EMPLOYMENT TRIBUNALS

Claimant: Mr M Walsh

Respondent: Philadelphia Scientific UK Limited

HELD AT: Manchester **ON:** 11 January 2018

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: Mr R Lassie, Counsel
Respondent: Mr S Chegwin, Solicitor

Judgment was sent to the parties on 17 January 2018. The claimant having requested written reasons on 29 January 2018, the following reasons are provided:

REASONS

Complaints and issues

1. By a claim form presented on 15 August 2017 the claimant raised:
   1.1. a complaint of unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996; and
   1.2. a claim for damages for breach of contract.
2. At the start of the hearing the parties clarified the issues for me to determine. It was common ground that the claimant had been dismissed without notice. On the complaint of unfair dismissal, I had to decide:
   2.1. whether the respondent could prove the sole or principal reason for the dismissal;
   2.2. whether that reason was one which related to the claimant's conduct; and
   2.3. if so, whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.
3. Had the claimant been found to have been dismissed unfairly, further issues would have arisen in relation to remedy.

4. The claim for damages for breach of contract involved determining just one issue: did the claimant repudiate the contract by committing gross misconduct, thus entitling the respondent to dismiss him without notice?

Evidence

5. I considered documents in an agreed bundle marked CR1, concentrating on those pages to which the parties had drawn my attention either in witness statements or orally during the course of the hearing.

6. Mr Aberle and Mr Worthington gave oral evidence as witnesses for the respondents. The claimant gave evidence on his own behalf and called Mr Roscoe as a witness. All four witnesses confirmed the truth of their written statements and answered questions.

7. The respondent did not call Ms Baldwin or anybody else who had directly witnessed the events that were alleged to amount to gross misconduct.

Facts

8. The respondent runs a small- to medium-sized business with about 60 employees. It specialises in the development and manufacture of batteries and associated products.

9. The claimant was employed by the respondent from 11 September 2012 to March 2017 when he was dismissed for gross misconduct. The precise date of termination may not matter but it is not altogether clear. The means by which termination was effected was a letter dated 22 March 2017.

10. On 26 September 2012, the claimant signed to acknowledge receipt of a Statement of Main Terms of Employment. The statement began with this sentence:

> "This document sets out your principal terms and conditions of employment and, together with the parts of the Employee Handbook to which it refers, constitutes the contract of employment".

11. The statement included a list of examples of gross misconduct entitling the respondent to dismiss the claimant without notice. The list was stated to be non-exhaustive. One of the examples of gross misconduct was [with original punctuation] "Rude offensive and threatening behaviour to the employer's, clients, customers or employees."

12. According to the statement, the respondent's disciplinary procedure would be set out in the Employee Handbook, available at the employee's request. The Handbook did indeed contain the disciplinary procedure, which appeared in Chapter XV. Section C of that chapter contained a non-exhaustive list of examples of "unsatisfactory conduct and misconduct". One of those examples was "rudeness towards …other employees, objectionable or insulting behaviour, harassment, bullying or bad language". At Section E there was another list, this time containing examples of "gross misconduct". These included, "deliberate falsification of any records…in respect of yourself or any fellow employee", "abuse of the personal harassment policy" and "serious breach of Company policies".

13. Chapter XVIII of the Handbook was headed, "Personal Harassment Policy and Procedure". Its introductory statement began, "Many people in our society are

harassed as a result of their race, colour…" and proceeded to list diversity characteristics broadly matching the protected characteristics in the Equality Act 2010. The second paragraph stated, "Personal harassment takes many forms but whatever form it takes; personal harassment is always serious and is totally unacceptable."

14. Outside the Handbook was a separate document headed, "Code of Conduct". In one page it summarised the respondent's values and expectations. Paragraph 1, headed, "Respect", stated, "We show consideration for our colleagues and all others we come into contact with through our work". Further down the page, it stated, "As employees, we have the right to…- Be treated fairly, courteously and respectfully by colleagues at all levels…Expect to work in an environment free from bullying, harassment and intimidation." Reciprocally, "As employees, we have the responsibility to: - Act professionally and considerately in our dealings with colleagues, showing respect and senstivity to their needs [and] - Treat colleagues…with respect, fairness and courtesy".

15. Initially the claimant was employed as a production operative, but in 2014 he was promoted to team leader. He was highly regarded and considered to be an asset to the respondent.

