EMPLOYMENT TRIBUNALS

Claimant: Mr P Foster

Respondent: Elsa Waste Paper Ltd

Heard at: Manchester **On:** 10,11 and 12 April 2018

Before: Employment Judge Horne

REPRESENTATION:

Claimant: In person
Respondent: Miss K Swan, solicitor

JUDGMENT having been sent to the parties on 12 April 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. By a claim form presented on 1 October 2017, the claimant complained of unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA"). He also raised a complaint in relation to holiday pay, but that complaint was withdrawn.
2. The issues were clarified at the start of the hearing and further refined during the course of the parties' closing submissions.
3. It was common ground that the claimant had the right not to be unfairly dismissed and that the respondent had dismissed him. It was also undisputed that the reason for dismissal was Mr Walsh's belief that the claimant had behaved aggressively and insubordinately towards his Managing Director. That reason was plainly one which related to the claimant's conduct. The fairness or

otherwise of the dismissal depended on whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.

4. Further issues then arose in relation to remedy:

   4.1. Whether it would be just and equitable to reduce the claimant's basic and compensatory awards on the ground of the claimant's contributory conduct.

   4.2. Had the claimant not been dismissed, what would his net pay from the respondent have been? There was no dispute about what his gross earnings would have been, but the parties could not agree on the amount of tax and national insurance that the claimant would have had to pay.

   4.3. Should the claimant give credit for his entire earnings received from an employer (Norton) for whom he worked after his employment with the respondent ended? The particular issue here is whether this income was paid to him gross or net. If he is liable to pay tax and national insurance on his earnings from Norton, the amount of tax and national insurance should be left out of the reckoning and only the net earnings should be deducted from his award.

   4.4. What income has the claimant actually received, and what will he continue to receive, from his current employer (MDL)? The question for me to decide was how many hours per week the claimant has been working, and will continue to work, at a premium overtime rate.

   4.5. How long will it be before the claimant finds employment that is remunerated as well as he would have been paid had he remained employed by the respondent?

   4.6. Whether the compensatory award should be increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRA") to reflect the respondent's unreasonable failure to comply with paragraphs 5 and 27 of the ACAS *Code of Practice 1 – Disciplinary and Grievance Procedures.*

   4.7. Whether the compensatory award should be reduced under the same section to reflect the claimant's unreasonable failure to comply with paragraph 26 of the same *Code.*

5. Prior to the announcement of the judgment on the fairness of the dismissal, the respondent also asked the tribunal to consider making a "*Polkey* reduction", that is to say, a reduction to the compensatory award on the ground that, had the respondent acted fairly, the claimant would or might have been dismissed in any event. Following announcement of my conclusions on fairness and contributory conduct, I gave the parties a further opportunity to make submissions about whether or not a *Polkey* reduction should be made. At that point, the respondent's solicitor indicated that she was no longer seeking a *Polkey* reduction. I therefore did not make any determination of this issue.

6. Initially, when considering remedy, it appeared as if there might also be an issue as to whether the claimant had made reasonable efforts to mitigate his losses. During the course of submissions on remedy, however, the respondent's solicitor indicated that this point was no longer in contention.

Evidence

7. I considered documents in an agreed bundle which I marked "CR1". In keeping with the warning which I gave the parties, I read only those documents to which the parties drew my attention in the witness statements or orally during the course of the hearing.

8. The respondent called Mr Walsh, Mr Creek, Mr Humphreys and Mrs Humphreys as witnesses. The claimant gave oral evidence on his own behalf. All witnesses confirmed the truth of their written statements and answered questions.

Facts

9. The respondent is a family-owned company, carrying on a small to medium-sized paper recycling business. It has about 32 employees. Its Managing Director and substantial shareholder is Mr Greg Humphreys. His mother, Cynthia Humphreys, is also a shareholder and co-director. The Humphreys family owns another company, called Document and Data Shred Limited, of which Mr Humphreys is also the Managing Director. Both businesses operate from the same depot in Stockport.

10. The claimant worked for the respondent from June 2013 as a casual driver. From 22 September 2014 he was taken on as an employee. His role was to drive an articulated truck and trailer. His employment lasted until 4 July 2017 when he was dismissed without notice.

11. On 25 September 2014, the claimant signed to acknowledge a written statement of terms of employment. Provided to him at the same time as his statement of terms was a written disciplinary policy. The policy contained examples of gross misconduct. These included "using threatening behaviour" and the "use of swearing, abusive language and abusive behaviour".

12. On 25 May 2017 the claimant attended a perfunctory appraisal meeting with the respondent's Compliance Officer, Jenny Morris. The claimant rightly expected the appraisal to be carried out more thoroughly. When he got home, he wrote a grievance letter. It contained many points of dissatisfaction, not just about the appraisal. One of his concerns was that forklift drivers would drive too close to his vehicle, endangering his safety. He handed it to Mr Humphreys the next day. There was a brief conversation in which Mr Humphreys questioned why the claimant would want to work for a company if it was as bad as the claimant's letter described.

