EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100009/2017

Held in Glasgow on 26 June 2017

Employment Judge: J D Young

Mr C Darby	**Claimant** **In Person**
Marsh Services Ltd	**Respondent** **Represented by:** **Mr D Dyal - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed in terms of Section 98 of the Employment Rights Act 1996 and the application is dismissed.

REASONS

1. In this case the claimant presented a claim to the Employment Tribunal claiming that his dismissal was unfair. The respondent resists this claim. They state that the claimant was dismissed for gross misconduct after appropriate investigation and that all disciplinary procedures were followed.

Issues

2. The issues for the Tribunal were essentially:-

   (a). whether the decision maker believed the claimant to be guilty of the misconduct on reasonable grounds, reasonably tested and dismissal was within the band of reasonable responses; and

(b). the sanction of dismissal was not inconsistent given the claimant's position that an employee of the respondent named Martin Pugh was guilty of similar misconduct but he had received a warning rather than being dismissed.

The Hearing

3. At the Hearing evidence was given by Alistair Brighton, Corporate Sales Leader with the respondent and who made the decision to dismiss the claimant; Rosaleen Jeanes, Senior HR Business Partner with the respondent; Paul Moody, Head of the respondent's Financial and Professional Practice (FinPro) who heard an appeal by the claimant; and the claimant.

4. As a preliminary matter Mr Dyal advised that the true name for the respondent was Marsh Services Ltd rather than "Marsh Limited" as had been previously given in the documents. There was no objection to that name change from the claimant.

Documentation

5. The parties had helpfully co-operated in preparing and supplying to the Tribunal a Joint Inventory of Productions paginated 1 – 279.

Findings in Fact

6. From the relevant evidence led, admissions made and documents produced I was able to make findings in fact on the issues.

7. The respondent is a large company operating internationally and offer various services in insurance broking, risk management, risk consulting, risk financing and insurance services.

8. The claimant was employed by the respondent initially as a Development Executive but quickly gained promotion firstly to Glasgow Sales Leader and then to Regional Sales Leader in Scotland. He was hard working and

successful in that role. He had continuous employment with the respondent in the period from 5 March 2012 until that employment was terminated with effect from 12 January 2017.

9. The claimant was employed on those terms and conditions contained with the Statement of Terms and Conditions of Employment dated 1 and 2 February 2012 (JP79/92). The claimant was subject to the respondent's Disciplinary Policy and Procedures (JP109/116). In terms of that procedure acts of gross misconduct which might lead to dismissal included:-

> ***"****Serious Incapability whilst at work, or in control of a company owned vehicle, through the misuse of alcohol or abuse of drugs."*
>
> *"Fighting, assault or threat of assault on another person".*

Incident

10. The incident which led to the dismissal of the claimant took place at a company event entitled "Team Walk Challenge". This is an annual fundraising event held by the respondent in aid of a nominated charity. The event in question was held in Center Parcs. It was a weekend long event over 16/18 September 2016 and involved approximately 500 employees. The claimant had arranged and entered his team for the challenge and paid the appropriate fee of £300. Other costs for accommodation and subsistence were paid for by the respondent.

11. On the train journey to the challenge on Friday 16 September 2016 and at the destination a good deal of alcohol was consumed by the claimant in the company with his colleagues. As a result the claimant became very intoxicated

12. In the evening he fell over twice as a consequence once outside his chalet accommodation and once inside and had been helped up on those occasions. He was advised that he should go to bed "*to sleep it off*". Whilst in the bedroom an argument broke out between him and Eamonn Gallacher who was one of the claimant's direct reports.

13. Raised voices were heard by colleagues in the adjacent room. The argument became heated. In the course of this argument the claimant struck the wall of the bedroom with the palm of his hand. The particular allegation against the claimant was that in the course of the argument he punched Mr Gallacher in the face.

14. The following morning the team challenge continued. The claimant's group completed the challenge together on Saturday 17 September 2016 but the atmosphere was more subdued than it had been on the Friday evening with little conversation between Mr Gallacher and the claimant. Those taking part returned to their homes on Sunday 18 September 2016.

