taken by Mr McDonald of any conversations he had during the investigation including this one and the number of

matters about which he failed to question the individual complainants, I find on balance that his evidence on this issue is consistent with his not conducting interviews or taking any witness statements during the investigation and that neither did he ask Ms Violo-Hitch about her presence in the bar on 10 May 2022 or about the Jimmy Saville comment and that her evidence on this point is unreliable.

Appeal

81. The dismissal letter again contained errors in dates, referring to the disciplinary hearing held on 2 June (rather than 1 June) and referred to appealing *'within two of receiving this letter'*. On querying this the claimant was advised he had two days to appeal.
82. The claimant appealed by letter dated 10 June 2022. The appeal hearing was held on 16 June 2022 and chaired by Mr Flannagan, who was accompanied by a note taker. On inviting him to the appeal hearing, Mr Flannagan summarised the grounds of appeal in the invitation letter as follows:
- *"You feel the time the message was stated as wrong was incorrect and that it is not unreasonable to send messages at the time in which the message was sent"*
 - *Amanda was not uncomfortable from the message as no innuendo was involved but it was in fact work differences that eroded the working relationship*
 - *The claims of "licking her all over" are fabricated*
 - *The comment about Jimmy Saville was made but was not made by yourself but one of your group and that evidence provided by yourself supports this"*
83. The respondent did not take or produce any notes taken during the appeal hearing and as the claimant had not been provided with notes of the disciplinary hearing, he recorded the meeting and a transcript was provided for these proceedings (pages 135 to 147).
84. At the appeal hearing, Mr Flannagan confirmed he was there to hear the reasons for the claimant's appeal as summarised in the invitation letter and referred to the charges set out in the disciplinary outcome letter. The claimant set out his position on the three allegations found against him in the disciplinary letter and his grounds of appeal as summarised by Mr Flannagan above.
85. He referred to his evidence produced at the disciplinary hearing and Mr Flannagan confirmed he had copies of this evidence and had read it. The claimant also produced a further witness statement from Mr Roitman (a member) in relation to the conversation relating to Jimmy Saville in Spikes bar, which Mr Roitman said did not take place on 10 May 2023.
86. Mr Flannagan asked if he was satisfied with the process and procedure and the claimant pointed out the several errors in letters sent to him, that he was not informed of the allegations against him prior to the first investigation meeting so was unable to prepare and was given only one

day's notice for the disciplinary hearing and was not given enough time, with 24 hours being the bare minimum.

87. He also made the point that in relation to Ms Wilkins' allegation that there was a contradiction in what was said and the reason for the dismissal, that Ms Wilkins said one thing and he was dismissed for another thing. He further pointed out that his witnesses confirmed that the date is wrong and that he never said anything and that despite the finding in the dismissal letter, that he has not admitted to making any comment and yet he was dismissed for doing so, so he felt that his witness statements had been cast aside and not taken into account.
88. On 20 June 2022 a letter confirming the outcome of the appeal was sent to the claimant. Mr Flannagan confirmed that having given the matter full consideration, the original decision taken by Mr McDonald was upheld.
89. The claimant states in his witness statement that in previous years he was usually paid holiday he was owed but was unable to take holiday in 2021 and was not paid for it due to cash flow issues and it was agreed he could carry it forward. He claims he is also owed holiday accrued in 2022. The claimant was not challenged on this in cross examination. Mr McDonald states in his witness statement that the claimant was paid for all holiday up to the date of termination. There was no evidence before me in the bundle of records for holiday taken by the claimant in 2021 or 2022 or of being paid for all holiday owed to him up to the date of termination.

