EMPLOYMENT TRIBUNALS

Claimant: **Mr P Verelst**

Respondent: **TPCG Limited**

Heard at: Sheffield by CVP **On: 14 September 2020**

Before: **Employment Judge Brain**

Representation

Claimant: Mr P Morgan, Counsel
Respondent: Miss L Amartey, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The respondent did not unfairly dismiss the claimant. Accordingly, the complaint of unfair dismissal fails.
2. The claimant was not wrongfully dismissed by the respondent. Accordingly, the wrongful dismissal complaint fails.

REASONS

1. After hearing evidence and receiving helpful submissions from both counsel, the Tribunal reserved judgment. The Tribunal now gives its reasons for the Judgment that has been reached.

Introduction

2. In a claim form presented to the Tribunal on 19 March 2020, the claimant brings the following complaints:

    2.1. Unfair dismissal. This is a statutory complaint brought under the Employment Rights Act 1996.

    2.2. Wrongful dismissal. This is a common law complaint which the Tribunal has jurisdiction to determine pursuant to the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

3. It is not in dispute between the parties that the claimant was employed by the respondent as a cleaning supervisor/stores person and was summarily dismissed on 26 November 2019. There are significant differences between the parties about much else in the case, not least the events that took place on that day. In summary:

    3.1. It is the claimant's case that: the respondent dismissed him for *"tittle tattling";* dismissal for that reason was procedurally and substantively unfair; this reason did not give grounds for the respondent to summarily terminate the contract of employment and that the dismissal was wrongful.

    3.2. The respondent's case is that on that day the claimant perpetuated what amounted to a sexual assault upon Christopher Wright who is the respondent's sole director. The respondent's case is that the claimant's actions were a repudiatory breach of contract entitling the respondent to summarily dismiss the claimant and that dismissal of him was fair for the purposes of the 1996 Act.

4. The Tribunal had the benefit of hearing evidence from Mr Wright. The respondent also called evidence from Mrs Maxine Dobson. She has been employed by the respondent for a period of 13 years in the capacity of office manager. The Tribunal heard evidence from the claimant and from his wife, Nancy Black.

5. The Tribunal shall firstly make its findings of fact. A summary of the relevant law will be then set out. The factual findings will be applied to the relevant law in order to determine the issues in the case.

Findings of fact

6. Mr Wright gave undisputed evidence that the respondent is a small business which employs 15 people. In evidence given under cross-examination, he said that he was the managing director, Mrs Dobson runs the office and there is a part-time payroll administrator. The other employees are engaged to undertake various cleaning duties and associated tasks.

7. Mr Wright's evidence is that the claimant was employed from July 2008. The claimant's evidence is that he was employed for a longer period. He gives his employment commencement date as May 1999.

8. The claimant's evidence is that he was initially employed upon a part-time basis in 1999 when *"the company was called Total Property Care Group".* The claimant says that the name changed to Robshaws Total Property Care Group in 2005 before being changed again to TPCG Limited.

9. The Tribunal accepts the claimant's evidence upon the issue of continuity of service. When asked about this issue in cross-examination, Mr Wright appeared unsure of his ground, seeking to defer to the knowledge of Mark Walford who is described as the financial director. (It appeared from Mr Wright's evidence that Mr Walford was not an employee of the respondent but is an individual to whom Mr Wright has outsourced payroll and HR matters). Mr Wright did not take issue, when asked about it in cross-examination, with the claimant's position that the claimant's employer had gone through several iterations down the years. The names Total Property Care Group and Robshaws Builders were familiar to Mr Wright. (Indeed, the Tribunal notes that the trading name of the respondent is given as '*Robshaws*

TPCG' in the letter written to the claimant by Mr Woolford dated 23 September 2019 at page 35 of the bundle).

10. Further, the respondent is on the backfoot upon this issue given the failure to comply with its obligations in part I of the 1996 Act (in particular, to furnish a statement of employment particulars). For these reasons, the Tribunal credits the claimant with continuity of service from May 1999.

11. In paragraph 3 of his witness statement Mr Wright said:

"*As TPCG is a small business I tend to deal with staff performance and conduct issues informally, where at all possible. This was certainly the case with [the claimant]. Over the course of his employment, perhaps on average every six to twelve months, I have had to informally warn him about various aspects of his performance or conduct. After such informal warnings [the claimant] would address the issue in question, at least for several months, until a further such warning was required".*

12. In paragraph 4 of his witness statement Mr Wright says that he invited the claimant to such a meeting on 26 November 2019 in order to discuss the five issues there set out. In paragraph 11 of his witness statement, Mr Wright says, "*that in addition to the matters set out in paragraph 4, I also wanted him to stop spreading the untrue gossip about me drink driving and going to prison*". In paragraph 7 of his witness statement, Mr Wright says that the claimant *"had been saying to staff members that he "couldn't wait for me to be jailed" as a consequence of a drink driving offence".*

13. Paragraphs 18 to 25 of the claimant's witness statement goes in to some detail about the issues to which Mr Wright refers in paragraph 4 of his witness statement. The claimant sets out a refutation of each issue, these being:

- *Poor attendance.*
- *Poor performance.*
- *Being rude to colleagues.*
- *Issues with the claimant's timesheet.*
- *A refusal or a reluctance to carry out certain aspects of the claimant's role.*

14. It is not necessary for the Tribunal to make any findings of fact upon any of those five issues. The Tribunal is satisfied upon the evidence that Mr Wright would have cause to speak to the claimant periodically about work issues after which the claimant would mend his ways for a time. In evidence given under cross-examination, the claimant accepted that he and Mr Wright had had *"our disagreements"* over matters. With this evidence comes the inference that the claimant and Mr Wright would have work related discussions from time to time. As Mr Wright said in his printed statement, he contented himself with dealing with matters informally. In evidence given under cross-examination Mr Wright said (very much in the same vein as the claimant) that the pair had had their "*ups and downs"* and that the claimant would *"respond positively"* when spoken to by Mr Wright. Mr Wright went so far as to say that he thought that he and the claimant would *"never part company".* The Tribunal concludes from this that informal discussions took place from time to time between the claimant and Mr Wright about work related issues and that matters never deteriorated to the point where Mr Wright felt the need to take any formal action against the claimant.

