EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4101891/2017

Held in Dumfries on 3 and 4 May 2018

Employment Judge: Lucy Wiseman

Mr Stuart Cockayne	**Claimant** **Represented by:-** **Mr A Bryce** **Solicitor**
Gates (UK) Ltd	**Respondent** **Represented by:-** **Ms J McCluskey** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided the claimant was unfairly dismissed. The respondent shall pay to the claimant a monetary award of £2,866. The prescribed element is £840 for the period 20 March 2017 to 19 April 2017. The monetary award exceeds the prescribed element by £2,026.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 24 May 2017 alleging he had been unfairly dismissed.

2. The respondent entered a response admitting the claimant had been dismissed for reasons of gross misconduct, but denying the dismissal was unfair.

3. I heard evidence from Ms Lorna Vidler, Production Manager, who took the decision to dismiss the claimant; Mr Kevin Proudfoot, Director of Factory Operations, who heard the appeal and the claimant.

4. I was referred to a number of jointly produced documents. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

5. The respondent is in the business of producing synchronous timing belts for the automotive and industrial markets.

6. The claimant commenced employment on 31 October 2009 and was employed as a Process Operator working in the Theta 1 cell. This is manual cell where the raw materials are cut and layered before being placed in the high temperature curing vessels.

7. The claimant earned £742 gross per week, giving a net weekly take home pay of £556.

8. An incident occurred between the claimant and Mr Alistair McQueen, on the morning of 24 October 2017.

9. Mr McQueen reported the incident to the Shift Co-Ordinator, Mr Graham Kirk. The file note (page 45) recorded that Mr McQueen felt he had been verbally and physically abused by the claimant when he was going through the Theta 1 cell. Mr McQueen told Mr Kirk that the claimant had approached him to ask if he was ok, and when Mr McQueen ignored him, the claimant grabbed him by the front of his polo shirt around the throat area, and held on for a period of time notwithstanding being asked three times to let go. The claimant had then shouted at Mr McQueen and was waving the pointed end of his scissors at him in a threatening manner.

10. Mr Kirk was asked to carry out an investigation into the incident, and he did so by interviewing Mr McQueen again in the presence of Ms McVinnie, from HR. The interview took place on 24 January, approximately an hour after Mr

McQueen had reported the incident, and a note of the meeting was produced at page 46. Mr McQueen told Mr Kirk that he had asked the claimant if he needed anything, to which the claimant had replied that he had got materials himself, and threw them to one side. The claimant then grabbed Mr McQueen by the neck of his shirt, waved the scissors at him and shouted why to do you never get stuff for me? Mr McQueen walked away with the claimant still holding his shirt. He confirmed the claimant had complained about him in the past.

11. Mr Kirk interviewed Mark Henderson who works on the Theta 2 cell (page 47). Mr Henderson told Mr Kirk he had heard raised voices, but nothing more because he had on ear-defenders. He was only really aware of the situation because both the claimant and Mr McQueen had told him "they had a wee niggle".

12. Mr Kirk next interviewed the claimant (page 48). The claimant was not told of the details reported by Mr McQueen: he was simply asked to describe, in his own words, what had happened. The claimant told Mr Kirk that he returned from collecting materials and Mr McQueen had asked if he wanted anything and he replied no. The claimant asked Mr McQueen why he had not spoken that morning. Mr McQueen appeared not to have heard the question and so the claimant followed him and tugged on the sleeve of his shirt. Mr McQueen had carried on walking and the claimant followed him and again asked why he was not talking. Mr McQueen told the claimant he was a grass regarding downtime and that he would report him for being abusive. The claimant told Mr Kirk he was holding scissors by the blade end whilst talking to Mr McQueen.

13. Mr Kirk informed the claimant he would be suspended on full pay whilst the investigation continued. This was confirmed by letter of 24January (page 50).

14. Mr Kirk spoke to Mr McQueen again that afternoon (page 49) and put to him what the claimant had said. Mr McQueen denied the claimant had tugged his shirt sleeve, and stated "no – he had me by throat until we got to unit I asked him 4 times to let go". Mr McQueen also confirmed the claimant had been "waving pointed end [of scissors] in my face". Mr McQueen admitted the

previous day, when the claimant said “Hi pal”, Mr McQueen had responded “you are no pal of mine”.

15. The claimant was interviewed again by Mr Kirk on 25 January (page 53). The claimant confirmed he had asked Mr McQueen why he wasn’t speaking and Mr McQueen has responded that he was a grass and did not want to be his friend. The claimant told Mr McQueen that he had to record downtime and the reason for it. Mr Kirk put to the claimant that he had grabbed Mr McQueen round the neck of his polo shirt, but the claimant denied this and said he did not grab him. He confirmed he had been using his scissors to cut materials, and had been holding them by the blade in his hand when talking to Mr McQueen, but not waving them at him.

16. Mr Kirk was interviewed by Ms McVinnie on 25 January (page 54) and asked to describe Mr McQueen’s demeanour at the time of reporting the incident. Mr Kirk confirmed that he had appeared agitated, very shaken up, flustered, upset and possibly angry.

17. Ms McVinnie, HR, took the decision to invite the claimant to a Stage III disciplinary hearing for gross misconduct arising from the alleged incident on 24 January (page 57).

18. Ms McVinnie also took the decision, approximately a week later, to interview other operatives working in the area where the incident had occurred. On the 10th February Ms McVinnie and Mr Kirk interviewed four operatives (page 58) but they did not see or hear anything.

