# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr A Gormley**
**Respondents:** **City of York Council**

**Heard on:** **13 November 2023** (by CVP)
**Deliberations: in Chambers: 17 November 2023**

**Before:** **Employment Judge Shepherd**
**Appearances**
**For the claimant: Mr Roxborough, counsel**
**For the respondent: Mr Healy, counsel**

## RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim of unfair dismissal is well-founded is well-founded and succeeds.

2. The claim of wrongful dismissal is well-founded and succeeds.

A further hearing will be listed to deal with remedy.

## REASONS

1. The claimant was represented by Mr Roxborough and the respondent was represented by Mr Healy.

2. The Tribunal heard evidence from:

Michael Melvin, Director of Safeguarding Adults;
Nick Carter, HR Advisor;
Claire Waind, HR Manager;
Aidan Gormley, the claimant;
Andrea Dudding, Trade Union representative.

3. I had sight of an agreed bundle of documents numbered up to page 295. Further documents, 17 pages of notes of the appeal hearing, were added during the course of the hearing. I considered those notes to which I was referred by the parties.

4. The issues were discussed at the start of the hearing. The claimant brought a claim of unfair dismissal. The respondent conceded that the claimant was dismissed and contended that this by reason of conduct. The Tribunal would decide whether the dismissal was by reason of conduct and, if so, whether the respondent had a genuine belief in the claimant's guilt on reasonable grounds following a reasonable investigation and whether dismissal was within the band of reasonable responses open to the respondent.

5. The claimant made an application to amend to include a claim of wrongful dismissal. Mr Roxborough submitted that no claim for notice pay was included in the form ET1. It was contended that the conduct was not sufficient to amount to gross misconduct. The claim had been drafted by the claimant with the assistance of his Trade Union representative.

6. Mr Healy, on behalf of the respondent opposed the application. There was no indication of this claim prior to the start of the hearing. This was a new cause of action, the amount of notice pay could be substantial in view of the claimant's 22 years' service.

7. I considered this application to amend. It did raise a new cause of action. The claim arose out of the same facts. The leading authority on the question of amendment is **Selkent Bus Co. Ltd. v Moore [1996] ICR 66** The well-known passage in Mummery J's Judgment from that case is also repeated in Elias J's judgment in the **Foxtons Ltd v Ruwiel UKEAT/0056/08** case:-

> "Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. What are the relevant circumstances? It is important and undesirable to attempt to list them exhaustively, but the following are certainly relevant:-
>
> > (a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action;
> >
> > (b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, eg in the case of unfair dismissal (section 111 of the 1996 Act);

> (c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the rules for the making of amendments. The amendments may be made at any time – for, at, even after the hearing of the case. Delay in making the application is however a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particular if they are unlikely to be recovered by the successful party, are relevant in reaching a decision".

8. This is not merely a relabelling exercise but I have considered the relative injustice issue as identified in the **Selkent** guidelines. On the claimant's side if the application is refused he will have a claim for unfair dismissal but will not be able to bring the claim that the finding of gross misconduct, leading to summary dismissal, was a breach of contract. On the respondent's side, it faces a new cause of action for notice pay that could succeed if the unfair dismissal claim fails.

9. Although I accept that this is not merely a relabelling exercise and the application is made at a very late stage, it does arise out of the same facts and requires no further evidence to be provided. Considering the balance of prejudice, the relative injustice and hardship involved, I am satisfied that it is in the interests of justice to grant the amendment.

10. I was concerned at the outset of this hearing that there was a substantial amount of documentary evidence and five witnesses to be heard. The factual issues were relatively complex and this is a case that should have had a longer listing than the one day that was listed once the claim was accepted. I considered postponing the hearing and listing it for two or three days but the representatives indicated that they would limit the evidence and conform to a fairly strict timetable which should mean that the evidence could be concluded. This was a video hearing, the parties, witnesses and representatives were all in attendance and I considered that it was appropriate to hear the evidence. This was concluded with no breaks save for lunch. There was no time left to complete submissions and both parties' representatives agreed to provide written submissions. This is not a course I would normally adopt but I considered it was in the interests of justice to deal with the matter in that way.