13. A grievance meeting took place on 5 June 2017. Mr Humphreys agreed that the appraisal should have been carried out properly. To deal with the claimant's point about health and safety, Mr Humphreys suggested that the claimant could remain in his cab whilst the vehicle was being loaded and unloaded. The claimant agreed. Two days later, Mr Creek, the Health and Safety Manager, reminded the claimant to stay in his cab. In answer to a question from the claimant, Mr Creek said that the "stay put" procedure applied only to him and not to the other drivers. The claimant thought that Mr Humphreys was missing the point: safety is meant to be for everyone. For his part, Mr Humphreys was content that the forklift operation was already safe. None of the other drivers had complained, so he was happy to humour the claimant by making a special arrangement for him. On 9 June Mrs Humphreys instructed Mr Creek to give the claimant a further reminder to stay in his cab. The claimant did not take this

instruction well. On 12 June 2017 he gave a further grievance letter to Mrs Humphreys, complaining of bullying and harassment.

14. On Friday 16 June 2017, the claimant was in the warehouse, standing at the side of his trailer, when Mr Humphreys drove near him in a forklift truck. Quite how near to the claimant, and how fast, Mr Humphreys drove is a matter of dispute. Little turns on it. What is undisputed is that the claimant then registered his disapproval by clapping his hands sarcastically towards Mr Humphreys. An argument ensued. There is a clash of evidence, to which I will return, about precisely what Mr Humphreys and the claimant said to each other. What is clear, however, and was never in dispute in the subsequent investigation, is that, in the course of the argument, the claimant told Mr Humphreys to "fuck off" and called him an abusive name (either "prick" or fucking idiot"). Mr Humphreys told the claimant that he was suspended and went away to find a witness. In the meantime, the claimant climbed into his cab. Mr Humphreys returned with Mr Creek. He instructed the claimant to come out of his vehicle, but the claimant refused. Instead, he drove towards the office. He then parked up and descended from the cab. In the presence of Mr Creek, Mr Humphreys again told the claimant he was suspended.

15. Shortly after this incident, the claimant sent a text message to a colleague, Mr Oliver Rawlinson. This message exchange was not made known to anyone to the respondent until it was disclosed during the course of these proceedings. I will return to the text message later in these reasons.

16. On 17 June 2017 the claimant's suspension was confirmed by letter.

17. Mr Humphreys believed that the claimant had breached the company's disciplinary policy and that a disciplinary investigation should follow. He decided to conduct the disciplinary investigation himself. First, he wrote a statement of his own version of events. He then asked Mr Creek to prepare his own statement, which he did. He did not try to find out whether any other employees had been present in the warehouse at the time of the incident. Nor did he consider whether the task of gathering evidence might be better done by somebody else.

18. According to Mr Humphreys' statement, following the claimant's sarcastic handclap, Mr Humphreys had asked the claimant what he was doing, to which the claimant had replied, "Well done, you just nearly killed me," and added, "You're a prick, fuck off!" Language such as this continued from the claimant once he had descended from his cab just outside the office.

19. Mr Creek's statement took up the story from when Mr Humphreys went to fetch him. He was walking behind Mr Humphreys. The claimant looked angry. When the claimant got out of his vehicle near the office, Mr Creek observed the claimant say something like, "fuck off, you prick".

20. There was no suggestion in the statements of Mr Humphreys or Mr Creek that Mr Humphreys had sworn at the claimant or behaved in any way aggressively towards him. Neither did those statements deny such behaviour on Mr Humphreys' part.

21. Having taken advice, Mr Humphreys decided that he should not be the one to conduct the disciplinary hearing. Instead, he chose Mr Mike Walsh, the Site Manager of Document and Data Shred Limited, who reported directly to Mr

Humphreys. Mr Walsh was himself no stranger to swearing in the workplace. During the course of a secretly-recorded meeting with a different colleague, Mr Walsh and the colleague between them had sworn some 176 times, including various derivatives of the word "fuck". The swearing was casual in nature, such as, "I thought, 'fuck it'' and "he's been fucking ages". From the transcript of the recording it is clear that the conversation was essentially good-natured. The conversation itself had nothing to do with the claimant.

22. By letter dated 21 June 2017, the claimant was informed of the outcome of his grievance. Only one aspect of the grievance was upheld, namely the deficiencies in his appraisal. The claimant was dissatisfied with the outcome and later appealed.

23. Also by letter of 21 June 2017, the claimant was invited to a disciplinary meeting scheduled to take place on 26 June 2017. The letter informed him of disciplinary allegations arising out of the 16 June incident. Royal Mail tried unsuccessfully to deliver the letter on 23 June 2017 and the claimant collected it on Sunday 25 June 2017. Having only a day to prepare, he asked for the meeting to be postponed. By agreement the meeting was rescheduled for 28 June 2017.

24. The claimant attended the disciplinary meeting unaccompanied. Present were Mr Walsh and the claimant, with a note-taker supplied by Hicks Watson. The claimant gave his own version of the 16 June incident. His account differed significantly from that of Mr Humphreys. According to the claimant, after the sarcastic handclap, Mr Humphreys started shouting at him along the lines of "What's your problem? It is only you that has a problem; why not write me another one of your fucking letters?" The claimant had responded by telling Mr Humphreys that he was driving too fast and too close, and that he should be leading by example. At this point, said the claimant, Mr Humphreys had come "right up to my face" and shouted, "I am your boss, you are my bitch". The claimant told Mr Walsh that he had then retreated to his cab for safety.