15. The following Thursday, 22 September 2016 Mr Gallacher approached Kevin Nicol, his Managing Director in Scotland. He stated that on the evening of 16 September 2016 the claimant had punched him in the face "*and he fell against the wall".* He advised that he required to raise the incident as he had become to feel "*more and more angry about the incident and that he felt that he could not work for (the claimant) any more*." These matters were raised by Kevin Nicol in an e-mail to Rosaleen Jeanes and Alistair Brighton of 28 September 2016 (JP143). In the course of the discussion with his Managing Director Mr Gallacher referred to texts which had been sent to him by the claimant on Sunday 18 September 2016 (JP 140/142) being:-

> Sun 18 Sep. 12:59
>
> *"A fair amount of soul searching over the past day or so has brought me to the conclusion that I don't have a choice but to resign on Tuesday. I'm going to explain to my missus tonight what I done and how I can't rectify it, so I have no choice. I've got 6 months to find something else. So finally, please accept my deepest heartfelt apology. Take care."*
>
> Sun 18 Sep, 15:50

"Part of why I'm so disappointed is that I can't genuinely remember why we argued, what we argued about and how it ended. I remember flashes but no content at all. I know however I was out of order. I'm not trying to get out of anything at all here as I have no doubt whatsoever that I was in the wrong. I've spoken to Debbie, who has gone through me and is not a happy bunny – I can't afford however not to be in a job, I'd lose everything. On that basis can we work together for a little longer until your plan comes to fruition with Weirs / CE, which of course I'll help make happen. Is that ok?

I drank far too much, far too quickly and turned into an absolute wanker for some reason – no excuse for that at all of someone of my age. If I was 15 it could be forgiven!!! Again, I'm sorry."

Investigation

16. It was considered that the matter required investigation. Between 29/30 September 2016 statements were taken from and information provided by some of those who had attended the Team Challenge Event and may have knowledge of the events which had taken place on Friday 16 September 2017. Information was received from Fiona Park (JP144); detailed statement from Eamonn Gallacher (JP145/148) in which he described in some detail the argument which had ensued with the claimant and the allegation that the claimant had "*lashed out and punched me on the left hand side of my jaw*"; Lorna Smart (JP149), Matt Marshall (JP150) and Mark Turner (JP151/152) who stated that he had shared a room with the claimant and when he had awoken on Saturday morning still suffering the effects of alcohol the claimant commented to him "*that he had argued with Eamonn and might even have punched him but wasn't sure and he could not remember what had triggered this argument. He was clearly embarrassed about this situation."*

Disciplinary Hearing

17. The claimant was then invited to a disciplinary hearing by letter of 30 September 2016 (JP153/154) with regard to his conduct at the Team Walk Challenge and specifically it was alleged "*you were intoxicated on the evening of Friday 16 September and had an argument with a colleague. It is further alleged the argument resulted in a physical assault of the colleague."*

18. That hearing took place on 4 October 2016 and was taken by Alistair Brighton (Notes at JP155/160). The claimant at that time acknowledged that he had been seriously drunk at the event and that there had been an argument between him and Mr Gallacher and was remorseful about that behaviour but denied that he had punched Mr Gallacher. He did state at that hearing that in relation to the conversation with Mark Turner he would not have used the work "*punch*" but may have said that he "*paushed* (phonetic) *him explaining this is Glasgow dialect for push*". In relation to the texts which had been sent to Mr Gallacher he advised that he had offered to resign as his behaviour "*on the evening without hitting EG was bad enough to warrant it".*

19. Subsequent to the disciplinary hearing Mr Brighton along with Rosaleen Jeanes contacted witnesses to clarify matters and ask additional questions. That included a conversation with Mark Turner on 7 October 2016 when information was requested of Mr Turner on:-

    (a). *Whether the claimant had said he had hit Eamonn Gallacher when he awoke the following morning to which Mr Turner is noted as responding:-*

        "Can't recall the exact word used thinks it might have been "punched".

        All blurry now." And

    (b). *Of a conversation between him and Mr Gallacher when Mr Gallacher had indicated that he had been hit by the claimant and stated:-*

> *"Does recall conversation. It was almost immediately after EG came out of the room. Was interested in what happened and thinks EG said CD "threw a punch, or had a go at him." MT confirms he was surprised.* (JP163*)*

20. Additional questions were also asked of Matt Marshall who advised that he "*does remember EG telling him that CD had hit him but can't recall exactly when, but definitely told him that. EG was upset coming out of the room. He did speak to someone else at the party about it prior to talking to Matt."* (JP163)

21. Subsequent to those enquiries Mr Brighton considered the evidence available and in particular whether he was of the view that the claimant had punched Eamonn Gallacher which he considered was the most serious allegation against the claimant.

