EMPLOYMENT TRIBUNALS

Claimant: **Mr C Still**

Respondent: **British Telecommunications plc**

Heard at: **Ashford, Kent** **On:** **29, 30 and 31 January 2018**

Before: **Employment Judge Wallis (sitting alone)**

Representation
Claimant: **Miss E Sole, Counsel**
Respondent: **Mr S Proffitt, Solicitor**

JUDGMENT

1. The Claimant was unfairly and wrongfully dismissed;

2. The Respondent is ordered to pay the Claimant notice pay of £8,628 and compensation for unfair dismissal of £42,629.60.

REASONS

Brief oral reasons were given at the hearing because of time constraints. These written reasons are provided to supplement those reasons.

Issues

1. By a claim form presented on 10 February 2017 the Claimant claimed unfair dismissal and wrongful dismissal. The Respondent's case was that he had been dismissed by reason of conduct or alternatively some other substantial reason in that his conduct had led to a breach of trust and confidence.

2. The issues were agreed at a case management discussion held by telephone on 25 April 2017. The issues were as follows:

(a) What was the reason for dismissal;

(b) If it was conduct or some other substantial reason, did the Respondent have a genuine belief that there had been misconduct, and was that belief based on reasonable grounds following a reasonable investigation; and/or that the breakdown of trust and confidence in the employment relationship was a reason that could justify dismissal of the Claimant;

(c) Was a fair procedure followed; in particular, was there an unfair delay in the procedure, was the length of suspension unfair, and were the fact-finding interviews conducted fairly;

(d) Did the decision to dismiss the Claimant fall within the band of reasonable responses open to a reasonable employer;

(e) If the claim is successful, what is the appropriate remedy, taking into account Polkey and any contributory conduct;

(f) Was there any unreasonable failure to follow the ACAS Code that would indicate that an uplift in any award was appropriate;

(g) Did the Claimant act in such a way as to justify summary dismissal, or is he entitled to notice pay.

<u>Documents and Evidence</u>

3. I had an agreed bundle of documents and written statements from the witnesses who gave evidence. I also had a cast list and reading list from the Claimant. At the end of the hearing, I received written skeleton arguments from the representatives.

4. On behalf of the Respondent, Mr Proffitt also produced copies of the cases of Lemonious v Church Commissioners EAT/0253/12; and Han v The Governing Body of Beardwood Humanities College [2017] EWCA Civ 1629.

5. I heard evidence from the Respondent's witnesses as follows:

- Mr John Rickett, Senior Operations Manager – South East, and the person who decided to dismiss the Claimant;
- Mrs Dawn Schwartz, HR Complex Case Specialist;
- Mr Ian Barrett, Operations Manager and the person who investigated the incident on 5 October 2015;
- Mr Arthur Little, Operations Manager, and the person who investigated the allegations against the Claimant in respect of incidents in August and September 2015.

6. I also heard from the Claimant himself Mr Christopher Still.

Findings of Fact

7. There was no dispute that the Claimant had been employed by the Respondent from 18 February 1980 until he was dismissed summarily on 28 September 2016. His evidence was that he had been employed for some eighteen years in a clerical role, and then for the next eighteen years as an engineer.

8. There was no dispute that during his lengthy period of service the Claimant had a clear disciplinary record. As an engineer he was required to attend service jobs both in urban and rural settings at various distances from the office. The Claimant described how he was "passionate" about his job and always ensured that the job was done well. He mentioned an incident where he had stayed until 10.00pm to ensure that the customer had faults rectified.

9. It is worth mentioning at an early stage in these findings that the Claimant has a particularly loud voice. That was clear when he was giving evidence. When he became flustered or bothered by a particular question, it was also clear that his voice became even louder. It was noticeable that at all times he was anxious to ensure that he had fully explained the point that he wished to make. However, he was able to respond to instructions to try simply to answer the questions being put.