25. The claimant asked Mr Walsh to check whether the incident had been captured on CCTV. He also suggested that Mr Walsh interview Mr Rawlinson and three other colleagues, known by their first names, Leon, Mustapha and Steve. Mr Walsh told the claimant that he would carry out some further investigations and then reconvene the meeting so that the claimant would have a chance to discuss any further evidence uncovered.

26. Following the meeting Mr Walsh set about interviewing the witnesses whom the claimant had named. Mr Rawlinson told Mr Walsh that the claimant had said to Mr Humphreys, "I'm not your bitch". As Mr Rawlinson recalled, Mr Humphreys and the claimant had been "in each other's faces", with Mr Humphreys looking "furious".

27. Leon's recollection of the incident, as he told it to Mr Walsh, was that Mr Humphreys had been shouting at the claimant to "fuck off". Whilst the claimant was inside his cab, Mr Humphreys had been pounding on the door to try to get him to come out.

28. Mr Walsh then interviewed Mr Humphreys. He did not ask Mr Humphreys whether he had sworn at the claimant, or whether they had been "in each other's faces". He put to Mr Humphreys the claimant's allegation that he had said, "You are my bitch". Mr Humphreys denied that allegation. He added that he had

reminded the claimant that he was the boss and that the claimant should do as he was told. At that point, according to Mr Humphreys, the claimant had replied, "I am not your bitch". When asked whether there was CCTV footage of the incident, Mr Humphreys told Mr Walsh that he had checked with Ms Jenny Morris, the compliance officer. She had told him that the system had not been recording at the time.

29. Having gathered this further evidence, Mr Walsh decided to dismiss the claimant for gross misconduct. He thought the claimant guilty of aggressive, abusive and insubordinate behaviour. Contrary to the assurance he had given to the claimant at the disciplinary meeting, Mr Walsh did not convene any further meeting with the claimant to discuss the new evidence before coming to his decision. As Mr Walsh saw it, if the claimant did not like the decision, he could always appeal.

30. In coming to his decision, Mr Walsh did not attempt to distinguish between insubordination that had occurred at the start of the incident and insubordination of the claimant shutting himself in his cab. Rather, he looked at the event as a whole. In forming his view of what happened, he made three controversial findings on the evidence:

    30.1. Contrary to the claimant's account, Mr Walsh believed that it was the claimant who had introduced the inflammatory word, "bitch" into the conversation. He thought it significant that both Mr Rawlinson and Mr Humphreys recalled the claimant having used that word. They were the only two witnesses who had mentioned the use of that word at all, apart from the claimant.

    30.2. In Mr Walsh's view, Mr Humphreys had not sworn at the claimant at all during the encounter. He discounted Leon's evidence of Mr Humphreys swearing. As Mr Walsh reasoned, Leon's evidence was insufficient to support a finding that Mr Humphreys had sworn, because Leon was the only person who claimed to have heard it. That, of course, was incorrect. The claimant was also saying that Mr Humphreys had sworn at him. He and Leon were the only people who mentioned either way whether Mr Humphreys had sworn.

    30.3. Mr Walsh did not accept the claimant's account of Mr Humphreys having behaved in any way aggressively towards the claimant. This involved rejecting, or at the very least playing down, Mr Rawlinson's evidence that Mr Humphreys and the claimant had been "in each other's faces". Nobody else, apart from the claimant, had said whether Mr Humphreys had been aggressive towards the claimant or not.

31. Here, then, are three instances of Mr Walsh having preferred Mr Humphreys' account over that of the claimant. In the first case, Mr Walsh's rationale was that there was one (and only one) witness who supported Mr Humphreys. Had that been the only controversial finding, Mr Walsh's reasoning would have been perfectly logical. But his second and third findings were based on there being one witness (and only one) who supported the claimant. The clash of logic behind these findings lays bare what I find was a selective approach on Mr Walsh's part. Mr Walsh may not have realised he was cherrypicking the evidence, but viewed objectively, that is what I find he was doing.

32. The claimant learned of Mr Walsh's decision on 4 July 2017 when he received a hand-delivered letter bearing the same date. He appealed against his dismissal by letter dated 7 July 2017. On 12 July 2017, Mrs (Cynthia) Humphreys invited him to a disciplinary appeal meeting scheduled to take place on 20 July 2017. Mrs Humphreys had already invited the claimant, by letter dated 6 July 2017, to a grievance appeal meeting.

33. The claimant thought that Mrs Humphreys would not be able to conduct either appeal impartially. On 13 July 2017, he e-mailed Mrs Humphreys, requesting an independent chairperson, specifically for his grievance appeal. He also informed Mrs Humphreys that he could not attend on 20 July, so the two appeals were re-arranged to take place on 21 July 2017. He was notified of the change of date on about 15 July 2017.

34. The claimant e-mailed Mrs Humphreys on 17 July 2017, this time on the subject of both appeals. He informed Mrs Humphreys that he would attend the appeal meetings if the respondent conducted them according to its own rules. The context of his e-mail made clear that he would only attend if a different person was appointed to conduct the appeals. Having taken advice, Mrs Humphreys agreed to accede to the claimant's request. By e-mail dated 20 July 2017, she informed the claimant that the combined appeals, due to be heard the following day, would now be chaired by someone else. That person was to be Ms Marie Shenton, a partner in the respondent's accounting firm.