Findings for purpose of wrongful dismissal

90. For the purposes of the wrongful dismissal/breach of contract claim, I must consider my own view.
91. I find that the claimant sent a facebook message to Ms Clark, a work colleague and that the timing and content of the email, was inappropriate. I find that the claimant's explanation that he meant no innuendo and was referencing that she was well turned out and smart at work did not mitigate or excuse his conduct in sending a private message late at night. I further find that his inability or unwillingness to accept or acknowledge that receiving such a message, notwithstanding his intention, from a senior colleague late at night whilst at home, may be inappropriate and make Ms Clark feel uncomfortable, exacerbates the offence.
92. I am not persuaded on the basis of the evidence from the investigation and before me in the tribunal and do not find that the claimant made the comment alleged in the pro golf shop to Ms Clark. There was no other documentary or witness evidence from the disciplinary investigation to support Ms Clark's grievance statement and she was not called as a witness at the tribunal. The claimant strongly denied making the comment at the time and in the tribunal. I will discuss this further in my conclusions.
93. I am also not persuaded on the evidence heard and do not find that the claimant made a comment referring to Joel Rickardson as resembling Jimmy Saville in Spike's Bar on 10 May 2022. I find that the evidence from the investigation and before me in the tribunal did not support this for the reasons set out in my findings above. I will discuss this further in my conclusions.

Law

Unfair dismissal

94. The relevant provisions in relation to an unfair dismissal claim are found in **section 98 of the Employment Rights Act 1996**. Under s.98 (2)(b) a reason which 'relates to the conduct of the employee' is a potentially fair reason for dismissal. The question of whether it is fair or unfair appears in section 98(4):
"*...The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
(a) 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
(b) shall be determined in accordance with equity and the substantial merits of the case."
95. In **British Home Stores v Burchell [1980] ICR 303**, Mr Justice Arnold identified three considerations which arise in misconduct cases. Firstly, did the employer have a genuine belief that the employee was guilty of the misconduct in question? Secondly, was that belief based on reasonable grounds? Thirdly, had that belief been formed following such investigation into the matter as was reasonable in all the circumstances? This is commonly referred to as the 'Burchell test'.
96. If in applying the Burchell test the answer to the questions posed is yes, the Tribunal must still determine whether the decision of the employer to dismiss the employee rather than impose a different disciplinary sanction (or no sanction at all) was a reasonable one. The Tribunal must not substitute its own view for that of the employer.
97. In considering the fairness of the dismissal the appeal should be treated as part and parcel of the dismissal process: **Taylor v OCS Group Limited [2006] ICR 1602**.
98. In the employment context "gross misconduct" is commonly used as shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, however, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances: **Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854**.
99. Exactly what type of behaviour amounts to gross misconduct will depend upon the facts of the individual case.
100. It follows that in the statutory context of section 98(4), even if the Burchell test is met, the Tribunal must still consider the following:

- a. Whether the employer acted within the band of reasonable responses in choosing to characterise the misconduct as gross misconduct, and if so
- b. Whether the employer acted within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal.

101. On the latter question the employee's length of service and disciplinary record are relevant (**Trusthouse Forte (Catering) Limited v Adonis [1984] IRLR 382**) as well as the attitude of the employee to his conduct (**Paul v East Surrey District Health Authority [1995] IRLR 305**).

Polkey

102. I must also consider any procedural unfairness and if I conclude that the claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in *Polkey v AE Dayton Services Ltd [1987] UKHL 8*.

103. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: *Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 at para 24*

Contributory Fault

104. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

105. Section 122(2) provides as follows: "*Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.*"

106. Section 123(6) then provides that: "*Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*"

107. In the case of s.123 this is a mandatory duty for the tribunal to consider even if the issue is not expressly raised by the parties (*Swallow Security Services Ltd v Millicent UKEAT/0279/08*). The conduct does not need to amount to a breach of contract or gross misconduct, the three factors that must be present are that the conduct must be culpable or blameworthy, it must have actually caused or contributed to the dismissal and the reduction must be just and equitable (*Nelson v BBC(No.2) [1979] IRLR 346 (CA)*)

ACAS uplift

108. The Claimant alleges breaches of the ACAS Code – if found, the question arises whether any adjustment should be made under section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 for failure to follow the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures. A mere failure to follow the Acas Code will not be sufficient, it must be unreasonable. If so, the tribunal must consider whether it is just and equitable to award an uplift and if so by what percentage up to 25%.