10. A new manager was appointed in August 2015, Mr Dickson. It appeared from the evidence that he was younger than the Claimant and the Claimant found that Mr Dickson was particularly focussed on personal targets. That focus caused difficulties between them, particularly when Mr Dickson initiated an informal performance plan just a few weeks after becoming the Claimant's acting manager.

11. On 20 August 2015 Mr Dickson visited the Claimant while he was working on site and invited him to a meeting to discuss his performance. He delivered a letter to the Claimant. Mr Dickson did not give evidence at the Tribunal. Later, what happened at this incident became one of the allegations against the Claimant and I refer to that later in these findings. It was not clear why it was not raised at the meeting of 8 September 2015, if it was viewed as serious misconduct. It had the appearance of being used as a makeweight.

12. On 8 September 2015 a meeting was held to discuss the Claimant's performance. The Claimant was accompanied by his trade union representative Mr Browning. The meeting was conducted by Mr Wheeler. The allegation about that meeting was that the Claimant had shouted and had become aggressive.

13. On 14 September 2015 Mr Dickson asked the Claimant to meet with him and told him that he was to be issued with an informal warning about his performance. The allegation about that meeting was that the Claimant became aggressive and raised his voice and left the meeting slamming doors behind him. Mr Dickson told the subsequent investigation that he felt shaken by this.

14. After the Claimant left the meeting, he went into the yard of the premises and kicked the tyre of a van and a sand bin. At the time he was shouting and expressing his displeasure about the unfolding of events. It was also suggested that he was heard shouting on his telephone in the frame room and observed throwing an item across the room (although ultimately there was no evidence of throwing an object).

15. I should mention that the Claimant had a sickness absence record of stress and anxiety, with absences between 21 March and 3 April 2012; 18 April and 24 April 2012; 22 February – 28 March 2013; 21 May – 24 May 2013; 15 September – 3 October 2015; and 7 October 2015 – 31 December 2015. It was apparent that he had gone on sick leave immediately after the incidents on 14 September 2015. At around that time, towards the end of August 2015, there was no dispute that the Claimant's wife had to have an operation and spent some time in hospital. That meant that the Claimant was responsible for their four children and he was working reduced hours at that time, albeit it was his evidence that he often had to work additional hours which made things very difficult for him. I accepted that the combination of circumstances involving his domestic difficulties and questions about his performance had caused a stressful environment for the Claimant at that time.

16. The Claimant returned to work on 5 October 2015 and on that day Mr Dickson took him through a return to work interview and then carried out the various safety checks that are required when engineers return from work. There was a dispute about the timing of the next meeting on that day with Mr Little, although nothing turned on it save for a clash of memories; I did not consider it as a significant point about credibility. Mr Little had been appointed to conduct a fact-finding interview with the Claimant in respect of the incidents on 20 August, 8 and 14 September. The Respondent's procedure does not provide for any prior notice of a fact-finding interview being given to an employee. The Claimant was therefore ushered into a room where Mr Little was waiting, by Mr Dickson.

17. There was a dispute about the way in which the Claimant behaved at that meeting. Only Mr Little and the Claimant were present. Mr Little described that when he explained what was to be discussed, the Claimant stood up, banged the desk and shouted that he was not prepared to conduct the interview. He claimed that it was a management set up and walked towards the door, hitting the wall as he went. Mr Little was able to get him back into the room but it was Mr Little's evidence that the Claimant then slumped to the floor causing Mr Little to be concerned about his health. Mr Little decided that the meeting should not continue. He telephoned the employee counselling helpline and the Claimant spoke to them for about half an hour while Mr Little got some advice from HR. He got authority to suspend the Claimant. After the Claimant's telephone call was over, the suspension was explained to the Claimant. Mr Little then drove the Claimant home. The Claimant denied that he had behaved in that manner. I found that the Claimant had initially conducted himself in the manner described by Mr Little, but that the situation was resolved as shown by Mr Little feeling able to drive the Claimant home.