35. The claimant did not attend on 21 July 2017. By this time he had arranged alternative employment and had work commitments. He e-mailed Mrs Humphreys, complaining that he had only been given one day's notice of the meetings. His position at that time was that he should have at least 7 days' notice of any forthcoming meeting, to enable him to make arrangements with his new employer for time off work. Mrs Humphreys saw things rather differently. As far as she was concerned, the claimant had known for 6 days that the appeals would be proceeding on 21 July; all that had changed was the identity of the person who would be chairing them. Nevertheless, Mrs Humphreys agreed to rearrange the meetings for a second time. She proposed two dates in August for the claimant to select. One of these was 17 August 2017. The claimant confirmed that he would attend on that date. His confirmation e-mail was sent at 9.03pm on 25 July 2017. Unfortunately, Mrs Humphreys missed the e-mail, with the result that she wrongly assumed that the claimant had decided not to proceed. On 17 August 2017, the claimant, having taken a day off work from his new employer, arrived at the respondent's premises to attend his appeal. To his great annoyance he found that Ms Shenton was not there and the meeting could not take place. He e-mailed Mrs Humphreys later that day to express his "disgust". When she realised what had happened, Mrs Humphreys e-mailed with her apologies and offered an explanation. Her e-mail, dated 25 August 2017, also offered a further appeal meeting on Thursday 7 September 2017.

36. By this time the claimant had decided he was not prepared to take any further time off work for the sake of his appeal. He was no longer interested in attending on weekdays, even if he had 7 or more days' notice. He proposed Saturday 9 September 2017, a date on which he would not be working. It also happened to be a date on which Ms Shenton was unavailable, being an accountant who worked Monday to Friday. E-mails passed to and fro, setting out the parties' increasingly entrenched positions. The claimant would not back down from

insisting that his appeal meeting take place outside normal office hours. Eventually it became clear that they would never agree on a date. The appeal meeting never took place.

Relevant law

37. 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.

38. 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.

39. 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.

40. 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.

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

42. It can be gross misconduct for an employee to refuse to obey a direct management instruction. According to *UCATT v. Brain* [1981] ICR 542, "the primary factor which falls to be considered by the reasonable employer deciding whether to dismiss the recalcitrant employee is the question, 'is the employee

acting reasonably or could he be acting unreasonably in refusing to obey my instructions?"

43. The following provisions of *ACAS Code of Practice 1 – Disciplinary and Grievance Procedures* ("COP1") appear to me to be relevant:

> "6. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.
>
> 7. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.
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> …
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> 26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. …
>
> 27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case."

44. Where the tribunal considers that the conduct of an unfairly dismissed employee, before the dismissal, was such that it would be just and equitable to reduce the basic award of compensation to any extent, section 122(2) of ERA requires the tribunal to reduce the basic award accordingly.

45. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, section 123(6) of ERA requires the tribunal to reduce the compensatory award by such amount as is just and equitable having regard to that finding.

46. To justify a reduction in the basic or compensatory awards, contributory conduct must be culpable or blameworthy and must have caused or contributed to the dismissal: *Nelson v. BBC No.2* [1980] ICR 110, CA. The tribunal must in addition be satisfied that it is just and equitable to reduce the award.

47. In deciding upon a contributory fault reduction, the tribunal must consider only the conduct of the employee and not that of the employer.

48. The amount of a reduction is a matter of discretion for the tribunal. Guidance as to the exercise of such discretion was given in *Hollier v. Plysu Ltd* [1983] IRLR 260. Contribution should be assessed broadly. Without fettering the tribunal's discretion, the EAT suggested the following categories: wholly to blame (100%), largely to blame (75%), equally to blame (50%) and slightly to blame (25%).

49. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 applies to proceedings before an employment tribunal relating, amongst other things, to complaints of unfair dismissal. The section provides, relevantly:

> (2) If…it appears to the employment tribunal that-
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If…it appears to the employment tribunal that-

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

Conclusions – fairness of the dismissal

Reason for dismissal

50. I remind myself of the common ground. The reason for dismissal was Mr Walsh's belief that the claimant had behaved aggressively and insubordinately towards Mr Humphreys. This was a reason that related to the claimant's conduct. I must therefore consider whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.

Investigation

51. I start by assessing the quality of the investigation. I would hold the respondent to the standards within the reasonable range expected of a small to medium-sized employer.

Reasonableness of appointing Mr Walsh as decision-maker

52. The first point I have considered is whether it was reasonable for the respondent to appoint Mr Walsh to take the disciplinary decision.

53. Context is all-important here. The respondent was faced with a highly problematic situation. It is a dilemma commonly faced by small employers where an employee is alleged to have committed misconduct towards a very senior person in the business. Mr Humphreys was the Managing Director and substantial shareholder. As owner-director, he was one of two people (the other being his mother) with ultimate authority to take decisions on dismissing employees. Yet, having witnessed the alleged misconduct, and perceived himself as being on the receiving end of it, he was not well placed to assess the evidence of misconduct dispassionately. Who, in those circumstances, should take responsibility for disciplining the claimant? One thing was plain: that person should not be Mr Humphreys. The respondent itself recognised that it would be wrong for him to take the decision. They were right to do so. If Mr Humphreys took the decision himself, he would be rightly accused of not being objective. There are cases where a manager catches an employee "red-handed" and reasonably takes the view that any further investigation would be futile. In those

circumstances, he or she may fairly dismiss the employee on the spot. This is not one of those cases. Any reasonable employer would realise, and the respondent itself did realise, that it was important to find out whether there were witnesses who were not directly involved in the altercation who could give a more objective account of what happened.