Wrongful Dismissal

109. I must decide if the claimant committed an act of gross misconduct entitling it to dismiss without notice. In distinction to the claimant's claim of unfair dismissal, where the focus is on the reasonableness of the respondent's decisions, and it is immaterial what decision I would myself have made about the claimant's conduct, I must decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.
110. In [Briscoe v Lubrizol Ltd 2002 IRLR 607, CA](#), the Court of Appeal approved the test set out in [Neary and anor v Dean of Westminster 1999 IRLR 288](#), Special Commissioner (Westminster Abbey), where Lord Jauncey asserted that the conduct '*must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment*'. The Court of Appeal in Briscoe stressed that the employee's conduct should be viewed objectively, and so an employee can repudiate the contract even without an intention to do so.
111. A court or tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee.
112. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice.
113. Since the question of whether an employee is in repudiatory breach is a matter of fact, the employer's motivation for wanting to summarily dismiss is effectively irrelevant. In [Williams v Leeds United Football Club 2015 IRLR 383, QBD](#),
114. The issue of whether misconduct by an employee amounts to a repudiation may turn on the terms of his or her contract of employment. In [Dietmann v Brent London Borough Council 1988 ICR 842, CA](#),

Holiday Pay – Working Time Regulations 1998

115. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends.
116. Reg 13 and 13A provide for 5.6 weeks leave per annum. Reg 14 provides for payment of accrued untaken leave payable on termination.

CONCLUSIONS

117. I will address each of the agreed issues in the case separately, but each conclusion has been drawn having taken account of the whole of the evidence in the case, both written and oral.

Unfair Dismissal

118. I remind myself it is not for the Tribunal to substitute its own view for that of the respondent. I must satisfy myself that the dismissal fell within the range of reasonable responses.

Turning to the list of issues:

Has the Respondent shown the reason for dismissal?

119. It is for the respondent to establish the reason for dismissal. In its response to the claim, the respondent says the reason for dismissal is gross misconduct for '*unwanted advances of a sexual nature to fellow employees*' and '*unwanted statements in reference to a fellow colleague having a resemblance to Jimmy Saville*'. The respondent relies on three allegations discussed at the disciplinary hearing and set out in the dismissal letter.

120. There was a 4th allegation discussed in the disciplinary hearing regarding the message sent to Ms Wilkins in February 2022, which was part of the investigation but was not cited in the dismissal letter as a reason for dismissal. Regarding the fourth allegation Mr McDonald conceded and I conclude that the reason for dismissal was the claimant's conduct based on the three allegations set out in the dismissal letter, which the respondent categorised as gross misconduct.

121. The claimant had suggested at the time and in his claim that he believed his dismissal was pre-determined and that there was an intention to force him out, as he had refused to take a pay cut and the respondent had financial difficulties. I do not accept this assertion and accept that there are no other reasons for dismissal other than conduct.

Was the reason a potentially fair reason of a kind that can justify dismissal under sections 98(1) and (2) of the Employment Rights Act 1996 (ERA)?

122. Conduct is a potentially fair reason for dismissal under s.98(2)(b) ERA.

If so, was the dismissal fair or unfair within section 98(4), and did the respondent in all respects act within the band of reasonable responses?

123. Following the test in BHS v Burchell test, I must answer the following questions:

Did the Respondent genuinely believe the Claimant was guilty of gross misconduct?

124. I conclude from the written evidence and oral evidence at the hearing that Mr McDonald considered the three allegations to be serious and categorised them as unwanted conduct that was sexual in nature and unwanted statements re Jimmy Saville as bullying and harassment and he also referred in evidence to sexual harassment. I find that considering them as such, he believed that the claimant's conduct amounted to gross misconduct because on his view the safe-guarding of staff is a key obligation of an employer.

Did the Respondent hold that belief based on reasonable grounds?

125. In considering whether the respondent's belief that the claimant was guilty of gross misconduct was based on reasonable grounds, I will take each of the three allegations on which Mr McDonald relied in turn:

Spikes Bar on 10 May 2022 – *'making unwanted statements in reference to a fellow colleague resembling Jimmy Saville'*

126. The original allegation by Ms Wilkins, as put to the claimant at the disciplinary investigation meeting, was that on 10 May 2022 in Spike's Bar the claimant was speaking about himself and made comments about Jimmy Saville. This was supported by a statement obtained by Mr McDonald from Mr Sloman, of the claimant likening himself to Jimmy Saville.

127. The evidence of comments about Jimmy Saville being made in reference to a fellow employee came from the claimant during the disciplinary investigation meeting; he recalled that comments were made to Joel Rickardson by one of the 'drinking club' members and that this did not happen on 10 May 2022 but on 12 April 2022. This was subsequently supported by two witness statements provided by the claimant at the disciplinary hearing and a third at the appeal hearing.