16. The claimant's team sat at an array of desks occupying a space roughly the size of our tribunal room. That space was part of a room that was roughly 3 or 4 times bigger. Elsewhere in that large room were other teams of production operatives.

17. On 29 September 2016 the claimant had an accident involving a glue gun in which he injured his right hand. I have considered whether to make, and record, a finding about how the accident happened. In my view, there is no need for me to make such a finding in order to resolve the present dispute. If the claimant brings a claim for damages in the county court, that exercise may be unavoidable, but it does not help me in my task.

18. Very soon after the accident, the claimant was given first aid by Ms Helen Baldwin, a production operative in a different team. The claimant explained to Ms Baldwin how his injury had occurred, following which Ms Baldwin made an entry in the accident book, which the claimant signed.

19. In late 2016, or possibly early 2017, the claimant checked the accident book in order to establish the date of the accident. Having re-read Ms Baldwin's entry, he approached her, pointed out various alleged inaccuracies, and asked her to amend the accident book. Ms Baldwin declined. Her position was that she could not change the accident book because it was a legal document. At that stage, the claimant did not take the matter any further.

20. It is worth stepping out of the time line for a moment to record that all parties now recognise that certain details in the accident book entry were incorrect. The template contained a heading, "Home address" for both the injured employee and the person reporting the accident. Under that heading, Ms Baldwin entered the business address. There was a field for the postcode to be entered, but no postcode was written down. Possibly due to the common confusion in telling left from right in a person who is opposite the observer, Ms Baldwin mistakenly wrote that the claimant had injured his left hand when in fact it was his right hand that was injured. All of these details were inconsequential.

21. Of more significance to this claim is what Ms Baldwin wrote down about how the accident had happened. The claimant's case is that she got that part of the accident report wrong as well. He contends that he gave her a much different version of events. He may or may not be right. In my view, it is unnecessary for me to make a finding either way. I am confident, however, that, by February 2017, he genuinely thought that Ms Baldwin's description of the accident did not reflect what he had told her. This finding is, of course, unimportant to the complaint of unfair dismissal. It does, however, have some significance for the breach of contract claim.

22. On 2 February 2017, the claimant checked the accident book again. (For the purposes of the breach of contract claim, I find that his reason for doing so was not because he had a present intention of bringing a personal injury claim. He contemplated that if his hand did not fully recover, he might bring such a claim in the future. His motivation was to set the record straight, in case it might need to be relied on in the future.) This time he noticed that that Ms Baldwin had, with the company's approval, changed the phrase "left hand" to "right hand" to correct her earlier mistake. He approached Ms Baldwin a second time to see if she would be prepared to change other aspects of the report. There may or may not have been some brief discussion about the trivial details, such as home addresses and postcodes. The real substance of the conversation was about whether Ms Baldwin was prepared to change her recorded history of the accident. This Ms Baldwin refused to do. The claimant challenged her, asking the rhetorical question: if she had changed the detail about which hand had been injured why could she not change the rest? Ms Baldwin replied that the claimant would have to go and see the Manufacturing and Health and Safety Manager, Mr Smart. This is what he did. It is common ground that, by this time, the claimant was noticeably frustrated. Mr Smart agreed with Ms Baldwin: the accident book could not be retrospectively changed.

23. At this point in the chronology we reach a fork in the road. There are many accounts about what happened, all coming from different sources. Of these, two conflicting narratives are particularly important. One is my finding of what happened. The other is the version believed by the respondent.

24. I start with my own finding on the balance of probabilities. This, of course, is only relevant for the claim for damages for breach of contract. In my assessment, the claimant's evidence was essentially credible. Although contradicted by some of the statements of his colleagues which appear in the bundle, the claimant's version had the advantage of being tested by cross-examination. There was no oral evidence to contradict it. On the balance of probabilities, I find:

    24.1. The claimant, although frustrated and upset, did not do anything in particular to vent his frustration until he had gone to see Mr Smart.

    24.2. In the course of his conversation with Mr Smart, the claimant said that if his hand did not recover he might want to bring a claim against the company. He therefore wanted to set the record straight.

    24.3. When the claimant returned from seeing Mr Smart, he had a word with Ms Baldwin in private. He told her that she was right and that an accident book entry could not be changed retrospectively.