11. This involved a further day in chambers for me to consider the submissions, review the evidence and reach a decision. I would normally issue an extempore judgment but, in order to move the matter forward as quickly as possible, I am providing a written judgment.

## Background/ facts

12. Having considered all the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal

findings that I made from which I drew my conclusions. The numbers in brackets are references to the page numbers of the documents within the bundle of documents.

13. Where I heard evidence on matters for which I make no finding, or do not make a finding to the same level of detail as the evidence presented, that reflects the extent to which I consider that the particular matter assists in determining the issues. Some of my findings are also set out in my conclusions, to avoid unnecessary repetition some of the conclusions are set out within the findings of fact. The numbers in brackets refer to those within the bundle of documents

14. The claimant was employed by the respondent as an Approved Mental Health Practitioner (AMHP) from 3 April 2000 until his summary dismissal for gross misconduct on 10 March 2023.

15. On 3 August 2022 (49) a complaint was submitted to the respondent under its Dignity at Work Policy by AG, a locum AMPH, in which an allegation was made against the claimant in respect of a discussion between the claimant and a trainee in respect of the assessment on 7 June 2022 of a young girl who was alleged to have been subject to abuse. There was discussion about the assessment of the girl.. AG stated:

> "Aiden made comments about how some girls can make false allegations and not all tell the truth. I was very upset by his comments given the little information we had on this 19 yr girl. She is a care leaver and struggled with self-harm and risky behaviours over many years. I felt Aiden dismissed this and generalised.…
>
> I have had other concerns about Aiden making comments about what I'm wearing and other comments that I surmount to inappropriate behaviour in the workplace.
>
> He told me a strange story whilst working late with him undertaking a MHA. I wasn't sure if the story was meant to be funny or something that had actually happened to him but it involved a small boy falling back onto a poker whilst stoking the fire. Given it was dark and late and I had only worked for York a short time I didn't know what to make of it but I felt vulnerable. I didn't speak of it to my partner when I got home but did a few days later. I did mention it to LH a colleague. It seems that Aiden does talk like this to people and doesn't see any wrong doing.
>
> I try to ignore comments and not give eye contact or get into conversations that I don't need to have. I would not want to go out alone with him if working late.
>
> He has made a comment in the car when I have gone to change gear saying he thought I was going to touch his knee.
>
> We all have a laugh and a joke at times but given the late-night incident this made me feel uncomfortable."

16. The claimant was suspended on 17 October 2022. An investigation took place and it was recommended that the matter should be considered at a formal disciplinary hearing.

17. The disciplinary hearing took place on 10 March 2023. On 14 March 2023 Michael Melvin wrote to the claimant with the outcome of the disciplinary hearing (51). In this letter it was stated

> "The hearing was convened to discuss the allegation that you had bullied, harassed and/or intimidated another employee/s within the context of the Council's dignity at work policy.
>
> Having considered all the information presented at the hearing, including your formal response, mitigation and explanations, I advised you on Friday, 10 March 2023 that I had found the allegations proven, resulting in your summary dismissal.
>
> The summary of my findings and considerations are as follows:
>
> - I find that you have engaged in behaviour including unwanted innuendo and unwelcome jokes or comments that are sexist and that this behaviour that any reasonable person would realise is likely to offend without the recipient having to make that clear to you. I formed a reasonable opinion, on the balance of probability that these allegations were substantiated because in addition to the complainant's experience, evidence from other statements corroborated that the complainant was not the only member of the team to experience behaviour that falls into this description.
> - I also noted that when given the opportunity to reflect on your alleged behaviour in the hearing, you took the view that you will continue to behave and speak in the manner that you do until someone tells you otherwise. Given the nature of the allegations presented against you and the time that you have had to reflect on these issues during the investigation process, it is really disappointing that you appear to maintain a stance that has led us to these allegations being registered in the first instance.
> - I have taken account of the characters statements that you have provided from your colleagues and I have no reason to not accept that they are their truthful views of you was a colleague. I did discount any references to your capability as an AMHP as that was not an allegation the investigation of the hearing was considering. However, because some of your colleagues do not recognise this behaviour from you does not undermine the experience of those who have.
> - I did note that you were described by one of your long-standing colleagues as being a "misogynist". A definition of which supports the nature of the original allegations.
> - I have taken into account your explanations and the mitigating circumstances you presented and balanced this against your alleged behaviours, the impact this has had on your colleagues and your willingness to acknowledge and learn from this.
> - In balancing some of these conflicting statements, I have to consider the motivation of each party to make the representations that they have. I was not presented with any evidence to support and suggest that the allegations that were made against you were malicious in any way. I therefore have no reason to doubt the content of the original and corroborating statements.