15. It is in this context that the meeting of 26 November 2019 took place. As the claimant said, he was summoned to the meeting by text. The text is at page 36. Mr Wright wrote in the text, "*I need you in the office this afternoon".* There is some merit in Mr Morgan's suggestion that this was a somewhat terse text, particularly when seen in the context of the somewhat warmer exchange of texts between the claimant and Mr Wright on 19 November 2019. The claimant that day asked to see Mr Wright who replied to apologise for the fact that he did not have time to see the claimant, having only just returned to work from holiday. When asked for an explanation as to the brevity of the text of 26 November 2019, Mr Wright said that he needed the claimant to come in to the office to deal with an urgent delivery. This contrasts with paragraph 4 of Mr Wright's witness statement which makes no mention of an urgent delivery but rather says that Mr Wright required the claimant to attend the office to discuss the five work related matters set out in paragraph 13 above. Mr Morgan suggested that the brevity of the text of 26 November 2019 and the tone of it was indicative of Mr Wright having resolved to end the claimant's employment.

16. Mr Wright denied having any intention of dismissing the claimant and that that was the reason for summoning him to a meeting on 26 November 2019. As has been said, it was the claimant's case that the respondent dismissed him for *"tittle tattling"* about the claimant's involvement in a drinking and driving incident and that Mr Wright had tired of the claimant's *"tittle tattling"* behaviour. Whilst Mr Wright accepted that he had, on 26 November, taken the opportunity of discussing the claimant's propensity for gossiping about the drink driving incident, it is Mr Wright's case that he dismissed the claimant not for the gossiping but rather for the claimant's reaction when the issue was put to him.

17. In paragraph 7 of his witness statement, Mr Wright says that he "*raised with [the claimant] a rumour that I had been informed he had been circulating for a year about me to other staff, namely, that I had been arrested for drink driving. Apparently [the claimant] had also been saying to staff members that he "couldn't wait for me to be jailed". This rumour was completely untrue, I had not been arrested for drink driving at all, and obviously I was not going to jail. I was upset that such untrue gossip was being spread about me and wanted to tell [the claimant] to stop it. When I put this to [the claimant] (him spreading rumours about me going to prison for drink driving) he got up from where he was sat, ran around the desk and lunged at me. Before I knew what was happening [the claimant] grabbed me by the collar with both hands, spun me towards him on my swivel chair and kissed me on the lips sticking his tongue into my mouth. He then told me that he "wouldn't do that to me because he loved me". [The claimant] then returned to his seat*".

18. The claimant signed his printed witness statement on 3 September 2020. It includes paragraph 7 as set out above. After having taken the non-religious oath today, and before attesting as to the truth of his printed witness statement, the claimant amended paragraph 7 as it appears in the printed version. He added, after the sentence ending *"… I was not going to jail"* the words, "*I was arrested for failure to produce and not drink driving. I let myself down".*

19. In evidence given under cross-examination, Mr Wright explained that the driving incident had happened in July 2018. He was charged with an offence of failing to produce a specimen and was convicted of that offence in a Magistrates' Court on 26 July 2019. He told the Tribunal that he had received a driving ban.

20. Mr Morgan put it very well when he described the offence of a failure to provide a specimen for analysis as *"a backstop"* for a situation where an offence of driving while under the influence of alcohol may not proceed for want of a specimen for analysis.

21. For his part, the claimant gave this account (in paragraph 13 of his witness statement):

"*In relation to the tittle tattling Chris [Wright] talked about I assume he is referring to gossiping amongst staff about his drink driving. Various members of staff had come to talk to me about this. I do not wish to name them as some still work for the company and I don't want to get them into any trouble. They would talk about how bad Chris's drink driving was and I would listen. I recall on one occasion someone telling me that Chris had recently been arrested for drink driving. I confirmed I had heard the same and Chris knew how I felt about it all. If Chris had given me a chance to explain things then I would have explained all of this. I also don't understand how I can be sacked yet all the other staff who were talking about Chris' drink driving can get away with it. This is unfair".*

22. It was put to the claimant in cross-examination that he had been telling people about Mr Wright facing prosecution for drinking and driving, that there was a possibility of him being imprisoned and that he had been doing so for a period of around 14 months. The claimant agreed that he *"could have"* been indulging in this behaviour for that period of time. However, he maintained that he had simply joined in with others' conversations about the matter.

23. Mrs Dobson said, in paragraph 4 of her witness statement, that the claimant "*had in fact been telling staff (which I know because of several of them told me – and Peter had said it to me also) that he could not wait for Chris to go to jail over it*." When this passage was put to the claimant in cross-examination he accepted that he had *"mentioned it"* to Mrs Dobson. Miss Amartey then suggested to the claimant that he was the one spreading the information to which the claimant replied, "*I'm not the only one".* Miss Amartey then put it to the claimant that Mr Wright had known that he (the claimant) had been speaking about the issue and spreading information about the matter for a period of 14 months. The claimant accepted that he had so known for that period.