22. He did not see a reason why Eamonn Gallacher should fabricate his version of events. He was influenced by:-

    (a). The text messages sent by the claimant to Mr Gallacher on 18 September. He considered that the offer of resignation would not have been made had he simply been drunk and had an argument with another employee. He thought the text messages indicated that something "*significantly more serious*" had occurred.

    (b). He considered that the statement from Mark Turner was significant wherein the morning after the incident the claimant had told him that he had "*hit/punched Eamonn Gallacher*." He considered that the explanation from the claimant that he had "*paushed*" Mr Gallacher was unreliable. He considered that this explanation had been put forward with the claimant having had time to "*process what had occurred and after he had realised the gravity of the situation."* While he liked the claimant and strong figures had been delivered by him in his employment he considered that he had reasonable grounds to believe that the claimant had punched Eamonn Gallacher and this was an act of gross misconduct which

could only be dealt with by dismissal. He could see no exceptional factors which might be taken into account to mitigate the sanction.

23. That outcome was advised to the claimant by letter of 14 October 2016 (JP 174/177). This letter contained reasons why Mr Brighton believed that the claimant was guilty of a punch on Mr Gallacher. The letter also advised that at the company's "*sole discretion*" the claimant would receive pay for his notice period and his last day of service would therefore be 12 January 2017. The claimant was advised of the appeal procedure.

Appeal

24. The claimant appealed in terms of a letter of 14 October 2016 (JP 178). He stated that he would wish to appeal on the grounds that "*I have been dismissed for an offence that I did not commit"* and that his grounds of appeal would also be based on lack of consistency and cited examples of offences by other employees of the respondent where he believed gross misconduct had been committed but no dismissal had taken place.

25. The appeal was arranged for 2 November 2016 and was taken by Paul Moody who was Head of FinPro Specialities Practice. That was a distinct and separate unit from that in which the appellant worked. The claimant was to be accompanied by Mr Robert Worrell on this occasion. Mr Moody was supported by Nicola Fowler, Senior Hr Business Partner. Minutes of that meeting were taken and produced at JP199/208.

26. At that time the claimant wished to explain that his *"relationship with Eamonn wasn't ever contextualised"* and the background not considered. He indicated that Mr Gallacher had not been performing well and had become distant from the claimant and in his view "*jealous*". He stated that he had sought to discuss with him improvements to his performance or potentially a move to a different department.

27. He denied that he had punched Mr Gallacher and stated that he considered the witness statements lacked consistency and that he had said to Mark Turner that he had "*pushed*" Eamonn Gallacher and not *"punched"*

28. In relation to the text messages the claimant indicated that the first message was sent "*on the recommendation of my wife, she is a psychology student. It was reverse psychology, she suggested that I apologise and then potentially it could turn the situation around*." He indicated that it was never his intention to resign but he wished Mr Gallacher to think that he was taking the argument seriously. He had not responded to that text so he had sent a further text later. No response was received to that text either.

29. In relation to the conversation with Mr Turner the claimant advised that he *"spoke to Mark at 7am the next morning when I was lying face down on the bed and said that I pushed him. I refuted what Mark said in the initial disciplinary and he reconsidered and said that is what he thought I said*." (JP 206).

30. There was also the following exchange in relation to consistency wherein Ms Fowler stated:-

> *"In the e-mail that you sent me you raised the consistency piece and were concerned that other people within the business had been called into disciplinary hearings over similar instances but the outcomes had been less severe. I obviously cannot comment on the specific instances but can investigate this further for you. Would you like me to do this?"*
>
> The response from Mr Worrell was:-
>
> > "*We want Chris's appeal to be treated as an individual case"* and that *"we would like you to look at Chris's case on its own merits and the context behind it. We don't want you to spend time on this. My solicitor recommended that we don't press for information at this time but are happy to trust in the individual process we want to look forwards and not backwards."(*JP207)

31. Ms Fowler indicated that she wished to be sure that the claimant was "*happy with this*" as "*you only get one chance to appeal* " and she was "*more than happy to investigate this for you."* However the claimant advised that when

he had spoken to "*Acas they said that if we have to go down the mediation route then they would look at this then."*

32. A further enquiry was made by Mr Moody subsequent to the appeal hearing. He obtained some further information from Matt Marshall; Mark Turner; Alistair Brighton; and Eamonn Gallacher.(JP209/213)

33. Mr Moody decided that he would not uphold the appeal and wrote to the claimant by letter of 11 November 2016 (JP214/215). Within that letter he gave reasons why he considered that the original decision was correct and it was more likely than not that the claimant had punched Mr Gallacher.