18. The Claimant was then on sick leave in addition to having been suspended. He presented a grievance about the way in which he had been treated. Meanwhile, the Respondent decided that Mr Barrett should undertake a fact-finding interview in respect of the incident on 5 October 2015 with Mr Little, once the Claimant was able to attend such a meeting.

19. Mr Little referred the Claimant to occupational health. Unfortunately, the questions that he asked occupational health about the Claimant were not in the trial bundle. The occupational health report was in the bundle and in the report the doctor responds to specific questions raised; it was not entirely clear what those questions were from a reading of the answers. However, the doctor commented on the fact that the Claimant was off work due to stress and was receiving counselling through the Employee Assistance Programme. It also referred to some knee problems that he was experiencing particularly when climbing poles, heavy lifting and carrying, and working in confined spaces. The Claimant told the doctor that the origin of his stress was linked to difficulties achieving his performance targets during the last five years. He felt that insufficient allowance had been made for his age and he referred to the symptoms that he suffered.

20. The occupational health doctor considered that the Claimant would be able to return to work on a four week phased return plan and would benefit from support and adjustments. Some of those adjustments related to his knee. Other adjustments appeared to be a reference to the stress condition. They suggested a referral for some talking therapy; being dealt with by a sympathetic manager and having an honest discussion about the way forward in respect of his performance; and the doctor commented that a phased return would allow him to build up his physical as well as his psychological resilience. He did not consider that his symptoms were likely to cause any substantial psychological risk and that he was fit to attend formal meetings. He recommended that he should be able to instruct someone to act as his companion and that he would benefit from "mutually agreeing to the time and place of any formal meeting, having the information about the meeting in advance and being allowed to have comfort breaks if required".

21. It was the Respondent's evidence that although HR knew of the Occupational Health referral and report, it was not shown to Mr Rickett when he held the disciplinary hearing with the Claimant or at any time referred to him to consider when he was making his decision about the nature of the penalty. Mr Rickett's evidence to the Tribunal was that he was not aware that the Claimant had undergone counselling, despite Mr Little mentioning that fact in the statement that he made in respect of 5 October 2015 during the investigation, which was available to Mr Rickett.

22. Mr Barrett held his fact-finding interview with the Claimant on 14 January 2016 and he recommended that the case was passed to his manager for consideration under the gross misconduct procedure.

23. Mr Little met with the Claimant on 4 January 2016 to complete his fact-finding interview. That interview proceeded without any difficulties. The Claimant explained both to Mr Little and to Mr Barrett that he was under a lot of stress in respect of his wife's health and childcare responsibilities in

August and September. He did not accept that he had behaved in a threatening and intimidating manner. He accepted that he had kicked a vehicle tyre. Mr Little's evidence was that the case was very complicated and he decided that he could not follow up with interviews of all the relevant witnesses because it was "above his pay grade". However, despite not completing the investigation, his report on the matter suggested that the incidents should be referred for consideration of disciplinary action.

24. I noted that the Respondent's procedures states that the fact-finding part of the disciplinary procedure should establish facts promptly and statements should be obtained from any available witnesses. I found that the procedure was not complied with fully by the Respondent in as much as the relevant witnesses were not seen promptly and in fact it was left to Mr Rickett, the person who dismissed the Claimant, to undertake further investigation and later still, Mr Liddell, who heard the appeal against dismissal, also carried out some investigation. I found that this did not represent best practice, and given the delay that occurred in speaking to the witnesses, and the effect on memories, created unfairness to the Claimant.

25. The Respondent decided to invite the Claimant to a disciplinary hearing. Mr Rickett was identified as the person to hear the case as he had no knowledge of the Claimant. The letter inviting the Claimant to a disciplinary meeting dated 4 February 2016 set out the allegations as follows:

    (1) On 20 August 2015, during a visit by your acting line manager Gavin Dickson, Gavin gave you an invitation letter to an IFW performance meeting and you then became aggressive and started shouting at him.