> As previously confirmed, I found the allegations against you proven. The normal sanction for Gross Misconduct is summary dismissal. I then had to consider whether there was sufficient mitigation to not apply the normal sanction. As you denied the allegations at the outset of the meeting your position was to deny the allegations rather than to provide mitigation against them and you showed little or no remorse for your actions in the hearing, despite the representations made, I found that there was no reason to lessen the normal sanction.
>
> I therefore confirm my decision to summarily dismiss you from the Council's employment without notice effective for Friday, 10 March 2023…"

18. The claimant appealed against his dismissal on 25 March 2023. An appeal hearing took place before a panel comprising three elected council members. The claimant's appeal was not upheld.

19. On 12 October 2023(293) Social Work England, following a referral by the respondent, wrote to the claimant providing the Case Examiner's decision that there was no realistic prospect of a finding of impairment of the claimant's fitness to practice.

## The Law

20. **Unfair Dismissal – Section 98 Employment Rights Act 1996 (the 1996 Act)**

> "98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –
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> (a) the reason (or if more than one the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling in subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) The reason falls within this subsection if it –
>
> (a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed to do;
>
> (b) relates to the conduct of the employee …
>
> (4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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".

21. In accordance with the case of **British Home Stores Limited v Burchell [1978] IRLR379** it is for the respondent to establish that it had a genuine belief in the misconduct of the claimant at the time of the dismissal and that that belief was based upon reasonable grounds and the dismissal followed a reasonable investigation and a reasonable procedure. This formulation is commonly termed the "Burchell test". If the Burchell test is answered in the affirmative, 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. When Burchell was decided the burden lay with the respondent to show some elements of fairness. That burden was removed by primary legislation in 1980 and there is now no burden on either party in relation to section 98(4) of the 1996 Act. The burden lies neutrally between them. It is of key importance to avoid substituting the Tribunal's view for that of the respondent. The Tribunal must judge the questions posed by section 98(4) from the standpoint of the hypothetical reasonable employer and note that the band of reasonable responses can in appropriate cases encompass both dismissal and a lesser disciplinary punishment. The size and resources of the respondent are relevant to the matters to be determined under section 98(4) of the 1996 Act. There was no suggestion in this case that resource issues affected the scope of the investigation.

22. In **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR23** the Court of Appeal confirmed that 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 any other procedural and substantive aspects of the decision to dismiss the person from his employment for misconduct reason.

23. In **Ulsterbus Limited v Henderson [1989] IRLR251** the Northern Ireland Court of Appeal said it was not incumbent on a reasonable employer to carry out a quasi judicial investigation into an allegation of misconduct with a confrontation of witnesses and cross-examination of witnesses. Whilst some employers might consider that necessary or desirable an employer who fails to do so cannot be said to have acted unreasonably. The Tribunal considered the decision of **A v B [2003] IRLR405** in which the Employment Appeal Tribunal reminded tribunals that in determining whether an employer has carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and the potential effect upon the employee. This decision was reaffirmed by the Court of Appeal in **Salford Royal NHS Foundation Trust v Roldan [2010] EWCA CIB522**.

24. In **Taylor v OCS Group Limited [2006] IRLR613**. Smith L.J. stated, at paragraph 47:

> "The error is avoided if ETs realise that their task is to apply the statutory test. In doing that they should consider the fairness of the whole of the disciplinary process. If they found that an early stage of the process was defective and unfair in some way they will want to examine any subsequent proceedings with

> particular care. Their purpose in so doing will not be to determine whether it amounted to a re-hearing or a review but to determine whether due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker the overall process was fair, notwithstanding any deficiencies at the early stage".