34. Thereafter the claimant e-mailed a Mr Joe Grogan and Mark Weil of the respondent to indicate that he would be taking matters further albeit he had a regard for respondent and had enjoyed working with the company.

Inconsistency of Treatment

35. The issue of inconsistent treatment did not arise within the disciplinary hearing with the claimant. The evidence from Mr Brighton (which was unchallenged) was that during the investigation process the claimant "*during an emotional evening telephone call*" made a claim that he was being treated differently to a Mr Martin Pugh who had been disciplined by way of a written warning for an event which the claimant indicated was similar. Mr Brighton's position was that he took advice from Rosaleen Jeanes to understand this incident and whether he should take it into account in his consideration of the matter. He was advised that the circumstances were different and it was not a matter which he should take into account.

36. The position of Ms Jeanes was that she had no prior knowledge of the Martin Pugh incident but made enquiries. She spoke with the HR Director who was familiar with the matter. She understood that Mr Martin Pugh and a colleague had been in a public house after work on a Friday evening with their respective female partners. On that occasion Mr Pugh had punched his colleague which was witnessed by other work colleagues who were in

the public house that evening. The matters of distinction for Ms Jeanes was that:

(1) The incident involving the claimant was one in which a senior member of the sales team had acted in a manner which was inappropriate when there were junior members of the team present;

(2) He had punched a direct report which was different to the Martin Pugh situation where two individuals of the same rank whilst in the public house with their partners had had a row.

(3) The incident involving the claimant had been at a work function.

She therefore advised Mr Brighton that the matter involving the claimant should be decided on its own facts.

36. Within the letter of appeal from the claimant (JP 178) he raised the issue of inconsistent treatment stating:-

> *"For example I am aware of three instances, one including proven, witnessed physical violence, where a colleague has committed a gross misconduct offence and they are still in the business and did not receive as severe a punishment as I have. To this extent can you please advise whether or not I contact Acas before or after the appeals process is complete?"*

37. In the letter the claimant also continued to maintain that he had not struck Mr Gallacher. As narrated above, at the appeal after discussing the events at the weekend in question Ms Fowler noted that the claimant had raised consistency of treatment and the exchange on inconsistency, again as narrated above, took place.

38. Mr Moody took from that exchange that the claimant no longer wished to pursue inconsistency as an issue. He did not then consider the matter as part of his deliberation on the appeal but determined it solely on the issue of

whether or not Mr Brighton's decision that there was sufficient to demonstrate that the appellant had struck Mr Gallacher was correct.

39. At that time there was no paperwork available for the incident involving Mr Pugh. It was thought that none existed. Ms Jeanes explained that later and after the decision had been taken the paperwork on this matter came to light. The claimant had raised it again in his ET1 and it was a feature of his complaint of unfair dismissal. That occasioned enquiry. Apparently the paperwork was within the filing system of the Personal Assistant to the member of HR who dealt with the matter at that time. Accordingly the paperwork as regards the incident involving Mr Pugh was produced at JP93/108 and included invitation to a disciplinary meeting; notes of disciplinary meeting; file notes of witness statements; continued disciplinary meeting and letter of outcome.

40. It appeared from those notes that the incident with Mr Martin Pugh took place late Friday afternoon on 23 August 2013 at a bar named Caminos. He had been drinking with colleagues. His girlfriend had been called a "*slapper*" by a colleague and he struck him as a result. There appeared to have been a lot of drink consumed. In terms of the notes it appeared that the issue of provocation played a part in consideration of the events and the decision which was reached namely to give Mr Pugh a "*written warning under the second stage of the company disciplinary procedure"* being one stage prior to a final written warning. This warning was to last for a year.

<u>Events subsequent to termination</u>

41. The claimant earned a basic salary with the respondent of £57,500 per annum at date of termination. However he also received performance related bonuses. In the year to April 2015 he had earned £142,188.10 (gross) including bonus. In the year to April 2016 he had earned £102,820.49 (gross) including bonus (JP231/232). He would also have been eligible for bonus in the year to March 2017. He considers that he may have been eligible for an amount between £20,000/£40,000 but within his Schedule of Loss (JP58/60) he indicated he made no claim for that amount as it would be *"reasonable to suggest that should I have been disciplined in*

line with other individuals for similar offences I would not have been eligible for a bonus."