    (2) On 8 September 2015, during the IFW performance meeting at Larkfield with Gavin Dickson, Pete Wheeler and your CWU representative Pete Browning, you became aggressive and was (sic) shouting despite being told to calm down on several occasions.

    (3) On 14 September 2015 during a 1-2-1 meeting with Gavin Dickson at Maidstone you became aggressive and raised your voice leaving Gavin feeling shaken. You then left slamming doors behind you.

    (4) On 14 September 2015 you went into the yard at Maidstone and was (sic) observed kicking vehicle tyres, head butting a yellow sand bin. You then started shouting at other engineers in the yard. You were then heard shouting on the phone whilst in the MDF room and observed throwing an object across the room.

    (5) On 5 October 2015 during a fact-finding interview held by Mr Little you became angry and was (sic) stomping around you were asked by Arthur to calm down but you started shouting and became very aggressive. You fell to the floor and started rolling around and shouting. The meeting had to be abandoned due to your behaviour.

26. The letter set out that this might constitute gross misconduct which was described as inappropriate, unprofessional and aggressive behaviour. The right to be accompanied was set out in the letter. The possibility of dismissal was explained. The relevant case papers were enclosed.

27. I noted that the disciplinary meeting date was varied in order that the Claimant could attend with his trade union representative. It therefore took place on 24 February 2016. There were no minutes of that hearing. Apparently, it had been recorded. There was a dispute at the Tribunal hearing as to whether the Claimant had been sent that audio recording. It was agreed that there was no transcript.

28. Mr Rickett decided to undertake further investigation. He interviewed Mr Little, Mr Fincham, Mr Browning, Mr Wheeler and Mr Lamb. Mr Fincham was one of the engineers who had been in the yard on 14 September 2015. He had reported the Claimant's behaviour at around that time, in an undated and unsigned very brief statement. He told Mr Rickett that he was concerned about the Claimant's behaviour in the yard and had got into his own van and locked the door. He did say that he had not felt threatened and he knew from past working with the Claimant that he could become "a bit heated". Mr Browning, the Claimant's trade union representative at the meeting on 8 September 2015 explained that the Claimant had a very loud voice particularly if he viewed something as wrong, when it could become even louder. Mr Wheeler who had conducted the meeting on 8 September 2015 said that the Claimant was very loud and angry but that when asked to calm down he had responded to that request, albeit it had to be made on several occasions. He said that he knew that the Claimant could get angry from having worked with him in the past and so he was prepared for the meeting to potentially become difficult. He had not felt threatened by the Claimant.

29. Mr Lamb had been in the car park on 14 September 2015. He told the Claimant not to kick his van and the Claimant did not do so. He said that he did not feel threatened and he knew that the Claimant had acted in that way in the past. He said that he was not threatening he "just screams and shouts".

30. I noted that the meeting on 8 September 2015 did not have to be abandoned because of the Claimant's conduct (in fact his representative became ill) and that he had responded to requests to calm down. However, the meeting on 14 September 2015 had ended with the Claimant raising his voice to Mr Dickson and walking out of the office in an irate manner which may well have included hitting walls as he went down the corridor.

31. Mr Rickett sent the statements to the Claimant and received responses from the Claimant.

32. The disciplinary process was then put on hold, with the agreement of the Claimant, while the grievance was considered. The Claimant added a number of matters to his grievance which I found added to the delay. I also noted that by the time Mr Rickett interviewed the witnesses who had not been interviewed by Mr Little, it was some months after the incidents in question.

33. The grievance outcome was sent to the Claimant on 14 April 2016 and he appealed. That was dealt with, with a decision being issued on 6 September 2016. Mr Rickett was not shown the grievance and remained

separate from it. The grievance was not upheld apart from one very small part in respect of the way Mr Fincham had described the Claimant.