54. The question then arose: who, if not Mr Humphreys, should be the one to take the disciplinary decision? If that decision was entrusted to Mrs Humphreys, the claimant would think, as he did when she proposed to chair the appeal, that she would just support her son. If the respondent chose a subordinate employee or officer, such as Mr Walsh, it would be difficult for him to put aside his own interest in keeping his employer happy. It would take a particularly robust employee to make findings that involved believing the accused employee's word over that of his Managing Director. And, if the decision was placed in the hands of a totally independent third party, the respondent would be surrendering its right to decide whom to employ and whom to dismiss. It would also face the prospect of having to instruct a second, outsourced, decision-maker to hear the appeal. The respondent had a difficult choice to make and it would only be in the plainest of cases that the tribunal would interfere.

55. It is significant that the claimant did not complain about Mr Walsh being appointed to conduct the disciplinary hearing and that he appeared to agree to proceed knowing that Mr Walsh would be the decision-maker. It may be that the claimant did not think of that point by the time he agreed to proceed. But it would not have been obvious to Mr Walsh that the claimant had neglected to think of whether Mr Walsh was an appropriate person. Still less would it have been apparent to Mr Walsh that the reason for the claimant's lack of objection was that the claimant had had insufficient time to prepare for his disciplinary hearing. The claimant had freely stated on a previous occasion that he had had insufficient time to prepare and that had resulted in a previous adjournment. It was also quite plain that the claimant was well aware of his rights and has already made reference to COP1. Mr Walsh was not the perfect choice of manager to hear the disciplinary hearing but it was open to a reasonable employer to appoint him.

Reasonableness of appointing Mr Humphreys as investigator

56. Another choice that the respondent had to make was who was going to gather the evidence. COP1 requires employers in misconduct cases, where practicable, to ensure that the investigator is a different person from the manager conducting the disciplinary hearing. The obvious rationale behind this requirement is to encourage employers to ensure that evidence is gathered by a neutral person. More importantly, paragraph 6 requires that the investigation should establish the facts. If the investigator was heavily involve in the incident out of which the disciplinary allegations arise, it will be very difficult for that person to establish anything other than facts which fit their own viewpoint.

57. In my view it would have been relatively straightforward for Mr Humphreys to delegate the task of gathering evidence, such as interviewing witnesses, to a more junior employee or officer. To fail to do so in this case was in my view totally unreasonable. Mr Humphreys knew that a dismissal decision would have to be made by somebody who either answered to him or was related to him. It would be particularly important that such a decision should be transparent and based on impartially-gathered evidence. Appointing himself as investigator also

meant, almost inevitably, that there would be no investigatory meeting with the claimant prior to a disciplinary hearing. There was no way that Mr Humphreys could interview the claimant.

Reasonableness of Mr Walsh's investigation

58. Mr Walsh corrected some the shortcomings of Mr Humphreys' investigation, but only to a limited extent. He interviewed further witnesses nominated by the claimant in the disciplinary meeting. (As an aside, it was reasonable for Mr Walsh not to ask the claimant to produce the text message exchanges with Jenny and Mr Rawlinson, now found in the bundle. The claimant had already relied on anonymised text messages at the start of the disciplinary meeting. It would be reasonable for Mr Walsh to think that, if the claimant had further text messages that were relevant, he would have mentioned them.)

59. But Mr Walsh's investigation contained a serious flaw. He did not give the claimant the opportunity to comment on anything said by Mr Rawlinson, Mustafa or Leon. Had there been a reasonable initial investigation, these statements would have been made available to the claimant prior to the disciplinary hearing. If Mr Walsh's enquiries were going to act as a substitute for the initial investigation, the least he should have done was reconvene the meeting to discuss the newly-discovered evidence with the claimant. This was why the claimant was promised a reconvened meeting for precisely this purpose. Mr Walsh's reason for breaking that promise (namely that the claimant was entitled to appeal) was based on an unreasonable misconception of what an appeal is supposed to do. It is meant to be an additional safeguard, not a substitute for giving an employee the chance to comment on the evidence against him. The danger of overreliance on an appeal is clear from what actually happened in this case. The appeal never went ahead, with each side blaming the other for that fact.

Reasonableness of the appeal

60. This brings me then to the appeal itself. In my view the respondent did not act unreasonably its handling of the appeal process. It was reasonably open to Mrs Humphreys to put herself forward to hear the appeal. When the claimant refused outright to engage with the appeal while Mrs Humphreys was in the chair, it was reasonable for Mrs Humphreys to offer an external appeal officer. The fact that the change in personnel was arranged at short notice did not make it any more difficult for the claimant to attend the meeting. Mrs Humphreys should, of course, have checked her emails more carefully. Had she done so, she would have saved the claimant the stress and inconvenience of needlessly attending on 17 August 2017. It was, however, reasonably open to the respondent to insist on the appeal taking place during the normal working hours of the person appointed to hear it, especially since this external person had been found at the claimant's insistence.