24.4. Later, still feeling frustrated, the claimant spoke to his team. He was sitting at his desk in the large room that I have already described. He told the team that, if they had an accident at work, they should check that the accident had been accurately recorded in the book because it could not be changed later. In order to make himself heard, he had to speak across a large space over some background noise. That may well have come across as raising his voice. He was not shouting aggressively.

24.5. At no point in these exchanges did the claimant swear or single out Ms Baldwin for public criticism.

25. As will be seen, the respondent believed that things had happened rather differently. I will return to that version later in this judgment.

26. On any view of the facts, Ms Baldwin was upset by whatever it was that the claimant had said. She took it as a personal slight. Mr Aberle noticed her shaking when she entered the office.

27. It is undisputed that the claimant left the building shortly after he had spoken to his team. He later telephoned Mr Smart to apologise for causing any inconvenience. Mr Smart replied that it was "a bit late for that" and that he was going to be suspended pending an investigation.

28. The claimant's suspension was confirmed by a letter dated 3 February 2017.

29. An investigation was carried out by Mr Baines, the Project Manager. Mr Baines had had no involvement in the events of 2 February 2017.

30. As part of his investigation, the claimant obtained a witness statement from Ms Baldwin. According to her, when the claimant had returned from seeing Mr Smart, the claimant "went over to his desk and told everyone, 'If any of you have an accident make sure it goes down in the book correctly and this first aider doesn't know what she's doing". She described being "scared of his next actions". Later, on his way out, the claimant had shouted, '[If] anyone has an accident write it in the book yourself. I'm gone'.

31. Mr Smart also made a statement. His recollection of the conversation with the claimant, as recorded in his statement, was that the claimant had told him that the accident book "had to be changed because he [the claimant] intended to put a claim in against the company". According to his statement, soon after the conversation, Ms Baldwin had complained to him that the claimant had shouted that "the first aider can't write down what you tell her properly".

32. In the course of his investigation Mr Baines also gathered statements from six colleagues who had been present at the time of the incident. Among the statements was one from Mr Craig Walls. Alone amongst the statements obtained at this time, Mr Walls' statement reported that the claimant had said, "[P]eople should not be first aiders if they can't fill in the fucking book properly". Nobody else at this stage claimed to have heard the claimant swearing. Other witnesses recalled the claimant being angry and telling them, if they had an accident, to fill in the accident book themselves and check that the details were right.

33. Mr Baines asked the claimant for his side of the story. Based on what the claimant told him, Mr Baines prepared a draft statement which the claimant

signed. His statement contained a version of events that was broadly consistent with my own finding about what happened.

34. Once Mr Baines had carried out his investigation the claimant was invited to a disciplinary meeting. The letter set out three allegations and warned that the first two of them may be considered to be gross misconduct. The allegations were:

    34.1. "Attempt to change an official Company record for personal gain."

    34.2. "Harassment/bullying by nature of pressurising and intimidating a junior colleague."

    34.3. "Use of inappropriate language on the shop floor not befitting a Team Leader".

35. Copies of the Code of Conduct and relevant sections of the Handbook were enclosed with the letter, along with the statements that Mr Baines had obtained.

36. The disciplinary meeting took place on 20 March 2017. It was chaired by Mr Markus Aberle, a contractor for the respondent carrying out the role of Operations and Quality Manager. Mr John Worthington took notes. The claimant was accompanied by Mr Gary Roscoe.

37. Before relating some of the specific things that were said, I need to deal with two disputes about the general tenor of the meeting:

    37.1. There is a dispute about whether or not Mr Aberle behaved aggressively at this meeting. Behaviour is often a matter of impression, and it may have been that the claimant perceived Mr Aberle to be aggressive. I accept, however, the evidence of Mr Worthington, whose perspective was more detached, that Mr Aberle did not do anything which Mr Worthington found to be aggressive. As for what was said during the meeting, I accept Mr Worthington's notes as being accurate.

    37.2. Mr Aberle told me that the claimant did not answer any questions at the meeting. Clearly he did; to that extent Mr Aberle's evidence is wrong. I also accept, however, what Mr Worthington said, which was that some of the claimant's responses did not engage with the questions that Mr Aberle was asking. To the respondent, at least, the claimant gave the impression of being evasive.

38. Once Mr Aberle had introduced the meeting, the claimant brought up the subject of the accident book. Having repeated the same rhetorical question as he asked Ms Baldwin, the claimant said that he wanted the accident book changed "because it was not correct" and he "wanted it putting right in case of further medical problems". Mr Aberle read out Ms Baldwin's statement to the claimant. He interrupted and said he disagreed with it. He did not apologise for the way he had acted.