128. Throughout the investigation the claimant denied that he made comments likening himself or a colleague to Jimmy Saville, saying it was a member of the group who referred to a colleague (Joel Rickardson) on 12 April 2022 during the netflix conversation. He also denied that the group were talking about Jimmy Saville again on 10 May 2023, which was corroborated by Ms Virgo.

129. In inviting the claimant to the disciplinary hearing, the allegation regarding Spike's Bar was set out in the invitation letter for the first time as making 'unwanted comments with reference to a fellow employee resembling Jimmy Saville', and later repeated as the reason for dismissal. It was submitted by Ms Webber that the respondent investigated one complaint but dismissed the claimant for another. Mr McDonald's reasoning for this was that as the evidence from the claimant and the claimant's peers was that Jimmy Saville was discussed with reference to a colleague but not himself, he considered the intent was the same and so was 'inclined to go with that interpretation'.

130. Mr McDonald was equally clear that he considered that the claimant's statement and his witnesses' statements, were evidence that Jimmy Saville was discussed on more than one occasion. By contrast, therefore, he placed no weight on their witness statements, as they were

'factually incorrect' and related to an incident on 12 April 2022 and in his view were not relevant to the complaint made by Ms Wilkins on 10 May 2022.

131. Taking account of all of the evidence, I conclude that Mr McDonald's findings and belief that the claimant was guilty of making unwanted statements in reference to a fellow employee resembling Jimmy Saville on 10 May 2022 in the presence of Ms Wilkins, which was bullying and harassment, was not based on reasonable grounds for the reasons that follow.
132. The evidence relied on Mr McDonald from Mr Sloman does not support his finding, referring as it does to the claimant likening himself to Jimmy Saville; by his own admission he placed no weight on the evidence of the claimant's witnesses as it related to another occasion on 12 April 2022 and so he considered it not relevant to Ms Wilkins' complaint on 10 May; yet he relied on their 'interpretation' of the conversation on 12 April 2022 as the reason for dismissal relating to the complaint about events on 10 May 2022; by his further admission he satisfied himself from the CCTV footage that Ms Wilkins and her children were not in Spike's bar on 12 April 2022 and that Joel Rickardson (about whom the comment was made) was not present in Spike's bar on 10 May 2022; and he did not interview anyone else in Spike's Bar on 10 May 2022 (as seen in CCTV footage) including Ms Violo-Hitch whom he acknowledged was in the bar that evening.
133. I have carefully considered Mr McDonald's explanation that whether the claimant was likening himself or a colleague to Jimmy Saville the intent was the same, as his explanation for adopting their interpretation in finding against the claimant in relation to Ms Wilkins' complaint. I have considered whether this was a reasonable ground to sustain a belief in the claimant's gross misconduct as detailed in the dismissal letter, given the evidence before him. Given the inconsistencies and contradictions in Mr McDonald's approach to and weighing of the complaint and the evidence, I conclude that this was not sufficient reason to sustain a belief on reasonable grounds that the claimant was guilty of the allegation of gross misconduct set out in the dismissal letter.

facebook message sent to Ms Clark at 11pm on 8 March 2022

134. It was not in dispute that the claimant sent the facebook message commenting on her appearance to Ms Clark at approximately 11pm at night. Ms Clark was married, the message was sent late at night and it was Mr McDonald's view that she brought it up with management because she felt uncomfortable.
135. The claimant did not accept that the content or timing of the message to a work colleague was inappropriate, a position he maintained at the hearing. Mr McDonald's reason for finding against the claimant on this issue was that whether or not the message contained any innuendo, the timing and content of the message made Ms Clark uncomfortable.

136. I conclude that Mr McDonald's finding that the content and timing of the message made Ms Clark uncomfortable and amounted to misconduct was based on reasonable grounds.

137. Mr McDonald accepted that if looking at this allegation alone, he would consider it a matter of serious rather than gross misconduct. I shall return to this issue below.