24. From this, the Tribunal concludes that the claimant had at all times been a willing participant in gossiping about and discussing the drink drive incident in which Mr Wright was involved. Further, at times, the claimant had initiated the gossip and discussion within the workplace. Further, Mr Wright knew that the claimant had been behaving in this way for a period of 14 months. As with the performance issues, Mr Wright had contented himself with taking no formal action in response to the claimant's behaviour.

25. In evidence given by Mr Wright under cross-examination, some further detail about the incident of 26 November 2019 emerged. He said that he was sitting next to Mrs Dobson. Each were sitting behind a desk adjacent to one another. In front of each of them was a second desk. The desks were therefore arranged in a square. Mr Wright was sitting to the right of Mrs Dobson (from the claimant's point of view). The claimant sat opposite Mr Wright. The desk opposite Mrs Dobson was empty. There was sufficient room for the claimant to get up and go around the right- hand side of the two desks (from the claimant's point of view). Mr Wright described them as *"standard office desks"* and estimated that together they were approximately six feet wide. Mr Wright was sitting in a swivel chair. The claimant was sitting in a

rigid four-legged office chair. Mr Wright was asked what he did as the claimant approached him. Mr Wright said, "*it happened in one or two seconds. I'd had no time to think. I just sat there*".

26. It was put to Mr Wright that it would make no sense for the claimant to say that he would not spread rumours about him in circumstances where the claimant admitted and accepted to having done just that. Mr Wright did not respond directly to that suggestion but said that he feared he was beginning to look weak in front of his staff and that was why he decided to take the opportunity to discuss the matter with the claimant and ask him to desist.

27. Mr Wright described himself as being shocked that the claimant had kissed him. He said that they had *"never had any physical contact before".* Mr Wright agreed with Mr Morgan that the incident was *"bizarre".* Mr Wright accepted that he had dismissed the claimant without asking the claimant for an explanation for his behaviour. Mr Wright had not gone to the police about the matter or sought any medical advice.

28. Mrs Dobson's account corroborates that of Mr Wright upon a number of issues. Firstly, she corroborates Mr Wright's account about the layout of the desks and where all of the participants were seated. She corroborates that Mr Wright would hold a meeting with the claimant approximately once a year in order to discuss work related issues. She corroborates Mr Wright's account that some issues were put to the claimant on 26 November 2019 and that Mr Wright then raised with the claimant the issue of the claimant speaking to other members of staff about the drink drive incident.

29. At paragraph 5 of her witness statement, she says that when Mr Wright raised the issue of the claimant spreading the rumour, the claimant "*became agitated, jumped up from his chair and ran around the desk. He lunged forward at Chris spinning his swivel chair round so that Chris' back was now facing me. He grabbed Chris by the collar with each hand pulled him forward and at the same time pushed his head towards Chris. I thought that [the claimant] was going to hit Chris. [The claimant] then let go of Chris and stepped back and said, "I wouldn't say that about you, I love you". It was over in seconds and [the claimant] returned to his seat across from Chris"*.

30. Mrs Dobson says that the claimant had a weeping cold sore visible on his lip at the time. Mr Wright gave similar evidence in paragraph 8 of his witness statement. In an attempt to corroborate this account, the respondent produced material from the claimant's Facebook account in which the claimant is pictured with a mark upon his lip. This evidence was only produced upon the day of the hearing but was admitted, there being no objection from the claimant. The claimant in answer produced good evidence that the photograph had been taken in Paris in October 2018. The respondent's evidence therefore did not prove the existence of a cold sore upon the claimant's lip in November 2019.

31. In evidence given under cross-examination, Mrs Dobson confirmed that there were no records of the approximately annual meetings held between the claimant and Mr Wright. She had attended one such meeting in the past. She said that she knew of their regularity because she was informed of them by Mr Wright.

32. Contrary to what she had accepted was her usual practice, Mrs Dobson's evidence was that she prepared a note of the meeting of 26 November. This is at page 38. It is worth setting out the note in full. It reads, "*Peter [the claimant] was*

asked to attend the office for interview with Chris regarding his behaviour and attitude towards the rest of the staff members. Peter denied spreading rumours around the staff regarding an incident that Chris had had with his car, when he had been into the office several times telling me the "story" in a gleeful manner and could not wait until Chris got his comeuppance. Peter became agitated, lunged forward from the chair he was sitting in, and I thought he was going to hit Chris, but he said why would I do anything to hurt you, I love you grasping on to his shirt. Unfortunately, I looked away and did not see what transpired. Peter stood up and left the office after Chris told him he was dismissed because of gross misconduct."

33. Mrs Dobson maintained that she had typed the note on the day of the incident and before she had gone home for the evening.

34. There is a significant discrepancy between the contents of the note at page 38 on the one hand and Mrs Dobson's printed statement on the other. There is no mention in the latter of Mrs Dobson looking away after the claimant had grasped Mr Wright's shirt. Mrs Dobson confessed in evidence before the Tribunal that she had *"no idea"* why she said in the note that she had *"looked away".* It was suggested to her that there was a further discrepancy in that the note (in contrast to the printed statement) makes no reference to a discussion between Mr Wright and the claimant about the matters referred to in paragraph 4 of Mr Wright's witness statement summarised in paragraph 13 above. This was a less forceful point given that the note at page 38 makes reference to a discussion of the claimant's *"behaviour and attitude"* towards staff members. On any view, this description (albeit rather brief) does encompass the matters referred to in paragraph 13.