61. Ultimately there was a breakdown of goodwill in arranging the appeal, due partly to the respondent's carelessness in not checking their emails leading to the missed meeting on 17 August 2017, but due also to the claimant's taking an entrenched position that he would not attend on weekdays just more than 7 days' notice to get time off work in his new job. The respondent's handling of the appeal did not in my view fall outside the range of reasonable responses and would not have made the dismissal unfair by itself. What the aborted appeal did

mean, however, was that the respondent was not able to cure its unreasonable handling of the earlier stages of the investigation.

Reasonableness of Mr Walsh's belief

62. I turn now to whether Mr Walsh had reasonable grounds for his belief as to what the claimant had done. I am quite satisfied that he had reasonable grounds for believing that the claimant had behaved aggressively. It was never in dispute that he had provoked a confrontation with his sarcastic handclap and had made matters worse with a pejorative name coupled with swearing. He had, on any view, disobeyed Mr Humphreys' instruction by locking himself in his cab. Behaviour like that towards the Managing Director is clearly insubordinate. It lacks respect and shows the employer that the employee is no longer willing to act under the employer's control. But there were matters of contention. In particular, Mr Walsh had to decide whether Mr Humphreys had provoked the claimant by shouting in his face, swearing at him and calling the claimant "[his] bitch". It was important for Mr Walsh to reach a view on these matters because they would make a difference to the level of sanction that the respondent could reasonably impose. It is one thing to take part in a gradually escalating shouting and swearing match; it is quite another to subject another person to unprovoked abuse. Moreover, if Mr Humphreys had reacted aggressively to the claimant's handclap, the fact that the claimant was initially to blame would not stop it being reasonable for him to take refuge in his cab whilst Mr Humphreys' rage died down.

63. Mr Walsh decided these issues against the claimant. For the reasons I have already given, my conclusion that his findings were based on an unreasonably selective approach to the evidence. Mr Walsh should not take this criticism too heavily on himself. He was put in a difficult position, having to make findings potentially against his own Managing Director. But knowing of this difficulty, any reasonable manager in his situation would either have declined to conduct the disciplinary hearing altogether, or would have chosen to demonstrate transparent fairness. This Mr Walsh failed to do. He therefore allowed himself on a selective reading of the evidence to find the claimant was the sole aggressor throughout when the evidence suggested that, by the time the claimant had got into his cab the confrontation had descended into a two-way shouting match.

Reasonableness of the sanction

64. In the light of these conclusions I turn to whether the sanction of dismissal was within the range of reasonable responses. The respondent's disciplinary procedure categories the use of swearing and abusive language as an example of gross misconduct. Nobody, least of all Mr Walsh, seriously expected the casual use of swear words in the respondent's organisation to be visited with dismissal. Where there is a culture of swearing in an organisation it is rarely going to be reasonable to dismiss simply for using swear words. On the other hand, the respondent did not need a written procedure to spell out that abusive behaviour directed at the Managing Director would be totally unacceptable. It was reasonable for Mr Walsh to draw a line between casual use of swear words on the one hand and swear words directed at an individual on the other, especially if they were combined with a personal insult. He would still need to bear in mind, however, that the inclusion of swear words in these rebukes would not be as shocking in this organisation as in others.

65. In my view, whether the dismissal was within the range of reasonable responses or not depended on the extent of provocation by Mr Humphreys. If the claimant had been the aggressor throughout, dismissal would have been within the reasonable range. If however Mr Walsh should have found that Mr Humphreys had given as good as he got, even after the claimant had first sworn, that would have been a powerful mitigating factor pointing away from dismissal. This is for two reasons. First, it would explain the later insubordinate behaviour of locking himself in his cab. Second, and importantly, to do otherwise would leave any employee in the claimant's position with a profound sense of grievance. There was no way that Mr Walsh could take disciplinary action against Mr Humphreys. If Mr Humphreys' behaviour went unpunished and the claimant was dismissed the inconsistency would be unfair. The only fair way of dealing with the inconsistency (bearing in mind that Mr Humphreys was never going to be disciplined) would be to consider an alternative sanction so as to reduce the gap in treatment between the two individuals.

66. I have already recorded my view that the respondent did not have reasonable grounds for treating the claimant as having been the sole aggressor. In those circumstances, the sanction of dismissal in this case was such that no reasonable employer could have meted it out to the claimant. Answering the statutory question, the respondent did not act reasonably in treating Mr Walsh's belief as sufficient reason for dismissing the claimant and the dismissal was therefore unfair.

Conclusions - contributory conduct

67. Before expressing my conclusion as to whether there should be a reduction in compensation for contributory fault, I need to record some further findings of fact.

68. For the purposes of this hearing, the claimant has produced text message exchanges between himself and two employees of the respondent. These are Ms Jenny Morris (Compliance Manager) and Claire Pavitt (Office Manager). The message exchanges show that, during the claimant's employment, Ms Morris and Ms Pavitt were quite comfortable in their use of swear words in conversation with the claimant. Tellingly, in my view, in one exchange with Ms Morris, the claimant was the first to use the word, "bitch". These text messages are not relevant to the fairness of the claimant's dismissal because they were never made known to Mr Walsh.

69. I have also had regard to the claimant's witness statement that forms part of his evidence to the tribunal. He confirmed in that statement (although he did not do so to Mr Walsh) that he did say to Mr Humphreys, "I'm not your bitch". In fairness to the claimant, his statement maintained that he used these words in response to Mr Humphreys saying, "You are my bitch".