39. During the course of the meeting the claimant asked for a number of other witnesses to be traced and interviewed. Mr Aberle did as he was asked. The same day, following the meeting, Mr Aberle spoke to twelve colleagues and, where possible, wrote down their version of events in statement form. Some potential witnesses did not want to give statements. Others said they had not been present at the time of the incident. One witness confirmed that the claimant had said that they should ensure the accident book was "filled in right" if they had an accident. Another witness, Mr Patel, said that the claimant had been

"swearing and using foul language, kicking an empty box on the floor." Mr Patel was the only one of the new cohort of witnesses to refer to any swearing.

40. Mr Aberle did not seek the claimant's comments on the newly-obtained witness statements. In his view, their evidence did not take the case any further.

41. By 22 March 2017, Mr Aberle had reached his decision. Contrary to the claimant's case, I find that Mr Aberle did not make a final decision until he had completed the disciplinary meeting and obtained the new evidence. If he had already made up his mind before the disciplinary meeting, he would have been going through a rather elaborate charade by speaking to so many witnesses afterwards.

42. Mr Aberle accepted Ms Baldwin's version of events in preference to that of the claimant. In deciding whose evidence to prefer, Mr Aberle attached some significance to what he saw as a change of story by the claimant. He believed Mr Smart's evidence that the claimant had initially said that he intended to bring a claim against the company. This remark appeared to Mr Aberle to betray the claimant's true intentions. It was, Mr Aberle thought, significantly different from the claimant's later comment at the disciplinary hearing that he wanted to set the record straight in case of future medical problems. This latter comment Mr Aberle took to be the claimant trying to down-play the extent of his self-interest in trying to get the accident book changed.

43. Mr Aberle thought that the incident had happened like this. He found that the claimant had immediately reacted angrily towards Ms Baldwin before he went to see Mr Smart. He had spoken to his team and made a number of disparaging remarks. Although he had not mentioned Ms Baldwin by name, he had specifically mentioned "the first aider" and said that she did not know what she was doing. He found that, in making those comments, the claimant had sworn, using the phrase "they should not be first aiders if they can't fill in the fucking book properly". Mr Aberle believed that the claimant had remarks such as these on three occasions. The first was before he went to see Mr Smart. The second was when he returned from seeing Mr Smart. The third was on his way out of the building. The claimant's comments about Ms Baldwin on the shop floor were "patronising and undignified", leaving her "belittled and insulted".

44. On the basis of those findings, Mr Aberle considered all three allegations proved.

45. Mr Aberle considered the appropriate sanction. In his view, the first allegation (attempting to change the record for personal gain) on its own would have merited a final written warning. The right sanction for the third allegation (language) in isolation would have been a written warning. In Mr Aberle's mind, the second incident (treatment of Ms Baldwin) was the most serious. It amounted to a serious breach of the Code of Conduct. In his view, even on its own, the claimant's behaviour towards Ms Baldwin amounted to gross misconduct. When taken together with the first two allegations, the cumulative effect was worse still. Mr Aberle took into account the claimant's denials, and absence of apology, which he took to represent a complete lack of remorse. In his view, the only appropriate sanction was dismissal.

46. Having decided to dismiss the claimant, Mr Aberle caused a letter to be sent to the claimant informing him of the outcome. The letter was sent on 22 March 2017. It is not clear how the dismissal letter was sent or when it was received.

The letter gave the claimant until 30 March 2017 to appeal in writing to Mr Duncan Jones, the Managing Director.

47. On 23 March 2017 two further witnesses made statements and sent them to Mr Aberle. I do not know when Mr Aberle received them, but in any case they arrived after the dismissal letter had already been sent. Accordingly Mr Aberle did not take them into account.

48. The claimant did appealed against the decision. I accept that he sent an email to the respondent's generic "info@...." email address. This address was used for a wide variety of purposes, including customer queries and spam e-mails. Although it was Mr Aberle's responsibility to deal with e-mails arriving in this inbox, I accept Mr Aberle's evidence that he did not notice the appeal coming in. He would not have expected an appeal against dismissal to land there, especially when the claimant had been told to whom the appeal should be sent. The claimant did not chase the respondent to find out the progress of his appeal.