35. Mrs Dobson says in paragraph 8 of her witness statement that Mr Wright asked her to type up a letter to the claimant to confirm his dismissal for gross misconduct. This is the document at page 37 of the bundle. Mrs Dobson said that she had typed this before she prepared the note at page 38. She said that Mr Wright had dictated the letter to her and that she had posted it using the respondent's franking machine.

36. It was squarely put by Mr Morgan on behalf of the claimant that the letter at page 37 and the note at page 38 were prepared by Mrs Dobson well after 26 November 2019 and that they were an attempt by the respondent to mislead the Tribunal. There were several grounds for Mr Morgan' suggestion. Firstly, the language used in both was very similar: (in particular the contention that the claimant had *"lunged"* towards Mr Wright). Secondly, the letter at page 37 had not been received by the claimant. Thirdly, the letter at page 37 was not on company letterhead.

37. Mrs Dobson explained the absence of letterhead on the document at page 37 upon the basis that this will be the respondent's file copy. The version sent to the claimant will have been fed through the printer upon paper containing the respondent's letterhead. This was a credible explanation. Regarding the similarity of wording between the note and the letter, Mrs Dobson said that there was *"no other way to put it. He lunged."*

38. At 13:51 on 26 November 2019 the claimant emailed Mr Wright. The claimant asked for written reasons for the termination of his employment. Mr Wright responded at 15:14 the same day. The reason given for termination of the contract was said to be gross misconduct. It was suggested to Mr Wright by Mr Morgan that this was the only written communication emanating from the respondent about the decision to dismiss the claimant. Mr Wright maintained that the letter at page

37 had been sent in that night's post. Mr Wright was unable to explain whether he had asked Mrs Dobson to send the letter at page 37 at the time that the email had been sent. When asked why the words *"gross misconduct*" were set out in block capitals Mr Wright said that he was "*shocked and stunned. I was in a spin over the whole thing*".

39. In evidence given under cross-examination, the claimant denied lunging at Mr Wright, kissing him, telling him that he loved him and that he would not spread rumours about him. He said that he had readily admitted during the meeting that he had been participating in the spreading of rumours about Mr Wright. It was put to the claimant that this was inconsistent with paragraph 10 of the claimant's witness statement in which the claimant says that, "*Mr Wright started the conversation [of 26 November] with something like three people had told him I'd been talking about him getting in trouble for drink driving. I responded with "oh have they?""* It was suggested by Miss Amartey, with some justification, that paragraph 10 amounted to a denial of the behaviour which the claimant said in evidence today he had readily accepted when confronted about it by Mr Wright on 26 November. The claimant did not address Miss Amartey's point directly but said that, "*That's why he dismissed me [ie for the gossiping]. Because he had got banned – he took it out on me*". The claimant accepted that he had not been told by Mr Wright that he was dismissed for gossiping but that the claimant had drawn such an inference from the circumstances.

40. The claimant confirmed that it was his evidence that the note at page 38 had been concocted by Mrs Dobson. He acknowledged that Mrs Dobson bore him no ill will.

41. In paragraph 24 of his witness statement, the claimant says that he had kissed Mr Wright upon a previous occasion. He says that, "*Before my annual leave in September 2019 I kissed Mr Wright on the head as a goodbye as I was going on holiday. Mr Wright responded, he smiled and said, "enjoy your holiday". It was a light-hearted gesture certainly not aggressive in any manner at all".* The claimant's case is that Mr Wright took no action following this incident. It was suggested to the claimant by Miss Amartey that the incident of September 2019 had not occurred and he had never kissed Mr Wright on any previous occasion. It was not put to Mr Wright by Mr Morgan that a tactile encounter had taken place on any occasion prior to November 2019.

42. Following his dismissal, the claimant sought advice from his trade union. The trade union advised him to appeal and prepared a draft appeal letter for him. This is at pages 39A. It was sent to the claimant by Kelvin Mawer, his trade union representative on 5 December 2019. Mr Mawer prepared the wording of the appeal letter for the claimant and then instructed him to sign and date the appeal letter and obtain proof of sending.

43. Mrs Black says that on 23 December 2019 at around lunchtime she received an email from the claimant containing Mr Mawer's email. Mrs Black says that she then copied and pasted Mr Mawer's wording into a letter which the claimant then signed and dated. Mrs Black says that she put the letter in an envelope and addressed it to Mr Wright. She put a first-class stamp on the envelope. She then went out shopping between 2pm and 3pm on 23 December and took the letter with her to post. She says she posted it in the letterbox located near to where she and the claimant live.

44. Mr Wright's evidence is that he did not receive the letter of appeal. He said that had he received it then he would have sought advice.

45. Page 40 of the bundle is an email from the claimant to Mrs Black. It is dated 23 December 2019 timed at 20:58. There is then copied and pasted within the same wording as in Mr Mawer's email to the claimant of 5 December 2019 at page 39A. Mrs Black's account was that the email from the claimant to her of that date was sent at around lunchtime. When asked about this, Mrs Black said that she had received a *"number of emails"* which had been deleted and the claimant asked her *"to forward another copy".* When the claimant was asked about this discrepancy he said the one at page 40 was "*the one I have kept from start to finish. I don't keep emails. They go after so long*".