34. Once the grievance appeal had been dealt with, Mr Rickett returned to his decision-making process. I found that he reviewed the notes that he had made and came to a decision that something must have happened on 5 October 2015 in order for Mr Little to adjourn the meeting; he therefore preferred Mr Little's account of that meeting. He accepted Mr Fincham's evidence about how he had felt in response to the Claimant's conduct in the yard on 14 September 2015 and in particular that he had locked himself in his van. He felt unable to accept that the Claimant's account could not be correct given the reaction from his colleagues. He concluded that there was a consistent pattern of aggressive behaviour and that the Claimant easily lost control in situations where he was not happy.

35. Mr Rickett decided that a warning would not change the Claimant's behaviour because he would not accept that his behaviour had been serious and inappropriate. He decided that the Claimant's behaviour amounted to gross misconduct and that he should therefore be summarily dismissed.

36. The decision letter, although dated 21 September 2016, was sent on 26 September 2016 and set out in detail the way in which Mr Rickett had come to his decision.

37. The Claimant appealed against that decision. I heard no evidence from Mr Liddell who heard the appeal. I understood that he had also interviewed additional witnesses who should have been interviewed during the original fact-finding because they were witnesses to some of the events. In general terms, they appeared to agree that the Claimant was shouting but they had not felt threatened by him.

Submissions

38. I had received written submissions from both representatives and read them before they supplemented those with oral submissions.

The Law

39. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for the dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of an employee holding the position which the employee held.

40. In this case, the reason relied upon by the Respondent is conduct. In the case of **British Home Stores v Burchell [1978] IRLR 379** it was decided that the test was whether the employer entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. The employer must establish that they did believe that the misconduct had occurred; (see **Post Office v Foley; Boys and Girls Welfare Society v McDonald**). As far as the other two limbs of the test are concerned,

these go to the question of reasonableness under section 98(4) of the Act (see **Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09**). So, the burden of proof is neutral in respect of the second and third questions laid down in **Burchell** namely whether there were reasonable grounds for the belief and whether there was a reasonable investigation.

41. In **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23** it was held 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 other procedural and substantive aspects of the decision to dismiss.

42. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider 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 that question shall be determined in accordance with equity and the substantial merits of the case (section 98(4)). It is quite clear from decisions such as that in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair. That decision was subsequently approved by the Court of Appeal in **Post Office v Foley [2000] IRLR 827**. It was emphasised that the process must always be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to the Tribunal's own subjective view of what they in fact would have done as an employer in the same circumstances.

43. In claims of wrongful dismissal, the question for the Tribunal is whether in fact the employee so misconducted himself as to justify the employer summarily dismissing him. (Cicero Languages v Brown EAT/639/96).

44. Section 119 of the Employment Rights Act 1996 sets out the provisions relating to the calculation of a basic award. It can be reduced in certain circumstances which are set out in paragraph 122.

45. The compensatory award is calculated pursuant to the provisions of section 123 of the Act. It shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the

Claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. That award can also be reduced in certain circumstances.

46. Section 113 of the Employment Rights Act 1996 provides that the Tribunal may make an order for reinstatement in accordance with Section 114 or reengagement in accordance with Section 115.

47. Section 114 provides for the contents of the order for reinstatement.

48. Section 116 requires the Tribunal, when considering making an order for reinstatement to take into account whether the Claimant wishes to be reinstated; whether it is practicable for the Respondent to comply with an order for reinstatement; and, where the Claimant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

Conclusions

49. Having made the findings of fact set out above, I returned to the list of issues in the case in order to draw these conclusions.

50. The first issue was the reason for dismissal. I concluded that the reason for dismissal was conduct. I concluded that there were reports of unacceptable conduct on the part of the Claimant on 20 August, 14 September and 5 October 2015. I was satisfied that that was the reason for dismissal.