42. As part of the remuneration package with the respondent he also received a car allowance, membership of a pension scheme; life insurance at four times salary and private health care for himself, his wife and two children.

43. He agreed that the difference between the payment of car allowance and the amount deducted from his salary under his "salary sacrifice scheme" amounted to £130 per month and effectively this amount meant that he was able to obtain (using the respondent employee car benefit scheme) the benefit of two cars (Mercedes and a Mini). He emphasised that the respondent had also arranged payment for all "ancillary bills being insurance and ongoing maintenance costs". He also agreed that at termination he had the opportunity buy these cars or enter into "PCP" contracts for their purchase and that he chose to enter the PCP contracts. The cost of those contracts were shown at JP252/257 and then JP258/264. Using the cost figures per month of £542.97 for the Mercedes car and £294.37 for the Mini car the total amount payable per month was £837.34.

44. The claimant had been able to find alternative employment and he agreed that the car allowance received from the claimant's new employer ran at the amount of £800 per month (JP276). Tax was paid on the car allowance which the claimant had received and he is now liable for maintenance and tax on the vehicles.

45. The alternative employment obtained by the claimant commenced from the date of his effective termination of employment with the respondent. He is now employed with an independent broker. He stated that the salary was £66,000 per annum but that there was no bonus scheme, no pension arrangement, no life cover, or private healthcare. Payslips in respect of the employment found by the claimant were produced at JP275/279. The contract of employment was produced at JP267/274.

46. It was challenged that no bonus payment or other commission payment would be payable to the claimant as it was suggested that in the sphere of

employment occupied by the claimant bonus was the norm. However the claimant denied any such scheme operated for him.

47. He also advised that he had been seeking better employment opportunities and had an interview on 10 July 2017. He was as yet unsure about any remuneration package but hoped that there might be a bonus scheme if he were successful in that application.

Submissions

for the Respondent

48. For the respondent reliance was placed on **BHS v Burchell [1980] ICR 303** and the guidance given as to the principal considerations when assessing the fairness of a dismissal by reason of conduct.

49. In this case it was stated that there was a genuine and reasonable belief that misconduct had taken place.There was an adequate basis to found the belief that the claimant had punched a junior colleague. While the claimant did not admit to this there was sufficient evidence available for Mr Brighton to come to that belief.

50. There had been no challenge taken to the investigation that had been conducted in the matter and it was submitted that such investigation had been more than adequate.

51. Given there was a well founded belief that the claimant had struck a junior colleague the sanction of dismissal was open to the employer. There was nothing exceptional about the case. The normal sanction within the disciplinary procedure for an act of gross misconduct such as this was dismissal.

52. Thus dismissal came within the band of reasonable responses of a reasonable employer.

53. So far as inconsistent treatment was concerned the employer was entitled not to take this matter further given what had been said on appeal.

54. However as the leading case of **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352** had made clear there were very limited circumstances in which a dismissal could be unfair by reference to a comparison with the way in which an employer has treated other employees. It was necessary to retain flexibility. That had been approved by the Court of Appeal in **Paul v East Surrey District Health Authority [1995] IRLR 305**. The guidance had been re-emphasised in **MBNA Ltd v M Jones UKEAT/0120/15/MC.** In **Securicor v Smith [1989] IRLR 356** it was emphasised that where an employer distinguishes between two cases the test is whether it was irrational to do so and that no reasonable employer would have made that distinction.

55. Again in **United Distillers v Conlin [1992] IRLR 503** it was stated that consistency was an important consideration but it was also important that flexibility be retained.

56. In this case the claimant's case was not truly comparable because:-

- In the Pugh case there had been an admission of guilt which was a mitigating factor.
- It was submitted that denying guilt but having it proved was significant.
- No apology or remorse was given.
- The claimant punched a junior colleague who reported to him whereas that was not the case with Mr Pugh.
- The claimant's misconduct took place within a work event whereas Mr Pugh's conduct did not.
- Mr Pugh was provoked as his partner was subject to an offensive remark.

Thus it was open to the employer to distinguish between the two cases and there was no comparable circumstance.