46. Neither the claimant's nor Mrs Black's evidence upon this issue was satisfactory. There is no proof of sending of the appeal letter. Mr Mawer had sensibly advised that the claimant obtain proof of sending but he did not do so. It is difficult to understand why an email timed at 20:58 on 23 December 2019 would have been retained by the claimant and Mrs Black and not one from several hours earlier. The Tribunal was at a loss to understand what the claimant meant by having kept the email at page 40 *"from start to finish"* and why he had not kept a copy of earlier ones to fit the timeline. His evidence about emails *"going"* after so long cannot explain the presence of the one at page 40 and the absence of emails from only several hours prior upon the very same day.

47. Mrs Black was asked whether the claimant had explained to her the reason for his dismissal. She said that the claimant had told her that it was *"just gross misconduct".* She was then asked whether she had enquired of the claimant about the nature of the gross misconduct in question. She said simply that it was "*down to Chris' drink driving".* She said that she could not recall having discussed with the claimant the outcome of the appeal process in which she had become involved.

48. The appeal letter prepared for the claimant by Mr Mawer was addressed to Mr Wright and reads as follows:

    "I am writing in regards to my employment at Robshaws Property Care Group Limited. As you are aware that you terminated my contract of employment on 26 November 2019 for an alleged act of Gross Misconduct. I wish to appeal against this decision on the grounds of an Automatic Unfair Dismissal as no procedure was followed. I did not receive any correspondence in regards to any disciplinary hearing, I was not given the rights to representation nor the right of appeal. No thorough investigation was carried out, therefore there is a clear case of Automatic Unfair Dismissal. I believed the way this has been handled has broken the trust and confidence between you as my employer and myself as the employee. I also want to raise that as my employer for over 19 years you have failed to offer a workplace pension which is a legal right. I wish to be represented at my Appeal hearing by my Unite the Union Regional Officer, it would be appreciated if the appeal hearing can be set on date and at a time when both my representative and I can be attendance."

49. No appeal hearing took place. This was because the respondent did not receive the letter of appeal. The claimant was asked why he had not chased the matter up as plainly he will have heard nothing about an appeal in the circumstances. The claimant said that, "*I did it through solicitors."* It was suggested that the appeal letter had not been sent and was created by the claimant as "*something to put before the Employment Tribunal"* (as Miss Amartey put it).

50. The claimant's schedule of loss is at pages 32 to 34. The claimant seeks loss of earnings from 26 November 2019 to the date of the hearing. He has given credit

against earnings received elsewhere in the sum of £5,217.42. The claimant obtained alternative employment quickly after his dismissal. The terms and conditions of his new employment are in the bundle commencing at page 55. This shows that he commenced work on 9 December 2019 earning a salary of £17,680 per annum. His earnings from 9 December 2019 to the date of this hearing will plainly have been well in excess of £5,217.42 given the level of his salary in his new employment.

The relevant law

51. The Tribunal now turns to the relevant law. The claimant complains that he was wrongfully dismissed. In a claim for wrongful dismissal the legal question is whether the employer summarily dismissed the claimant and that by doing so the employer was in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is in breach of contract and the employee's breach is repudiatory. A repudiatory breach is one where the employee by conduct abandons and altogether refuses to perform the contract. If the employer, knowing of the repudiatory conduct, dismisses the employee for it then the employer is by so doing accepting the employee's breach and is entitled to dismiss the employee without notice. On the issue of wrongful dismissal, it is necessary for the Tribunal to make its own findings of fact. The question for the Tribunal is objectively whether the employee has committed a breach of contract and whether it was sufficiently serious and injurious to the relationship (which has at its heart mutual trust and confidence) to justify a dismissal.

52. For the purposes of the unfair dismissal complaint, the focus (at least at liability stage) is upon the employer's reasons for dismissal and the employer's conduct of matters. In this case, the reason for the dismissal relates to the employee's conduct.

53. In a case where an employee is dismissed because the employer suspects or believes that the employee has committed an act of misconduct, in determining whether the dismissal is unfair an Employment Tribunal has to decide whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. It must be established by the employer the fact of the belief: that the employer did believe it. It must be shown that the employer has in his mind reasonable grounds upon which to sustain that belief. The employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The question for the Tribunal then is whether the decision to dismiss the employee was one that fell within the range of reasonable responses of the reasonable employer taking into account the matters referred to in section 98(4) of the 1996 Act. (The Tribunal shall not set out section 98(4) here. It is well known to the parties).

54. There is a burden of proof upon the employer to establish a genuine belief that there was available to it a permitted reason for dismissal. The burden upon the issue of the reasonableness of the belief, the reasonableness of the investigation and the decision to dismiss is a neutral one.

55. It is well established that the Tribunal must consider the reasonableness of the employer's conduct and not simply whether the Tribunal considers the dismissal to be fair. The Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band of

reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably may take another. The function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair. If the dismissal falls outside the band it is unfair. The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.

56. An employer having *prima facie* grounds to dismiss will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the procedural steps which are necessary in the circumstances of the case to justify that course of action. In rare cases, procedures may be dispensed with because the employer may reasonably consider them to be futile in the circumstances. If the employer acted reasonably in taking the view that, in the exceptional circumstances of a particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with, in such a case the test of reasonableness under section 98(4) may be satisfied.

57. Should the Tribunal decide that the dismissal is unfair then it shall go on to consider remedy. In this case, the claimant said in his claim form that he was seeking re-employment. Should the Tribunal decide that re-employment is not practicable then the Tribunal will consider the monetary remedies (those being the basic award and the compensatory award).