'You smell so good I could lick you all over' comment made to Ms Clark – *'unwanted advances of a sexual nature'*

138. In the dismissal letter Mr McDonald's reason for finding that this comment took place was due to the facebook message sent by the claimant and the lack of vision shown by the claimant in understanding the impact of sending that message on Ms Clark's personal relationship.

139. In the hearing Mr McDonald also gave as grounds for this finding that the claimant had admitted to making comments on Ms Clark's appearance but not to using those exact words.

140. During the investigation and as he maintained at the tribunal hearing, the claimant had admitted to complimenting Ms Clark on the front of house staff being smart and that she was always well turned out. He denied that he made the comment 'lick you all over' and I find that he repeatedly asked Mr McDonald for the time and date it took place and any witnesses.

141. At the disciplinary investigation meeting, Mr McDonald cited Ms Clark's grievance as being the primary complaint. It was accepted by Ms Webber in her submission that this was a very serious allegation that if proven, would be an act of sexual harassment. It was further submitted that being denied by the claimant, such a serious allegation would need a strong basis for the respondent to conclude it did occur.

142. Mr McDonald accepted that he had no independent evidence in support of this allegation and I find that despite stating that he would follow up with Ms Clark after the disciplinary investigation meeting, Mr McDonald failed to do so. I have found that he never asked Ms Clark about the date and time the comment was made and never asked about the colleagues who were witness to it, which she had stated in her written complaint and he was unable to establish who was on duty at the time, as he did not know or enquire about the date.

143. I find that the failure to question Ms Clark, either on receiving the grievance, to ask about the time and date the alleged comment took place or to make enquiries about witnesses mentioned in her written statement, and the failure to follow up after the disciplinary investigation meeting with the claimant, was not within the range of reasonable responses.

144. I have reminded myself that I must not substitute my own view for that of the respondent and have carefully considered whether in the absence of such initial or further investigations on such a serious allegation, Mr McDonald's belief based on the facebook message and previous comments on Ms Clark's appearance in being smart and well

turned out, was nonetheless reasonable grounds for finding the claimant guilty of making the 'lick you all over' comment. I conclude that it was not and that Mr McDonald's belief that the claimant was guilty of the misconduct was not based on reasonable grounds in the circumstances, as outlined in my findings above and on the evidence heard.

Did the respondent carry out a reasonable and sufficient investigation?

145. Based on my findings above and the written and oral evidence heard, I conclude that the respondent did not carry out a reasonable and sufficient investigation.
146. I have made findings above that there are a number of failings in the investigation. Mr McDonald failed to interview or re-interview the complainants about details of their complaints, including on questions and representations made by the claimant during the disciplinary investigation. He failed to take notes of conversations he said he had on receiving the original grievances and of his conversations with Mr Sloman and Joel Rickardson.
147. He did not interview other potential witnesses at the time, such as Ms Violo-Hitch regarding the Spike's bar 'Jimmy Saville' complaint and did not interview the claimant's witnesses or others in the bar on 10 May 2022 including Ms Virgo, who was a former employee and willing to speak to him. Neither did he follow up on identifying or interviewing any potential witnesses in relation to the 'lick you all over' comment reported to take place in the pro golf shop in front of work colleagues.
148. He failed to follow up on the claimant's explanation of the reason for the breakdown in the working relationship with Ms Clark due to work differences or on emails suggested by the claimant as evidence of this suggested at the disciplinary investigation meeting.
149. I have carefully weighed whether Mr McDonald's investigation was nonetheless reasonable and sufficient and that it may be within the range of reasonable responses, even if not every point is investigated. I conclude that in the circumstances it was not. The allegations were categorised as gross misconduct by the respondent with serious consequences for the claimant. There were some basic yet fundamental details of the allegations against the claimant, that he did not make enquiries about or further investigate the details including the time and date and potential witnesses of the 'lick you' comment.
150. The appeal as part of the overall process did not address any of these failings as no further investigation was carried out for the purposes of the appeal.

Was the process procedurally fair?

151. In considering whether the process was procedurally fair overall, I have found that: there were numerous errors in correspondence throughout the disciplinary investigation and process; there were no notes taken or provided to the claimant of any interviews or conversations with

witnesses; the claimant was not given access to or provided with any CCTV footage despite asking; the claimant was given one day's notice of the disciplinary hearing and had less than 24 hours to consider the written complaints and evidence provided to him for the first time with the invitation letter; he asked for more time to prepare for the hearing and gather information for his defence and arrange for someone to accompany him and his request was refused; he was given two days within which to appeal against his dismissal; and that he was not provided with any notes or a transcript of the disciplinary hearing prior to the appeal hearing.