51. Given that the reason for dismissal was conduct, I had to decide whether there had been a genuine belief that the conduct had taken place and whether that belief was based on reasonable grounds following a reasonable investigation. I accepted that Mr Rickett had a genuine belief that there had been misconduct. He had considered the reports that he had received and he had made his own further enquiries of witnesses. I was satisfied that he had reasonable grounds for coming to the view that the conduct had taken place. As far as the investigation was concerned, by the time Mr Rickett had completed his own investigation to augment that of Mr Little and Mr Barrett, I concluded that the investigation was reasonable in all the circumstances. I understood the Claimant's submissions that there were a number of flaws in the investigation and particularly that a number of witnesses were not followed up until Mr Rickett undertook that himself. However, although there were flaws at that earlier stage and although interviewing witnesses at a later stage meant that there was the possibility of memories being dimmed, I concluded that those flaws were rectified by Mr Rickett's actions and that the Claimant had had every opportunity to comment on that later investigation in addition to the original investigation.

52. I concluded therefore that the test in Burchell had been made out.

53. The next question was whether there had been a fair procedure. The Claimant suggested that there was an unfair delay in the procedure and that the length of suspension was unfair. I concluded that in respect of both of those issues the reason for the delay was the agreement to delay the

disciplinary process while the grievance was undertaken. There was no specific evidence that pointed to any unreasonable delay in handling the grievance. It appeared that the Claimant had added various issues to his grievance at various times and those matters were investigated. It therefore took some months to complete the process.

54. The next issue in respect of the procedure was whether the fact-finding interviews were conducted fairly. In this regard, I noted that the Occupational Health recommendation was that the Claimant should be given notice of the content of any proposed "formal" meetings and that the Respondent's argument was that fact-finding interviews were not "formal". The Respondent was correct in as far as the disciplinary procedure itself does not suggest that those are formal meetings. I concluded that it would be best practice, where there is such a recommendation from Occupational Health, to ensure that an employee is given notice of such an important meeting. However, in this case the Claimant's conduct at the fact-finding interview on 5 October 2015 did not appear to be caused by lack of notice but by his belief that he was being treated badly and this may well have been exacerbated by his feelings of stress and anxiety not only because of the questions about his performance but because of his domestic difficulties at times. Although he did not receive notice of later fact-finding meetings on 4 January and 14 January 2016, he was able to respond fully and in a reasonable manner in respect of those meetings. I concluded therefore that it could not be said that the fact-finding interviews were conducted unfairly.

55. I concluded therefore that the procedure, assessed in the round, could not be described as unfair.

56. The next issue is whether the decision to dismiss the Claimant fell within the band of reasonable responses open to a reasonable employer. This was the nub of this case. I was mindful of the requirement that a Tribunal must not substitute its own view for that of the Respondent. The question is what did the Respondent know at the time of the dismissal, and was it reasonable for the Respondent to take the view that the conduct that it knew about was a serious matter. The ACAS guide provides that the employer should consider, when looking at penalty, the employee's record, their service with the organisation, their work experience and any special circumstances that might make it appropriate to adjust the severity of the penalty; and whether the proposed penalty is reasonable in all the circumstances. Mr Rickett's evidence was that he had considered the Claimant's length of service and clear disciplinary record but he did not consider that those points outweighed the conduct that had been alleged. He did accept in evidence that it might have been relevant had he seen the Occupational Health report and had he known that the Claimant had undergone counselling for stress. I noted that Mr Rickett accepted that the Claimant had behaved appropriately in meetings after 5 October 2015 but it was apparent that he had not taken that into account when he came to his decision that he could not have any confidence that the Claimant would not act inappropriately in the future. The evidence was clear that the Claimant had acted appropriately at all meetings following counselling.

57. I noted that the statements given by witnesses during the disciplinary process all indicated that they had not felt threatened by the Claimant.