58. Whereas at liability stage, the spotlight is very much upon the conduct of the employer, this shifts when looking at remedy issues. The focus may very much shifts to the conduct of the employee.

59. A Tribunal may reduce the basic award in circumstances where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, then the Tribunal shall reduce that amount accordingly.

60. Where the Tribunal finds that the dismissal was to any extent caused or contributed to or by the action of the claimant, the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

61. Should the Tribunal find that the dismissal was procedurally unfair but, had a fair procedure been adopted, the employee would have been dismissed in any event, that is a matter which will affect the compensatory award (as does the question of the longevity of the employment relationship in any event had the dismissal not taken place).

62. In order to provide an incentive to follow proper procedures and recommended practice, section 3 of the Employment Act 2008 contains provisions giving Employment Tribunals a discretion to vary awards for unreasonable failure to comply with any relevant Code of Practice relating to workplace dispute resolution. Section 3 of the 2008 Act does so by introducing a new section 207A and schedule A2 into the Trade Union and Labour Relations (Consolidation) Act 1992. The

relevant Code of Practice to which this provision applies is to the ACAS Code of Practice on Disciplinary and Grievance Procedures.

63. Subsection (2) of section 207A provides that an Employment Tribunal may, if it considers it just and equitable, increase any award to an employee by up 25% if it appears to the Tribunal that the employer has unreasonably failed to comply with the relevant Code of Practice.

64. Subsection (5) of section 207A provides that where an award is adjusted under section 207A that adjustment must be applied before any adjustment under the Employment Act 2002 for a failure to provide employment particulars.

65. The 2002 Act is applicable where there is a failure to provide employment particulars as required by Part I of the 1996 Act. In such a case, where the Tribunal finds in favour of an employee but makes no award to him the Tribunal must make an award of either two or four weeks' pay in the employee's favour. A similar provision applies in a case where employment particulars have not been supplied and the Tribunal makes an award in the employee's favour. There is an exception where it would be unjust or inequitable to make such an award.

Conclusions

66. It was common ground that the case stands or falls upon the Tribunal's primary findings of fact as to what transpired on 26 November 2019. Upon this issue, the Tribunal prefers the account given by the respondent.

67. Mr Morgan was right, in his submissions, to draw the Tribunal's attention to a number of features that were unsatisfactory about the respondent's evidence. Very much at the heart of his submission was the unsatisfactory nature of Mr Wright's evidence in connection with the events of July 2018 which led to his conviction on 26 July 2019 for failing to provide a specimen.

68. There is some force in this submission. The Tribunal searched in vain for any mention of a conviction for failing to provide a specimen in the respondent's witness statement and in the respondent's grounds of resistance (at pages 24 and 25 of the bundle). The tenor of each document is that Mr Wright was facing no criminal action of any kind.

69. Mr Morgan also prayed in aid the inconsistencies in Mrs Dobson's accounts (as set out in paragraphs 34-37 above) together with the similarity in wording in the letter at page 37 and the contemporaneous note at page 38. He submitted that the wording was too similar credibly to have emanated from different people (it being the respondent's case that Mr Wright had dictated the letter at page 37 and Mrs Dobson had prepared the note at page 38).

70. Mr Morgan also prayed in aid the inherent unlikelihood of the events as portrayed by the respondent in and of themselves and of the claimant saying that he would not spread gossip in circumstances where he freely admitted that he had been doing just that for a period of 14 months.

71. Mr Morgan said that *"something snapped"* in Mr Wright's mind, hence the terse nature of the text of 26 November 2019 at page 36. The claimant's position in short is that Mr Wright resolved that day to dismiss the claimant for tittle tattling or gossiping.

72. The way in which Mr Wright presented the evidence about his conviction for failing to provide a specimen was unsatisfactory. Against that, however, Mr Wright was careful (after he had taken the oath) to amend the printed witness statement before

adopting it as his evidence in chief. The Tribunal is satisfied therefore that, albeit unsatisfactory, Mr Wright was faithful to his oath to tell the whole truth and did not mislead the Tribunal in this respect.

73. The attack upon Mrs Dobson's credibility is much less forceful. True it is that Mrs Dobson remains an employee of the respondent. Without more, that is unlikely to be a persuasive submission against accepting Mrs Dobson's evidence. In many cases, employers will call employees to give evidence about what transpired in the workplace. It is a fact of life that workplace disputes and incidents are much more likely to be witnessed by fellow employees than members of the public.

74. Attractively as it was put by Mr Morgan, the Tribunal is not persuaded by the attack upon the respondent's evidence by dint of the use both in the letter at page 37 and the note at page 38 of the word "*lunge".* Mrs Dobson said that there was no other way in which to describe the claimant's actions. Had different descriptions been used then doubtless Mr Morgan would have pointed to an inconsistency. That two individuals have used the same word to describe the actions of the claimant that day is hardly surprising given the nature of those actions.

75. True it is that there were inconsistencies between Mrs Dobson's witness statement on the one hand and the contemporaneous note at page 38 on the other. In particular, she said in her witness statement that she saw the claimant push his head towards Mr Wright yet in the note said that she had looked away at that point. However, what is consistent in both accounts is that she says that she saw the claimant lunge forward towards Mr Wright. The claimant fairly acknowledged that Mrs Dobson did not bear him any ill will or hold any kind of grudge against him. Mrs Dobson impressed the Tribunal as a straightforward and truthful witness. The Tribunal agrees with Miss Amartey that there would have to be far more convincing evidence than that which was produced by the claimant before the Tribunal could accede to the claimant's submission that Mrs Dobson (a mature individual of 75 years of age) was party to misleading the Employment Tribunal and committing perjury and conspiracy to pervert the course of justice. It is perhaps unfortunate that the Tribunal did not have the benefit of evidence about the properties of the documents at pages 37 and 38. The Tribunal must therefore do its best with the evidence before it. The Tribunal is satisfied upon the evidence of Mrs Dobson and Mr Wright that the documents at pages 37 and 38 were contemporaneous.