49. Before presenting the claim, the claimant complied with the mandatory early conciliation process. During its communications with ACAS, the respondent discovered that the claimant had wished to pursue an appeal. Once it discovered this fact, the respondent proposed via ACAS and also separately in open correspondence between solicitors, to invite the claimant to participate in the appeal process. The claimant declined.

50. As at the date of the hearing, the claimant has not brought any civil claim for damages in respect of the injury to his hand. He has about another 18 months before the claim would be statute barred.

Relevant law

Unfair dismissal

51. Section 98 of ERA provides, so far as is relevant:

> (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-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal and
>
> (b) that is either a reason falling within 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) A reason falls within this subsection if it…(b) relates to the conduct of the employee…
>
> (4) 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 reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

52. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

53. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

54. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

55. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

Breach of contract

56. Where notice is required to terminate a contract of employment, the employer may nevertheless terminate the contract without notice if the employee repudiates the contract by committing gross misconduct.

57. "Gross misconduct" for the purposes of a claim of wrongful dismissal, has been defined in the report of Lord Jauncey in *Neary v. Dean of Westminster* [1999] IRLR 288. For conduct to come within the definition, it must so undermine the relationship of trust and confidence that the employer can no longer be expected to keep the employee in employment.

58. This test is objective. Unlike in cases of alleged unfair dismissal, it is for the tribunal to determine whether the employee's actions amounted to gross misconduct. Where the tribunal's view differs from that of the employer, there is nothing to stop the tribunal substituting its own view.

Conclusions – unfair dismissal

59. I will now turn to how I have applied the law to the facts.

60. The respondent has proved that the reason for dismissal was Mr Aberle's belief that the claimant had bullied and harassed a junior employee, putting pressure on her to change an accident record, and that this was aggravated by the fact (as Mr Aberle saw it) that the claimant was doing it for his own gain. That was clearly a belief that related to the claimant's conduct. I have to decide, therefore, whether the respondent acted reasonably or unreasonably in treating that belief as sufficient to dismiss.

61. In my view, the respondent carried out a reasonable investigation. An important factor here is that this is a relatively small employer with approximately 57 employees. It did not have the resources to carry out the same level of investigation as a very large employer. There was an independent investigation

by a manager who was not involved in the original incident. A large number of witness statements were obtained. There was then another manager appointed to conduct the disciplinary hearing. Except in one small respect, that manager had had no involvement in the incident: he did not observe the claimant's conduct, but merely noticed its immediate effect on Ms Baldwin. The Managing Director was reserved to hear an appeal if one should arise. At each stage of the process the claimant had an opportunity to have his say. For the reasons I have already given, the decision was not predetermined.

62. There was, in my view, a small flaw in the process. It was wrong of Mr Aberle to make a finding that the claimant had sworn whilst disparaging Ms Baldwin. Before being able to reach that conclusion reasonably, he should have made further investigations. Only two of the large number of witnesses had mentioned the claimant using abusive language. One of these had only provided their statement after the disciplinary hearing. The claimant should have been given an opportunity to comment on that witness's statement.

63. So far as the remaining conclusions reached by Mr Aberle are concerned, my view is that they were supported by a reasonable investigation.

64. It was unfortunate that there was no appeal meeting. I cannot, however, say that the absence of such a meeting took the procedure as a whole outside the range of reasonable responses. The claimant's appeal was sent to an unlikely email address. He did not chase it up. Although the respondent could have proactively searched the inbox to see if the claimant had appealed, it did act reasonably by offering an appeal as soon as it was discovered that the claimant had tried to appeal.

65. I now turn to whether there were reasonable grounds for the respondent's belief. Although it conflicts with my own findings of fact, it does not mean that the belief was not supported by reasonable grounds. There were four witnesses, including Ms Baldwin herself, who specifically described the claimant making personal criticisms of Ms Baldwin to the room at large. Their evidence, if accepted, tended to show that the claimant was not just explaining procedure to be adopted when filling in an accident book, but suggesting that Ms Baldwin could not do her job properly. Another manager in Mr Aberle's position might have chosen to prefer the evidence of those colleagues who did not refer to such personal criticism. But that was a decision for Mr Aberle to make. He had a rational basis for preferring Ms Baldwin's version to that of the claimant. Mr Aberle was entitled to accept the evidence of Mr Smart that the claimant had told him that he intended to bring a personal injury claim. It was open to him to deduce from the making of that remark that the claimant had later tried to minimise his own self-interest and that this should affect the weight of his evidence. Mr Smart's evidence also provide reasonable grounds for finding that the claimant was motivated in part by personal gain.