They were concerned about his behaviour which was described variously as "in a rage", or "aggressive" or "angry", or "a bit heated". However, it was clear from what they said that none of his erratic behaviour was addressed personally to them and exception was perhaps Mr Dickson who had his desk banged by the Claimant, but he was not interviewed by either Mr Little or Mr Rickett to give further detail of his complaint. I considered it noteworthy that the Claimant had never been disciplined or told that his behaviour was unacceptable and that if it continued or happened again then disciplinary action might occur. That was despite the fact that it was apparent from what the witnesses said that a number of them knew that that was the way that he had behaved over a number of years. I concluded that it was well-known that the Claimant had a loud voice which became louder if he perceived injustice, and that on occasions he would act irrationally. Such conduct had been accepted and tolerated over the years without any warnings to the Claimant.

58. In order to come to a conclusion about this issue, I considered what the Respondent knew about the Claimant's conduct. Mr Rickett, who made the decision, had descriptions of five incidents within a relatively short space of time that had caused concern to the Claimant's colleagues although they had not felt threatened by him. He knew that the Claimant was under pressure in respect of his performance and that his wife had been ill. He knew that the Claimant did not accept that his behaviour had been unacceptable although he knew that the Claimant had accepted that he had left one meeting and had kicked objects in the yard.

59. He knew that the Claimant had some 36 years' service with the Respondent and a clear disciplinary record. He knew from his sickness absence record that he had a history of stress and anxiety problems. However, unfortunately, he did not note that the Claimant had undertaken counselling and had been referred to Occupational Health, which he accepted in evidence could have been relevant.

60. Mr Rickett knew that since 5 October 2015 the Claimant had behaved reasonably in all meetings held with him. He knew that there had never been any customer complaints about the Claimant. He knew that the Claimant had behaved in a loud and vehement manner in the past. That was confirmed in particular by Mr Lamb and Mr Wheeler when he interviewed them. He knew that the Claimant had not been disciplined for that type of behaviour. He knew that the witnesses had said that they had not felt threatened by the Claimant and he knew that some of them had not been interviewed until many months after the events in question.

61. Weighing up all of those matters I concluded that a reasonable employer would have noted in particular that the Claimant's way of behaving in the past, which could be loud and vehement and might therefore be described as angry or aggressive when he disagreed with certain matters, had never been the subject of any disciplinary discussion or warning. I concluded that a reasonable employer in noting that would consider that the Claimant's clear disciplinary record indicated that the Claimant's conduct had not been so unacceptable that it had breached any of the Respondent's standards.

62. I concluded that a reasonable employer would have taken particular note of the fact that the Claimant was prone to stress and anxiety ill health and that at the date of the events in question he was under pressure both at work and at home. A reasonable employer would also have particularly noted that although the Claimant denied that he had been aggressive, he accepted that he spoke loudly and that he had acted violently in the yard and therefore he had accepted some of the conduct that was put to him.

63. The Respondent relied upon the definition of gross misconduct in their disciplinary procedure which referred to

    (1) bullying, discriminating against or harassing other people;

    (2) Deliberately damaging buildings or property – either ours or our customers;

    (3) Behaving in a way that is obscene, malicious or indecent.

64. In respect of (2) I noted that there was no evidence that the Claimant had caused any damage albeit he had kicked the tyre of a van and the salt bin. The allegations against him did not involve any deliberate damage. I concluded that that could not therefore have amounted to gross misconduct by reference to the Claimant's conduct.

65. In respect of (3), I noted that there no evidence that the Claimant had behaved in a way that was obscene, malicious or indecent. That left (1). The Respondent relied upon the harassment part of that definition and referred to the procedure where harassment is defined as "when someone behaves in a way that is seen as offensive, hostile and unreasonable. This kind of behaviour isn't generally acceptable and can be damaging to whoever is on the receiving end". I considered whether using a loud voice at meetings, and leaving the meeting on 14 September in an angry manner would fall within that definition. I could not say that the Respondent was unreasonable in considering that the Claimant's conduct had been unreasonable. However, I concluded that it was a matter of degree and context. I concluded that it could not be said someone was "on the receiving end" of harassment by the Claimant. He spoke loudly at meetings naturally, and he got louder when he disagreed with what was put to him; he blustered; on two occasions he walked out and behaved aggressively to inanimate objects in the yard on 14 September, and slumped to the floor on 5 October 2015. It could not be said that anyone was on the receiving end of that rather bizarre conduct.