76. As has been said, Mr Wright gets credit for making an amendment to the printed witness statement before attesting as to its truth. The same cannot be said for the claimant. In paragraph 44 of his printed witness statement he says that he wishes to claim the loss as detailed in his schedule of loss at pages 32 to 34 of the bundle. As we have seen, these losses are inflated. The claimant did not correct this part of his witness statement before he adopted it as his evidence before the Tribunal. The claimant was not therefore faithful to his oath to tell the truth as the evidence he gave of his losses was untrue. This is damaging to the claimant's credibility.

77. Further, the Tribunal found the claimant and his witness to be less than candid in a number of other respects. Firstly, the claimant advances (in paragraph 10 of his witness statement) what is tantamount to a denial that he had been gossiping about the drink drive incident. In contrast, before the Tribunal, the claimant admitted that he had done so. Secondly, the evidence of the claimant and Mrs Black about the letter of appeal was unsatisfactory. Mrs Black's evidence of posting the letter of appeal during the early course of the afternoon of 23 December

2019 was undermined by the fact that the only copy of the letter of appeal in the bundle (or at any rate, the one which she says was emailed to her by the claimant) was timed at just before 9 o'clock that evening. The timeline does not fit. Mrs Black's and the claimant's attempts to explain away the difficulty presented to them by the email at page 40 of the bundle were unconvincing.

78. Mrs Black was also strangely incurious, on her account, about the circumstances of the claimant's dismissal and what became of the appeal. She appeared to content herself with a perfunctory explanation from the claimant as to why he had been dismissed. She says that she made no enquiries of the claimant of what became of his appeal. This is simply not credible in circumstances where her husband had lost his livelihood and where she had become involved in printing off and posting a letter of appeal.

79. The Tribunal also notes that the letter of appeal prepared by Mr Mawer makes several references to *'automatic unfair dismissal'*. This appears to be a throwback to section 98A of the 1996 Act and the statutory dismissal and disciplinary procedures which were repealed with effect from 6 April 2009. Section 98A of the 1996 Act provided that an employee who is dismissed shall be regarded as unfairly dismissed if a dismissal procedure applied and the procedure had not been completed wholly or mainly attributable to failure by the employer.

80. The draft letter of appeal drafted by Mr Mawer is replete with references to the concept of automatic unfair dismissal. This is significant as the focus appears to be upon the process (or lack of process) carried out by the respondent as opposed to the substantive reason for the dismissal itself. When asked by the claimant for the reason for his dismissal on 26 November 2019, Mr Wright simply replied, *"gross misconduct".* In the letter of appeal, the claimant does not seek to question or seek reasons for his dismissal or an explanation of the nature of the gross misconduct. This, coupled with the rather coy evidence given by Mrs Black, persuades the Tribunal that the claimant knew full well the reason for his dismissal and was seeking to appeal because of procedural failings.

81. The claimant accepted under cross-examination that an employee who sexually assaults his manager may expect to be dismissed for gross misconduct. It was the claimant's case that gossiping or *"tittle tattling"* was not gross misconduct. This is made plain in paragraph 15 of the claimant's witness statement. It is significant, in the Tribunal's judgment, that nowhere in the appeal letter does the claimant take issue with his dismissal upon the basis that gossiping or tittle tattling is not gross misconduct nor does the claimant allege in the letter of appeal that that was the reason given by Mr Wright for dismissing him.

82. In the Tribunal's judgment, it would have been out of character for Mr Wright to dismiss the claimant for tittle tattling or gossiping after he had tolerated the position for a period of 14 months. The Tribunal considers that Mr Morgan is correct to say that something changed to precipitate the dismissal of the claimant by the respondent. That something was the claimant's actions in lunging at Mr Wright, kissing him and saying that he loved him.

83. Mr Morgan is also right to describe the incident of 26 November 2019 as bizarre. It is not credible that Mr Wright and Mrs Dobson would conspire to make up such an outlandish incident as a reason for the dismissal of the claimant. Sometimes, truth is stranger than fiction.

84. Further, the claimant gave an account of kissing Mr Wright just before he (the claimant) went on holiday in September 2019. The claimant, on his own account, therefore accepts that he has a propensity to behave in this way. This adds to the credibility of the respondent's case. Indeed, one can read into the passage in paragraph 24 of the claimant's witness statement that Mr Wright's failure to meaningfully object gave encouragement to the claimant as (on the claimant's account) Mr Wright had not found such behaviour to be unacceptable.

85. Mr Morgan also prayed in aid that the respondent's assertion that the claimant had said that he (the claimant) would not gossip about Mr Wright renders the respondent's version of events less plausible. However, in the Tribunal's judgment this is entirely plausible and in keeping with the claimant's conduct of saying one thing and doing another. The Tribunal has already pointed out the inconsistency between the claimant's denial of gossiping in paragraph 10 of his witness statement on the one hand and his evidence before the Tribunal that he was gossiping on the other. Therefore, that the claimant told Mr Wright an untruth when confronted with the issue on 26 November 2019 is entirely consistent with the claimant's demeanour before the Tribunal today.