152. I find that the procedural matters outlined above were indicative of a lack of attention to detail and due regard for a fair process, taking account of the size and resources of the respondent, who had HR advice from external providers, and having also outlined my findings on the investigation above, which I have found was not sufficient or reasonable, I conclude that given the number of deficiencies the process was not reasonable and was procedurally unfair.

Was the decision to dismiss a fair sanction i.e. within the range of reasonable responses for a reasonable employer?

153. I have reminded myself that I must not substitute my view for that of the respondent and must consider whether dismissal was within the range of reasonable responses for a reasonable employer and whether it was reasonable for the respondent to categorise the Claimant's conduct as gross misconduct including with reference to its disciplinary policy.
154. In summary, given my earlier conclusions when considering the Burchell test that the investigation was not sufficient or reasonable, and my conclusions that the belief that the claimant was guilty of misconduct was not based on reasonable grounds in two of the three allegations of misconduct relied on as the reason for the dismissal, I consider that the decision to dismiss was not a fair sanction within the range of reasonable responses that a reasonable the employer would take.
155. I found that the respondent did not carry out a reasonable or sufficient investigation and that the respondent's belief that the claimant made the 'lick you all over' comment was not based on reasonable grounds for the reasons stated above.
156. I also found that the respondent's belief that the claimant was guilty of making the comment regarding a colleague's resemblance to Jimmy Saville on 10 May 2023 in Ms Wilkins presence was not based on reasonable grounds for the reasons stated above.
157. This leaves the claimant's conduct in sending the facebook message, which if dealt with on its own rather than together with the other allegations, Mr McDonald accepted was a level down as serious misconduct, for which as a first offence under the respondent's disciplinary policy, the sanction is a final written warning.
158. I have nonetheless considered whether it was or would have been within the range of reasonable responses for the respondent to dismiss the claimant on this ground in isolation. I find that in light of Mr

McDonald's evidence on the level of this offence and the appropriate sanction and of the respondent's disciplinary policy, it would not be within the range of reasonable responses of a reasonable employer to dismiss on that ground alone.

159. On these findings, I conclude that in light of all of the above summary dismissal was not a fair sanction and is not within the range of reasonable responses for a reasonable employer and the claimant has been unfairly dismissed.

Polkey

160. Given my findings that the dismissal and the finding of gross misconduct was not sustainable and the decision to dismiss for gross misconduct was not a reasonable belief based on reasonable grounds, I cannot say with any confidence that there is sufficient evidence to enable me to reach a conclusion that the claimant would have been dismissed fairly, as a percentage likelihood, if a fair process was followed. There should be no polkey reduction.

Acas Code

161. A mere failure to follow the Acas Code will not be sufficient, it must be unreasonable. If so, the tribunal must consider whether it is just and equitable to award an uplift and if so by what percentage up to 25%.

162. I have found that there were failings in the investigation including failures to carry out all necessary investigations to establish the facts and to interview the complainants on key issues; failure to interview any of the claimant's witnesses or to attempt to identify or interview other witnesses; and failure to take notes or witness statements of conversations; the claimant was given insufficient time to review evidence provided and to prepare for the disciplinary hearing; the claimant was not provided with or given access to CCTV despite asking.

163. I find that the above failings were in breach of the Acas code and were in themselves unreasonable and I take account of the respondent's size and resources and that they had the benefit of external advisors throughout the process. I award an uplift of 20%.

Contributory

164. There is no requirement for the conduct or action of the claimant to be gross misconduct for it to be relevant conduct for the purposes of s.122 or s.123. 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.

165. I am obliged to consider under s.123 whether the claimant's conduct caused or contributed to his dismissal. I have found that the claimant was guilty of serious misconduct in respect of sending the late night facebook message and I further found in my objective view that the offence was exacerbated by his inability or unwillingness to acknowledge any level of inappropriateness or discomfort caused to Ms Clark.