66. I completely accepted that the Respondent was entitled to expect the Claimant and all its employees to act in a reasonable civilised manner. The Claimant had not done so on occasions. Apparently, he had not done so on previous occasions and was known by his colleagues to exhibit loud and vehement behaviour from time to time. He had never been told by the Respondent that this was not acceptable and that he was at risk of dismissal if he did not mend his ways.

67. Weighing up all of those matters, I concluded that the decision to dismiss fell outside the band of reasonable responses and that the decision was therefore unfair.

68. I had received submissions in respect of Polkey and contributory conduct. As I had not found that the dismissal was procedurally unfair there was no need for me to consider Polkey. There was clearly a need to consider contributory conduct. I had to consider whether the Claimant's conduct was blameworthy, whether it caused or contributed to the dismissal and if so, whether it would be just and equitable to reduce the award.

69. I concluded that the Claimant's conduct was blameworthy. Even though he had not been warned about his behaviour in the past, it must have been readily apparent to him that it was not acceptable to use a raised voice to his manager, bang on his desk, leave a meeting abruptly and create disturbance in the corridor as he left. It would also be apparent that it was not acceptable to kick objects in the yard while expressing loudly his discontent about the situation. I also noted that he had failed to some extent to give an explanation for his conduct. He had mentioned the causes of the stress that he suffered, but as far as I could ascertain (noting that I did not have the notes of the disciplinary meeting) he did not mention that he had seen Occupational Health or what they had recommended. It was unclear whether he had mentioned that he had undergone counselling sessions.

70. I did not consider that this was a case where it would be appropriate to make a 100% reduction in compensation, as suggested by the Respondent. I concluded that the cause of the dismissal was the Claimant's conduct, but that it would not be just and equitable to completely extinguish any award, given that he had not been told specifically by the Respondent that his behaviour, on occasions, was not acceptable. Having considered carefully the conduct exhibited by the Claimant, I concluded that the appropriate reduction in any award was 60%.

71. I further concluded that the Claimant had not acted in such a way as to justify summary dismissal.

Remedy

72. Having announced my decision, the Claimant indicated his wish to pursue reinstatement or re-engagement. He produced a witness statement about remedy, about which there were no questions. I heard submissions about this.

73. I adjourned and noted the provisions of section 114 and 115, and the tests to be applied. I noted that the Tribunal had discretion I the matter. I noted that the Claimant wanted this remedy (a); and that it was practicable in the sense that there were vacancies at the organisation (b). However, I noted that the Respondent had genuinely believed that the Claimant had acted in such a way as to breach trust and confidence. It was relevant that much of his work was done in public and unsupervised, thus requiring a large degree of trust. Moreover, the Claimant's conduct had soured relationships with colleagues, and although not intimidated, they described his conduct

as unpleasant. Certainly, his conduct has soured relationships with managers. The Claimant himself when giving evidence expressed strongly-held views that some of the Respondent's witnesses had 'lied'. I had doubts that the Claimant could return to work with those colleagues.

74. I noted that reinstatement or re-engagement can be ordered where there is contributory conduct, but in view of the circumstances here I concluded that this was not an appropriate case.

75. Having announced this decision, the parties were able to agree the compensation to be paid to the Claimant, having regard to the statutory cap.

76. The notice pay was £8,628. The basic award was £4,981.60. The compensatory award was £37,648. The Recoupment Regulations did not apply.

Employment Judge Wallis
9 March 2018