86. In summary, therefore, on balance, the Tribunal prefers the respondent's account and finds that the claimant did, upon being confronted by the employer with a request to desist from gossiping and tittle tattling, lunge at Mr Wright, kissed him and proclaimed that he would not gossip about him because he loved him. On any view, this is in the nature of a sexual assault.

87. The Tribunal prefers the respondent's account, in sum, because:

    87.1. Mr Wright's sworn evidence-in-chief was truthful whereas in a material respect the claimant's evidence-in-chief was not.

    87.2. Mr Wright's version is corroborated by an eye witness account from an individual whom the Tribunal found to be a reliable witness.

    87.3. The respondent's evidence must be set against the unsatisfactory nature of the claimant's account particularly around the appeal issue.

88. The Tribunal accepts that the late produced evidence from the respondent was not supportive of there being a mole or blemish prominent upon the claimant's lip. There is however no photographic evidence of the state of the claimant's lip in November 2019. The photographic evidence taken in October 2018 during the course of the claimant's trip to Paris is also not corroborative of a propensity to develop cold sores. The Tribunal accepts the claimant's account that the mark on his lip shown in the photographs was sustained when a glass from which the claimant was drinking broke. (The claimant said that he received compensation from the hotel in the form of free meals during the course of that week). The Tribunal accepts entirely the claimant's account upon this issue. However, the fact of the matter is that there is no photographic evidence of the condition of the claimant's lip in November 2019 and Mr Wright's account that the claimant had a cold sore is corroborated by Mrs Dobson. The Tribunal therefore finds as a fact that the claimant did have a cold sore upon that particular day. Even if the Tribunal is wrong upon that, it does not detract from the Tribunal's finding that the claimant lunged at Mr Wright for the reasons already given.

89. The Tribunal is satisfied that objectively the respondent has shown on the balance of probability that the claimant was in repudiatory breach of contract and was liable to summary dismissal. On any view, sexual assault upon the managing director

of the employer by an employee is repudiatory conduct which the respondent was entitled to accept. The respondent did so by bringing the contract of employment to an end immediately. Therefore, the complaint of wrongful dismissal fails.

90. The Tribunal now turns to the unfair dismissal complaint. In the light of the Tribunal's findings, the Tribunal is satisfied that the respondent had available a potentially fair reason for the dismissal of the claimant. This was by reason of the claimant's conduct. The Tribunal is satisfied that the respondent had a genuine belief in the incident, the Tribunal finding as a fact that it had occurred.

91. The Tribunal is satisfied that the respondent had reasonable grounds upon which to believe that the claimant had committed that act of misconduct. Indeed, the respondent's managing director Mr Wright was the victim of the sexual assault. His account is corroborated by Mrs Dobson. On any view, therefore, the respondent acted within the range of reasonable responses in determining that there were reasonable grounds upon which to sustain that belief.

92. The claimant was dismissed without the respondent following any kind of procedure or process. Mr Wright dismissed the claimant there and then. There was no investigation meeting. There was no disciplinary meeting.

93. The Tribunal agrees with Miss Amartey that this one of those rare cases where, exceptionally, the employer acted within the range of reasonable responses in determining that the following of a disciplinary process would be utterly futile. Mr Wright was sexually assaulted. It happened to Mr Wright himself. The claimant has tendered no explanation for his behaviour.

94. The Tribunal finds as a fact that Mr Wright did not receive the claimant's letter of appeal. The Tribunal does not accept Mrs Black's evidence that the letter of appeal was posted. As has been said, the claimant's evidence about the appeal process is so unsatisfactory that the Tribunal cannot be satisfied that the appeal letter was ever sent to Mr Wright. In those circumstances, in so far as it needs to be said, the respondent acted reasonably in not entertaining an appeal because as far as the respondent was concerned the claimant did not make one.

95. In so far as it is necessary to do so, the Tribunal finds that the respondent did not unreasonably fail to comply with the ACAS Code of Practice. As has been said, this is one of those rare cases where the employer, acting within the range of reasonable responses, could determine it to be utterly futile to follow the ACAS Code or indeed any other fair process.

96. If the Tribunal is wrong to find that the respondent's decision to dispense with a disciplinary procedure fell within the range of reasonable responses and consequently the decision to dismiss is unfair, the Tribunal would have made a reduction of 100% to both the basic and compensatory awards on account of the claimant's conduct. The Tribunal has made findings of fact that the claimant lunged at Mr Wright and sexually assaulted him.

97. This was egregious conduct upon the part of the claimant. The claimant's conduct occurred before the dismissal. This was a frightening and shocking incident which shook Mr Wright. It was plainly culpable and blameworthy conduct warranting the maximum reduction to the basic award.

98. The claimant's conduct was the reason for his dismissal. Accordingly, it would have been open to the Tribunal to make a reduction to the compensatory award in such amount as the Tribunal considers just and equitable. Here, in the Tribunal's

judgment, the employee was wholly to blame for his dismissal. There was nothing improper in Mr Wright seeking to discuss the claimant gossiping with him. The claimant's behaviour that day was culpable and blameworthy. A 100% reduction would therefore have been made to the claimant's compensatory award had he succeeded with his complaint.

99. For the avoidance of doubt, the Tribunal finds as a fact that the claimant was not furnished with a statement of terms and conditions. However, it is not open to the Tribunal to make an award under section 38 of the 2002 Act given that the Tribunal has not found in the claimant's favour upon the merits of either his wrongful dismissal or unfair dismissal complaints.

Employment Judge Brain

Date: 6th October 2020