57. No procedural unfairness had been put in issue and it had been accepted by the claimant that he could not fault the process undertaken by the respondent. Accordingly the dismissal could not be found unfair on procedural grounds.

58. If it was found that the dismissal was unfair then it would be necessary to make a decision on contributory fault based on the primary facts. Those would indicate that there had been a punch thrown by the claimant and thus contributory fault should be assessed at 100%.

59. The claimant sought compensation by way of remedy but apart from reduction on grounds of contributory fault it was significant that no claim for bonus for 2016 or other incidental rights was made in the schedule of loss. The only claim for incidental rights made in the schedule of loss related to cars.

60. As had been demonstrated the car allowance position meant that there was no loss. Excluding considerations of tax the net amount paid by the claimant when in the employment of the respondent for the 2 vehicles was £134 per month compared with £37 per month at present. He would also own the cars at the end of their PCP terms.

for the Claimant

61. The claimant emphasised that he had not done what he had been accused of doing namely striking Mr Gallacher.

62. If Mr Brighton had known about the case involving Martin Pugh then that would have given him the exceptional reasons that he needed not to dismiss.

63. The decision making process had been one sided. While he freely admitted that he had too much to drink he emphasised that this outing was of the nature of a social event and that there were parallels between this case and that involving Mr Pugh.

64. While it was stated that the cases were not comparable because Mr Pugh had apologised he could not do so because he had not struck anyone. He could not apologise for something that he had not done.

65. Neither was the text message any admission of guilt but part of a search to remedy matters between him and Mr Gallacher.

66. So far as the cars were concerned he required to enter into PCP arrangements as he was unable to afford the purchase price. It seemed to be forgotton by the respondent that he would have to pay insurance and maintenance costs and road tax. If he had stayed with Marsh he would have handed the cars on lease back and received new models without making any final payments.

67. The bonus on his earnings was an integral part of his remuneration with the respondent and made up a considerable amount of his yearly earnings and could not be ignored in any assessment of ongoing future loss.

Conclusions

68. In this case the law and the tests that should be applied are well established. Section 98 of the Employment Rights Act 1996 (ERA) sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages, namely, (1) the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2) of ERA and (2) if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was unfair or fair under section 98(4). As is well known, the determination of that question:-

> *"(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."

69. Of the six potentially fair reasons for dismissal set out at section 98 of ERA one is a reason related to the conduct of the employee and it is this reason which is relied upon by the respondent in this case.

70. The employer does not have to prove that it actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. At this stage the burden of proof is not a heavy one. A "*reason for dismissal"* has been described as "*set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee"* - **Abernethy v. Mott Hay & Anderson [1974] ICR 323.**

71. Once a potentially fair reason for dismissal is shown, then the Tribunal must be satisfied that in all the circumstances the employer was actually justified in dismissing for that reason. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

72. In a case where misconduct is relied upon as a reason for dismissal then it is necessary to bear in mind the test set out by the EAT in **British Home Stores v, Burchell [1978] IRLR 379** with regard to the approach to be taken in considering the terms of section 98(4) ERA:-

"What the Tribunal have to decide every time is broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question (usually though not necessarily dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. That is really stating shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief, that the employer did believe it. Secondly, that the

employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly we think that the employer at the stage at which he formed that belief on those grounds at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating these three matters we think who must not be examined further. It is not relevant as we think that the Tribunal would itself have shared that view in those circumstances."

73. The foregoing classic guidance has stood the test of time and was endorsed and helpfully summarised by Mummery LJ in **London Ambulance Service NHS Trust v. Small [`2009] IRLR 536** where he said that the essential terms of enquiry for Employment Tribunals in such cases are whether in all the circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of a dismissal in those respects, the Tribunal then had to decide whether the dismissal of the employee was a reasonable response to the misconduct.

74. The Tribunal requires to be mindful of the fact that it must not substitute its own decision for that of the employer in this respect. Rather it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case **(Iceland Frozen Foods Ltd v. Jones [1982] IRLR 439)**. In practice this means that in a given set of circumstances one employer may decide that dismissal is the appropriate response, while another employer may decide in the same circumstances that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of a case.

75. Additionally a Tribunal must not substitute their decision as to what was the right course to adopt for that of the employer not only in respect of the

decision to dismiss but also in relation to the investigative process. The Tribunal are not conducting a re-hearing of the merits or an appeal against the decision to dismiss. The focus must therefore be on what the employers did and whether what they decided following an adequate investigation fell within the band of reasonable responses which a reasonable employer might have adopted. The Tribunal should not "*descend into the arena*" – **Rhonda Cvon Taff County Borough Council v. Close [2008] ICR 1283**.