25. In the decision of **South West Trains v McDonnell [2003] EAT/0052/03/RN** HHJ Burke at paragraph 36:

> "Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or were arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances was the investigation as a whole fair?"

26. In the case of **Orr –v- Milton Keynes 2011 ICR 704** Aitkens LJ provided guidance

> "…..the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. (7) The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". (8) A particular application of (6) and (7) is that an ET may not substitute its own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances. (9) An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.

27. Section 207A of the 1992 Act provides that any Code of Practice issued by ACAS shall be admissible in evidence and that a Tribunal shall take account of any provision of such code as appears relevant. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2009 contained the following provision:

> *"9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct ….and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. …".*

28. Section 207A of the 1992 Act provides for an increase of up to 25% in any compensatory award for unfair dismissal if the employer has failed to comply with the Code and the failure is unreasonable.

29. In the employment context ”gross misconduct” is used as convenient 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, 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. Exactly what type of conduct amounts to gross misconduct will depend on the facts of the individual case. Generally to be gross misconduct, the misconduct should 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 employment. Thus in the context of section 98(4) of the 1996 Act it is for the Tribunal to consider:

(a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct and

(b) was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, the employee’s length of service and disciplinary record are relevant as is his attitude towards his conduct.

**Wrongful Dismissal Claim**

30. The test of the band of reasonable responses has no application to this claim. The issue here is for me to determine whether the respondent has shown on the balance of probabilities on the evidence before me that the claimant was guilty of gross misconduct. It is for me to make my own decision on that and not to evaluate the reasonableness of the respondent’s decision.

31. I had the benefit of written submissions provided by both representatives. These were helpful. They are not set out in detail in these reasons but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

**Conclusions**

32. The allegations against the claimant had changed from those within the Dignity at Work complaint which was submitted on 3 August 2022 about an incident on 7 June 2022.

33. It was not clear why AG felt offended or vulnerable. There was little or no evidence. The claimant had referred to false memory and she had been offended by that and walked off saying something like ‘I’ve heard enough of this shit from men’.

34. In the notes of the investigation meeting with AG there is reference to the young

person having a history of trauma and the claimant's comments had upset AG. It was said to be "a flippant comment about "not everybody tells the truth"

35. It was accepted by Michael Melvin, the dismissing officer, that this incident in itself was not gross misconduct.

36. The comment that the claimant made to AG that he must have touched a nerve was interpreted by Mr Melvin as dismissive.

37. In the Dignity at Work complaint AG had mentioned other concerns about the claimant making comments about what she was wearing and other comments which she considered to be inappropriate in the workplace. During the investigation AG stated that there were "lots of odd comments all the time 'there nice glasses'" (119). This was the only specific example of these inappropriate comments. It was submitted by Mr Roxborough that the remark is complimentary and cannot reasonably be interpreted as bullying. AG had never raised any concerns with the claimant and the claimant had never been subject to any prior complaints and "the claimant is at a loss to understand MM's conclusions"

38. The story of the boy suffering when a poker went up his bottom was denied by the claimant. Michael Melvin reached the conclusion that it could be a sexually intimidatory story told to a lone woman in a car. The claimant denied telling the story but admitted that, if he had, it would be inappropriate to tell that story. Mr Healy submitted that, if the story was told by the claimant in the circumstances alleged then summary dismissal for doing so fell within the band of reasonable responses.

39. It was submitted by Mr Roxborough that if the respondent was going to conclude that this story was told and was some sort of deliberate sexual intimidation, then the issue ought to have been properly explored with AG and the claimant during the investigation.

40. I am not satisfied that there was a reasonable conclusion that the telling of this story was sexual intimidation or bullying. There was no reasonable investigation.

41. The investigation was not reasonable. The statements about innuendos and sexist remarks were lacking in specificity and largely generic. There were no follow-up questions to ask what innuendo or unwelcome jokes or comments had actually been made and in what circumstances they had been made.