70. The text message exchange with Mr Rawlinson, which the claimant did not produce at the time of his disciplinary meeting, shows that, almost immediately after the claimant's altercation with Mr Humphreys, the claimant told Mr Rawlinson that he had been called a "bitch". From Mr Rawlinson's texts it is clear that he believed Mr Humphreys to have been "furious" at the time.

71. Taking this evidence together with my findings up to this point, I have made the following findings of fact:

71.1. It was the claimant who, on 16 June 2017, first used the word, "bitch". The claimant's version of the facts seems inherently less likely than that put forward by the respondent. On the claimant's account of the conversation, Mr Humphreys said, "You're my bitch," followed by the reply, "I'm not your bitch". It is unlikely in my view that the conversation would have flowed that way. It seems too stilted for an exchange that had already begun with a sarcastic handclap and rapidly descended into swearing. It is inherently more likely that the phrase, "I'm not your bitch" was a direct response to the claimant being reminded that Mr Humphreys was the boss and that the claimant should do as he was told. It also fits with the claimant having previously introduced the word, "bitch" into a conversation with Ms Morris.

71.2. Once the claimant had said, "I'm not your bitch", there followed a two-way shouting match in which both the claimant and Mr Humphreys swore at each other. Though I have not heard directly from Leon or Mr Rawlinson, their statements are clear and purport to speak out against their own employer. If they were lying for their own purposes, they would have much more to lose by supporting the claimant's version than by supporting that of Mr Humphreys.

72. The claimant's actions were undoubtedly culpable and blameworthy. He started the confrontation and considerably escalated it before Mr Humphreys did anything wrong. I have already set out my view that the claimant's actions at the start of the altercation were insubordinate. His conduct directly led to his dismissal.

73. I do not consider that the claimant's actions in locking himself in his cab were particularly blameworthy. Indeed, having found that the claimant and Mr Humphreys were shouting and swearing at each other, it was actually quite a sensible thing for the claimant to do to put a physical barrier between himself and Mr Humphreys.

74. In my view, the claimant was substantially, but not entirely, to blame for the incident on 16 June 2017.

75. Doing my best to look at the situation in the round, and looking at the way in which the claimant's culpable behaviour contributed to dismissal, my view is that it would be just and equitable to reduce the claimant's compensation by 60%.

Conclusions – other remedy issues

Net pay from respondent but for dismissal

76. Had the claimant remained in employment with the respondent, how much tax and national insurance would he have had to pay on his earnings? It is common ground that his gross pay would have increased considerably. His gross hourly rate of basic pay would have gone up from £9.50 to £12.00. Overtime pay would have increased from £12.00 to £18.00 per hour.

77. Prior to being dismissed, the claimant's net pay, as a proportion of his gross pay, was approximately 81%. There is no dispute about that. It was also common ground that this percentage would have gone down as his income increased. The higher his earnings, the more they would exceed his personal allowance and the greater the slice of his income that would attract the basic rate of income tax.

Neither party claimed to know, or offered to research, the actual amount of tax and national insurance that the claimant would have had to pay.

78. After some discussion there emerged an agreement of sorts. The respondent's solicitor indicated that she would not try to persuade me that the claimant would have had to pay more than 22 pence in the pound, on average, on his earnings from July 2017. For his part, the claimant said that he would not try to persuade me that he would have taken home more than an average of 78 pence in the pound. In the absence of any evidence that this figure was wrong, I proceeded on the basis that, had the claimant remained in employment with the respondent, his net pay would have been 78% of his gross pay.

Norton earnings – gross or net?

79. I accepted the claimant's evidence that Norton did not make any payments to Her Majesty's Revenue and Customs (HMRC) in respect of income tax or national insurance on sums paid by Norton to the claimant. I also accept that Norton did not make any deductions from the claimant's pay at source. Payments from Norton were all in multiples of £5.00. Where an employee is a taxpayer, it is rare for their take-home pay to be in such round numbers. Tax and national insurance deductions generally result in net pay expressed in pounds and pence. It is more likely that the payments were made gross. The claimant has not yet self-assessed his tax on his Norton earnings, but he will be obliged to do so in his next tax return. If his full gross Norton earnings were subtracted from his claim for loss of earnings, he would be undercompensated. It is only right that he should keep a certain amount back so that he can pay his tax when it falls due. The question is, how much? Here, in the absence of any evidence or submissions to the contrary, I find that he will be liable to pay 22% of his Norton earnings to HMRC and that this sum should accordingly be added back into his claim.

Earnings from MDL

80. There is a dispute about how much overtime pay the claimant has received, and will continue to receive, in his new employment at MDL. The agreed position is that the claimant works 6 hours' overtime per week. Where the parties disagree is about how much of that overtime is at a premium hourly rate. Unfortunately, the claimant has not brought all his pay slips, which might have answered that question definitively. Nevertheless I accept his oral evidence that not all of the overtime is at a higher rate of pay. Entitlement to a premium rate depends on the time of day at which the overtime is worked. Although I was not able to determine the exact time of the morning which marks the threshold between the two pay rates, it appeared to me that that time it was likely to be around 5.00am. The claimant was well used to starting work at 5.00am in his employment with the respondent and time after 5.00am is not generally considered to be unsociable hours. He told me, truthfully I find, that he would occasionally to start driving at 4.00am and receive some premium overtime for such an early start. This chimes with his general estimate that on average he receives pay at the higher rate for some 4 or 5 hours per month, or one hour per week. Apart from that one hour per week, I find, the claimant is paid, and will continue to be paid, his basic rate of pay.