76. Also in determining the reasonableness of an employer's decision to dismiss the Tribunal may only take account of those facts that were known to the employer at the time of the dismissal – **W Devis & Sons Ltd v. Atkins [1977] ICR 662.**

77. Both the *ACAS* Code of Practice on disciplinary and grievance issues as well as an employer's own internal policies and procedures would be considered by a Tribunal in considering the fairness of a dismissal. Again however, when assessing a reasonable procedure has been adopted Tribunals should use the range of reasonable responses test – **J Sainsbury Plc v. Hitt [2003] ICR 111.**

78. Single breaches of company rules may found a fair dismissal. This was the case in **The Post Office T/a Royal Mail v. Gallagher EAT/21/99** where an employee was dismissed for a first offence after 12 years of blameless conduct and the dismissal held to be fair given the serious nature of the offence and the clear provisions of an employer's disciplinary code. Also in **AAH Pharmaceuticals v. Carmichael EAT/0325/03** the employee was found to have been fairly dismissed from breaching company rules on leaving drugs in his delivery van overnight. The EAT commented:-

> *"In any particular case exceptions can be imagined where for example the penalty for dismissal might not be imposed, but equally in our judgment, when a breach of a necessarily straight rule has been properly proved, exceptional service, previous long service and/or previous good conduct, may properly not be considered sufficient to reduce the penalty of dismissal."*

79. This all means that an employer need not have conclusive direct proof of an employee's misconduct. Only a genuine and reasonable belief reasonably tested. The issue is not whether the claimant in this case actually struck Mr Gallacher.

80. In terms of the **Burchell** guidance it is necessary in the first instance to consider whether the respondent had a belief in the misconduct of the claimant. The critical issue in that respect was whether or not the respondent believed that the claimant had punched his colleague. Without that aspect of behaviour the events of 16 September 2016 would have been regrettable but there seemed no dispute that dismissal would not have followed.

81. The letter of dismissal (JP174/177) considers matters and on that "*very critical point"* states after consideration of evidence that "*it is considered that it is more likely that the alleged incident did take place."* In his witness statement Mr Brighton puts it that "*on the balance of probabilities, I had reasonable grounds to believe that the claimant had punched Eamonn Gallacher."* That would be sufficient to state that the respondent had a belief in the misconduct. The claimant clearly and fairly indicated that he had regard for Mr Brighton and had no issue with his integrity or in his handling of the disciplinary matter. There was no suggestion that Mr Brighton had any reason but to come to a considered view.

82. As indicated it is not the case that there requires to be absolute proof of such misconduct but only a belief formed after a reasonable investigation which disclosed reasonable grounds for that belief.

83. There was no suggestion in this case that the investigation was in some way flawed. Neither at the disciplinary nor at the appeal hearing did the claimant indicate that there were further lines of enquiry that should be pursued in the investigative process. There was no suggestion there or at the hearing that there were further witnesses that should have been canvassed by the respondent before they came to a view.

84. The evidence from the documents demonstrates that statements were taken from relevant witnesses. After the initial disciplinary hearing a further enquiry was made to clarify matters before a decision was made.

85. The respondent was faced with a position where something clearly had gone badly wrong between the claimant and his colleague. There was ample evidence of a drunken argument. Those in the vicinity were clearly able to recount raised voices and loud noises associated with the event. There was no dispute that the claimant albeit along with others was very intoxicated.

86. The respondent had the evidence of Mr Gallacher to the effect that he had been punched by the claimant. His evidence received support from the account given by Mark Turner who appeared to be someone who had a close relationship with the claimant and who had no reason to disadvantage him. His position in the statement provided (JP151) was that he had shared a room with the claimant that evening and when the claimant awoke he "*commented to me that he had argued with Eamonn and might even have punched him but wasn't sure and he couldn't remember what had triggered this argument. He was clearly embarrassed about this situation*." In his initial conversation with Mr Kevin Nicol he had indicated that when the claimant had woken up that morning he "*stated that he had hit Eamonn".*

87. Mr Turner also indicated that Mr Gallacher had told him that he and the claimant had "*fallen out*" and that it had "*got so heated at one point that Chris had thrown a punch at him."*