66. I must now ask myself whether the sanction of dismissal was within the range of reasonable responses. I find that it was. Ms Baldwin was in a vulnerable position requiring particularly robust protection against bullying. She was exposed in two ways. First, although there was no direct reporting line between the claimant and Ms Baldwin, she was, on any sensible view, a more junior employee than he was. Second, she was entitled to be protected as a first aider. Health and safety at work is very important. It benefits the whole organisation,

workforce and, often, the wider public. When a first-aider makes a contemporaneous record of an accident, she does not do it just to help the injured employee. It promotes the health and safety of the organisation as a whole and helps the organisation to discharge its legal obligations. That responsibility may come into conflict with the private interests of the injured employee who may want to prove that the accident happened in a certain way. It is vital that the first-aider is allowed to do their work independently without being pressurised by colleagues. When the claimant, a more senior employee, asked Ms Baldwin to change the accident book retrospectively, he put her in an awkward position. True it is that Ms Baldwin had already amended the accident book once. That was to correct an obvious mistake of minor significance. That fact did not make it appropriate for the claimant lean on her to change the much more controversial account of how the accident happened.

67. I remind myself that I have to evaluate the reasonableness of the sanction, not on my own version of the facts, but in the light of what Mr Aberle reasonably believed them to be. On Mr Aberle's findings, the claimant had repeatedly spoken in a disparaging way towards Ms Baldwin in front of an entire team. Whether or not he had used a swear word, he had exposed a junior employee to public ridicule in retaliation for carrying out the duties of a first-aider in good faith. As it appeared to Mr Aberle, the claimant's motive was one of personal gain and anger at his desired personal injury claim being thwarted. It was reasonable to treat his motive as an aggravating factor. He was a team leader who ought to have known better.

68. The claimant argues that, even on Mr Aberle's findings, his conduct did not fall within any of the specific examples of gross misconduct in the Handbook. His counsel makes a valid point in relation to the example of "abuse of the personal harassment policy". Even if "abuse" really meant "breach", it is certainly arguable that the Personal Harassment Policy was intended to encompass bullying behaviour unless it was connected to one of the listed diversity characteristics. But even if this argument succeeds, it cannot get around the other definitions of gross misconduct. The contractual definition encompassed rude and offensive behaviour towards colleagues. On Mr Aberle's view of the facts, the claimant's conduct matched that description. It was also open to Mr Aberle to see the claimant's actions as a serious breach of the Code of Conduct. In turn, that would be a "serious breach of Company policies" – an example of gross misconduct listed in the Handbook.

69. Looking at the respondent's policy, and reminding myself of Mr Aberle's reasoning, I cannot say that the sanction of dismissal fell outside the range of reasonable responses.

70. I now step back to ask myself the statutory question: did the respondent act reasonably or unreasonably in treating its belief in the claimant's conduct as a sufficient reason to dismiss him? I find that it did. The dismissal was therefore fair.

Conclusions – breach of contract

71. I return to my own findings of fact. On these findings the claimant acted inappropriately in asking Ms Baldwin to make further changes to the accident book. His actions are mitigated – although not justified – by the fact that Ms Baldwin had been previously prepared to correct a more obvious mistake. Whilst

respecting the reasonableness of Mr Aberle's view that the claimant was motivated by personal gain, I do not share his opinion. The claimant contemplated the possibility of bringing a personal injury claim in the event of future medical problems, but he had no present intention of claiming. His main motivation was to set the record straight, based on a genuine (if possibly mistaken) belief about what he had initially told Ms Baldwin. Unlike Mr Aberle, I have found that the claimant did not single out Ms Baldwin for public criticism. He spoke once to his team about the procedure for filling in an accident book, which Ms Baldwin took to be an implied slight. In my view, the claimant's conduct was culpable, but it would not damage the relationship of trust and confidence so seriously that the respondent could not be expected to continue employing him.

72. If the respondent wanted to terminate his contract it had to give notice. By dismissing the claimant without notice, the respondent was in breach of contract.

73. The parties agreed the amount of damages.

Employment Judge Horne

Date: 8 March 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON
13 March 2018

FOR THE TRIBUNAL OFFICE