166. I find that this was blameworthy conduct and that it materially contributed to the dismissal, being one of the charges relied on as a

reason for dismissal. It further contributed being a factor taken into account for the second charge of making the 'lick you' comment and even though I did not uphold that charge as reasonably founded, the claimant's conduct re the facebook message nonetheless materially contributed to his dismissal.

167. I have considered in light of the above whether it would be just and equitable to reduce the basic and/or compensatory award. I consider that this is the case and that given the nature of the conduct and as a material contributory factor, the contribution should be more than minimal for the reasons above and determine that the appropriate level of contribution is by a reduction of 40% to the basic and compensatory award.

168. In respect of s.122 the respondent asserts that the claimant's conduct in breaching the terms of his suspension by contacting friends and associates (members and a former colleague) for witness statements was blameworthy conduct because he was expressly told not to make contact while under suspension and in Mr Hine's submission also because it was an attempt to derail and deflect the investigation from the May 10 allegation to April. It was also claimed that contacting others to remove items from the pro shop was blameworthy but no evidence or submissions were advanced on this. I do not find that in the circumstances that the claimant's conduct in this respect was such that it would be just and equitable to further reduce the basic award and make no further reduction.

Was the respondent entitled to summarily dismiss the claimant - Wrongful Dismissal?

169. Finally, I must consider the claim for wrongful dismissal and whether on the evidence before the Tribunal, the claimant's actions warrant summary dismissal. I have given careful consideration to the evidence before me and heard and read at the tribunal in reaching my decision and my findings set out at paragraph 90-93 above.

170. I found that the claimant was guilty of misconduct in sending a facebook message to Ms Clark late at night for the reasons stated above. I found on balance that he did not make the comment in the pro golf shop and conclude that he was not guilty of misconduct in this regard. The 'lick you' comment was of a different ilk to the facebook message and to his admission to comments made about Ms Clark's smart appearance and looking good at work. I find that if witnessed by colleagues in the pro golf shop, as indicated in Ms Clark's grievance statement, in a busy golf club where staff and members socialised together, it would more likely than not have been discussed and come to the attention of other colleagues and management.

171. I found on balance that he did not make the comment in Spike's bar on 10 May 2023 referring to Joel Rickardson as resembling Jimmy Saville for the reasons outlined above and conclude that he was not guilty of misconduct in this regard. There was a conflation of evidence relating to two events on 12 April 2022 and 10 May 2022. The claimant admitted to a conversation on 12 April 2022 when a member of the group made such a comment, he denied making any comment himself on either 12 April 2022 or 10 May 2022. Ms Virgo's evidence at the hearing supported this and

was consistent with her written statement at the time. I considered Ms Violo-Hitch said for the first time at the hearing that a comment was made by the claimant likening himself to Jimmy Saville on 10 May 2022. On balance in the absence of any evidence that Ms Violo-Hitch had disclosed this at any stage of the investigation or in preparing her own witness statement for these proceedings, I give less weight to Ms Violo-Hitch's evidence, and prefer Ms Virgo's evidence on this issue.

172. Having concluded that two of the allegations of misconduct were not sustainable, and that the third allegation, as a first offence, was regarded as serious meriting a final written warning but did not amount to gross misconduct on its own, I conclude that the claimant's conduct, viewed objectively, was not a repudiatory breach of contract by the claimant and that it did not so undermine trust and confidence that the respondent was entitled to summarily dismiss the claimant and in doing the respondent was in breach of contract in summarily dismissing the claimant without notice or pay in lieu of notice.

Holiday Pay

173. The claimant makes a claim under the working time regulations for payment in lieu of accrued untaken holiday on the termination of his employment. In submissions Miss Webber clarified the carry over from 2021 was limited to 8 days under regulation 13A and for 2022 a pro rata accrual of 12 days to the termination date, so a total of 20 days. In the absence of holiday records as to when holiday was taken and any invoices submitted by the claimant including holiday or pay slips, on balance I find that the claimant is owed pay in lieu of untaken holiday.

174. The matter will be listed for a remedy hearing that will take place in due course and any case management orders in that respect will be sent to the parties separately.

Employment Judge K Hunt

Date: 8/12/2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
11 December 2023

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FOR EMPLOYMENT TRIBUNALS

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Case No: 3312598/2022

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