42. The reference to an incident in the car was vague. It was said that the gearstick accidentally touched the claimant's knee. The claimant said that he felt uncomfortable with AG's hand close to his knee. Michael Melvin said that this comment did not form part of his deliberations. It was not part of his decision to dismiss.

43. The claimant had provided some very supportive statements from colleagues and former colleagues. The allegations of sexist behaviour and innuendo are vague. There were no specific examples and the respondent appears to have accepted these allegations without reasonable questioning.

44. The allegation and investigation arose from a discussion about the consistency of

truthfulness of girls or young people making allegations of abuse and "false memory" which was, essentially, a professional concern. There appeared to be no investigation or finding with regard to the substance of the complaint about the discussion on 7 June 2022 It upset AG but it is unclear as to why it is said to be bullying.

45. Many of the statements are vague and unspecific. There was some reference to abusive or offensive emails but none were referred to the Tribunal.

46. The respondent dismissed the claimant for gross misconduct and rejected his appeal. The respondent reported him to his professional body Social Work England and to the DBS. The claimant has obtained further employment at a lower salary but this was potentially career ending. I have considered the authority provided by Mr Healy, **Moncrieffe v London Underground Ltd UKAEAT /0235/16/DA** in which the EAT (His Honour Judge Hand) considered the judgment in **A v B** and stated that:

> "I do not myself accept there is any heightened or higher test, more nor do I accept that any such heightened or higher test, nor do I accept that any such heightened or higher test should be confined to those professionally qualified. The test in my judgment, is the same in all cases…. Where grave allegations are made with potentially very serious consequences for a person who has been employed for a long time without any query being raised about his character, then it is incumbent upon the employer to take all that into account in examining what has happened and incumbent upon the Employment Tribunal to take it into account in deciding whether there was a reasonable investigation."

47 It was stated by the EAT that it was not understood why any distinction should be made between a pharmacist or a man who repairs trains. A finding of gross misconduct is a serious matter and a serious impediment to the future of any working man or woman.

48. I accept that this is the case but where a regulatory body can determine whether a claimant is able to continue to pursue his career then **A v B** must be relevant and the gravity of the consequences will be relevant, whether this is a professional or other body, which can determine whether the claimant will be able to continue in his or her profession or trade.

49. The claimant was a senior mental health professional with almost 23 years' service. with a clean disciplinary record. There was no evidence that these matters had been raised with the claimant in previous supervisions.

50. The investigation was inadequate and unreasonable. The allegations of innuendo and inappropriate jokes and the allegation that he was a misogynist have been accepted without any reasonable investigation. The finding of gross misconduct was not formed on reasonable grounds after a reasonable investigation.

51. It was said in the letter of dismissal that the claimant showed little or no remorse for his actions in the disciplinary hearing. However, in the claimant's statement to the investigation he does acknowledge (page 163) that his interactions with others have sometimes caused them offence. He had not been aware of this but he was still open to colleagues telling him so that he could change.

52. The standard of the investigation and the decision to summarily dismiss was flawed and outside the band of reasonable responses.

53. I am satisfied that no reasonable employer acting reasonably could have made the decision to dismiss in the circumstances. I have considered the reasonableness of the dismissal by the objective standards of the hypothetical reasonable employer and I have been careful not to substitute my decision for that of the respondent. The decision fell outside the band of reasonable responses which a reasonable employer might have adopted.

54. I am satisfied that the claim of unfair dismissal is well-founded and succeeds. I am not satisfied that there would be any reduction to the compensation on account of the claimant's conduct or that a reduction should be made for the reasons outlined by the House of Lords in the case of **Polkey v A E Dayton Services [1988] ICR 142.** The claimant's conduct was not such as to warrant dismissal if a fair procedure had been followed.

55. With regard to the claim of wrongful dismissal, I am not satisfied that the claimant was guilty of misconduct amounting to a repudiatory breach of the contract and the claim of wrongful dismissal is well founded and succeeds.

56. The question of remedy will be determined at a further hearing.

Employment Judge Shepherd

27 November 2023