88. There was also a discussion with Matt Marshall on 13 October 2016 (JP166) where he was asked if Mr Gallacher had told him that the claimant had hit him and he stated that he did *"remember EG telling him that CD had hit him but can't recall exactly when but he definitely told him that."*

89. There was also in the mind of Mr Brighton the content of the text messages sent to Mr Gallacher by the claimant (JP140/142). It is difficult to understand why the claimant took the tone he did with Mr Gallacher if he had not felt guilty at some significant incident between them. In those texts

he states he doesn't feel he has any choice "*but to resign on Tuesday"* and without specifying exactly what took place does indicate that he was "*out of order"*. He later explains that this was "*reverse psychology*" but it seems that the respondent was perfectly capable of reading these texts as confirmation from the claimant that he was very aware he had been guilty of significant misconduct. Given the surrounding circumstances this would add to the belief that he had hit Mr Gallacher.

90. While the claimant indicated that Mr Turner had "*retracted*" his statement that when he awoke he had admitted punching Mr Gallacher the terms of that "*retraction*" do not appear convincing. He states that the events were now "*blurry"* but it would appear that the respondent could reasonably rely on the initial statements made when events were fresher. Also it would not seem that the respondent was unreasonable in considering that the word "*punched*" was mistaken for the Glasgow dialect of *"pushed"*. That seemed a rather unlikely proposition and one put to explain away events rather than confirm it had not taken place.

91. In those circumstances it would be the case that the respondent had met the **Burchell** test. A reasonable investigation had been conducted. There were reasonable grounds arising out of that investigation for the respondent to come to the belief that the claimant had punched Mr Gallacher in the face as he maintained.

92. There were no issues raised to suggest that the procedure adopted by the respondent was unfair. The claimant accepted that the way in which the respondent had gone about the matter with a disciplinary hearing and appeal were not in issue. Accordingly the procedure which was operated was fair.

93. That would leave to be considered whether dismissal was really the appropriate penalty. Given that "*fighting, assault or threat of assault on another person"* is stated to be an act of gross misconduct within the disciplinary policy and that the claimant was in a senior position to Mr Gallacher it would have to be the case that the dismissal was within the range of reasonable responses of a reasonable employer. The claimant

was clearly a successful employee. However, given the belief they had on his misconduct I do not think it could be said that any reasonable employer would not dismiss in these circumstances. As stated the dismissal simply has to be within the band of reasonable responses. While another employer may have dealt with the matter by way of written warning that would not mean that the lesser penalty was appropriate for this employer.

Inconsistent Treatment

94. The proposition that there was inconsistent treatment for the claimant as compared to Mr Pugh is difficult for the claimant. The authorities cited in submission all indicate that a decision has to be made in "*truly parallel circumstances*". There can be no suggestion here that the claimant had been led to believe that certain categories of conduct would be overlooked or would not be dealt with by the sanction of dismissal. There was no evidence of any pattern of conduct which would demonstrate that position. Also there was nothing to suggest that the case involving Mr Pugh would support an inference that the reason stated by the respondent for dismissal was not the real or genuine reason.

95. Accordingly it is necessary to "*scrutinise arguments based on disparity with particular care"* and acknowledge that there will "*not be many cases in which the evidence supports a proposition that there are other cases which are truly similar, or sufficient similar, to afford an adequate basis for the argument."*

96. There would in the case involving Mr Pugh appear to be differences. The incident in which he was involved took place in a public house outwith any work associated event. Work colleagues were present at that time but only it would appear because the public house was close to the London office. There did seem to be an element of provocation with Mr Pugh's partner being verbally abused. While I did not consider that the alleged lack of remorse by the claimant was a significant issue given he never admitted the offence (unlike Mr Pugh) I did consider that the circumstances were sufficiently different not to be "*truly parallel*". There was also the difference that Mr Gallacher occupied a junior position to the claimant.

97. In all the circumstances therefore and given the flexibility on employers demanded by the authorities I could not say that there were truly parallel circumstances in this case such as to render the dismissal unfair.

98. The whole incident as the claimant well knows was extremely regrettable and it is sad it has resulted in a dismissal but I could not find that it was unfair in terms of section 98 of the Employment Rights Act 1996 and the claim is therefore dismissed.

Employment Judge: JD Young
Date of Judgment: 10 July 2017
Entered in register: 17 July 2017
and copied to parties

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