Duration of future earnings gap

81. The final issue affecting assessment of the claimant's losses is the question of how long the claimant will suffer an ongoing loss of earnings. He is currently paid less than he would have been paid by the respondent had he remained in their employment. Between being dismissed and joining MDL, his current employer, he has worked for Norton and other agencies. All of them paid the claimant less than he would have earned from the respondent. From the number of lesser-paid jobs that the claimant has had, I am able to infer that it is not easy to find driving work at the respondent's rates of pay. The claimant estimates that it will take a further 52 weeks before his earnings reach parity with the respondent. In the absence of any evidence supplied by the respondent that he will find equivalently-paid work more quickly, I agree with the claimant's estimate. His compensation should reflect an ongoing gap in earnings lasting a further year.

Section 207A increase

82. I consider next whether there should be any increase in the claimant's award of compensation to reflect alleged breaches of COP1. It is the claimant's case that the respondent failed to comply with paragraphs 5, 6 and 27.

83. In my view, there was technical compliance with paragraph 6. Mr Humphreys carried out an investigation and Mr Walsh conducted the disciplinary hearing. Paragraph 5, on the other hand, was not followed. It is important to carry out investigations of potential disciplinary matters to establish the facts of the case. Mr Humphreys did not carry out such investigation as was necessary to establish the facts. He recorded his own version of events and one witness. But he must have known there were other people at work within the location that might have been able to observe what was going on, and in my view he did not comply with paragraph 5 in simply producing his own statement and that of Mr Creek. The letter of paragraph 5 does not require that the investigation be carried out impartially; it does however in my view strongly imply that the person who carries out the investigation should not be somebody with a direct interest in the outcome of the case. It was, as I have already stated above, unreasonable for Mr Humphreys to carry out the investigation himself rather than delegate it to somebody such as Mr Walsh would could have done it for him. If Mr Walsh's later attempts to gather evidence did not amounted to compliance with paragraph 5, he would have fallen foul of paragraph 6. He was the same person who was carrying out the disciplinary hearing.

84. In my view, the respondent did not fail to comply with paragraph 27. It was not unreasonable for Mrs Humphreys to put herself forward. She was not involved in the disciplinary investigation or hearing. Whilst there could have been some risk of bias in hearing an appeal arising out of an incident involving her own son, the respondent only had a limited range of options. Even if it was unreasonable of Mrs Humphreys to propose to hear the appeal, no injustice was done because she agreed, at the claimant's insistence, to nominate an external chairperson.

85. In any case, Mrs Humphreys did not get the chance to "deal with" the appeal at all, whether partially or impartially. I agree with Miss Swan that the phrase, "dealt with" in paragraph 27 means something beyond making the administrative arrangements for hearing the appeal. To my mind it means considering the appeal on its merits.

86. The respondent's unreasonable failure to comply with paragraph 5 had a substantial impact on the overall fairness of the decision. It led directly to the

claimant not having the opportunity to comment on the evidence of Mustapha, Leon and Mr Rawlinson at the disciplinary hearing. I therefore consider that an increase to the award is just and equitable. In considering the amount, I bear in mind that the respondent had the advantage of access to a Human Resources and Employment Law specialist consulting firm, but I also take into account that it was a small to medium-sized employer who was faced with a difficult situation that I have already described. In my view the appropriate uplift to the award in 10%.

Section 207A reduction

87. I now turn to the issue raised by the respondent under the same section. Here I must consider whether the claimant's award should be reduced because of the claimant's alleged failure to comply with paragraph 26 of COP1.

88. In my view, paragraph 26 strongly implies that an employee should not just raise their appeal in writing, but make a reasonable effort to agree a time and place to meet with the employer to discuss the appeal.

89. My liability judgement already sets out the ways in which I found that the process of organising the appeal meeting broke down. Some of it is due to Mrs Humphreys' fault in not checking her emails properly. As a result, the claimant did attend one meeting. But the main reason why the appeal did not proceed was because the claimant took an entrenched position that he was not prepared to attend an appeal meeting except on a Saturday. His refusal to attend on weekdays was unreasonable. His reliance on the fact that he did not want to take time off from his new employment rather misses the point of an appeal. If he was serious about wanting his job back, it would have been worth his while to take a day off work to meet with the respondent, especially when the respondent was prepared to give adequate notice of the meeting. I therefore think it just and equitable to reduce the award.

90. The amount of the reduction should reflect my view that, overall, the respondent's failure to comply with COP1 was more serious than the claimant's failure. It should give credit for the fact that the claimant was initially prepared to attend, and did attend, an appeal meeting. But it should also reflect the fact that the claimant's stance deprived the respondent of the opportunity to put right the mistakes it had made in the original disciplinary process. In my view, the appropriate reduction in the award would be 5%.

Employment Judge Horne

26 June 2018

REASONS SENT TO THE PARTIES ON
29 June 2018

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FOR THE TRIBUNAL OFFICE