19. Ms McVinnie and Mr Kirk also interviewed Mr Smith, who worked in the cell opposite (page 59). Mr Smith confirmed he had not heard anything but could see Mr McQueen and the claimant appeared to be arguing. Mr McQueen walked away and the claimant followed him; they stopped and were talking. Mr Smith confirmed he had not seen anyone hitting or grabbing anyone and did not see any scissors.

20. Ms McVinnie interviewed Mr Sangster (page 60) who confirmed he had seen the two men talking and had guessed there was something going on by their

demeanour. He had heard raised voices, which appeared heated, and this had attracted his attention. Mr McQueen walked away and the claimant followed him to the back end of the Theta 1 cell. Mr Sangster did not see the claimant touch Mr McQueen.

21. A floor layout plan was obtained (page 62) and Ms McVinnie and Mr Johnston (shift co-ordinator) met with Mr Smith again (page 61) to ascertain where he had been standing at the time of the incident. Mr Smith confirmed he had been standing half way down his cell, facing the Theta 1 cell. He saw the men arguing, and saw Mr McQueen walk away with the claimant following. He did not see anything after that.

22. Ms McVinnie interviewed Mr Sangster again (page 63) to ascertain where he had been standing at the time of the incident. He had been with Mr Smith, but with his back towards Theta 1 cell: he had turned round when he heard raised voices. He had seen Mr McQueen walk away towards the back of the cell, then go right, at which point he could no longer see them.

23. Ms McVinnie met with Mr Mc Queen again on 14 February (page 70). Mr McQueen was asked to indicate on the floor plan, exactly where the incident had taken place. Mr McQueen indicated the claimant had grabbed him by the front of his shirt at the beginning of the Theta cell and continued to hold on to him until half way down the cell, when he managed to pull his hands off him.

24. Ms Lorna Vidler, Production Manager, was asked to conduct the disciplinary hearing. She received a folder of all the investigation materials prior to the hearing. In addition to the interview notes, there was also a downtime analysis for the Theta 1 cell (page 66 – 69). The operatives working on the manual cells are required to keep a note of all non-manufacturing time and the reason for it. The analysis showed that in a two month period there had been 90 minutes of downtime caused by operatives having to collect their own materials, and 330 minutes of downtime caused by jacket issues.

25. The level of downtime caused by operatives having to collect their own materials was not at a level to cause concern. The servicemen whose job it is to deliver materials to cells have to prioritise the automated cells and ensure

they are kept running continuously, and this may lead to times when operatives in the manual cells need to collect their own materials.

26. The disciplinary hearing took place on 23 February, with Ms Vidler accompanied by Ms Shields, HR, and the claimant accompanied by Mr Boyd. The notes of the hearing were produced at page 85.

27. Ms Vidler went over the version of events provided by Mr McQueen and the claimant. She focussed on whether the discussion/argument had been heated and loud. The claimant acknowledged the voices had been "louder than a normal conversation" and latterly agreed the discussion had been "fairly heated all the way through".

28. There was also discussion about why Mr McQueen would have thought the claimant a grass. The claimant explained Mr McQueen was upset and angry because the claimant recorded downtime when away collecting materials, and had informed his shift co-ordinator that Mr McQueen was not getting materials to the cell. The claimant felt Mr McQueen was "not doing his job right" and that he was under pressure with the amount of work.

29. The claimant had obtained statements from Mark Henderson (page 100) and Darren Archibald (page 99) confirming they also needed to stop production in order to collect materials because the servicemen were not always available. The claimant wanted to produce these statements at the disciplinary hearing to support what he was saying regarding downtime.

30. Ms Vidler and Ms Shields refused to allow the claimant to produce the statements and took the view that the performance of Mr McQueen was not an issue for the claimant and others.

31. Ms Vidler focussed on the extent to which the claimant accepted he had "tugged" or "grabbed" the shirt of Mr McQueen. The claimant told Ms Vidler that in order to get Mr McQueen's attention he had "flicked" the sleeve of Mr McQueen's shirt with his finger. The claimant accepted he had initially said he had "tugged" the shirt sleeve, but he did not see any real margin of difference between the two. The claimant denied grabbing the shirt around the throat.

32. There was also a great deal of focus on where the various elements of the incident occurred and who could have seen what. The claimant was not shown the floor plan (page 62) and not asked to reference his account using the floor plan.

33. Ms Vidler, at the conclusion of the hearing and following a final recess, informed the claimant that she believed there had been a very heated argument; that the claimant made contact with Mr McQueen with considerably more force than he described (more akin to Mr McQueen's statement); the claimant had volunteered, in the initial interview, that he had scissors in his hand and had only done so because he had expected to be asked about this and Mr McQueen had no reason to make up such a serious allegation unless the assault took place, and this was supported by the statement regarding his demeanour when making the initial complaint. Ms Vidler confirmed her decision was to summarily dismiss the claimant for gross misconduct.

34. The claimant was dismissed, with effect from 23 February 2017, for assaulting a fellow employee in the workplace. This decision was confirmed in a letter dated 24 February (page 92).

35. The claimant appealed against the decision to dismiss by letter of 2 March (page 93). The grounds of appeal were that the initial decision to suspend, the investigation process and the hearing were contrary to natural justice; the decision was not reasonable based on the facts and the decision was unduly harsh.

36. The appeal hearing took place on 16 March, and present were Mr Kevin Proudfoot, Director of Production Operations, Ms Shields, HR and the claimant. A note of the hearing was produced at page 95.

37. The claimant accepted he had an opportunity to put forward the points he wished to make at the appeal, although he was of the view the dismissal had been pre-determined and Mr Proudfoot would not overturn the decision of his Production Manager.

38. Mr Proudfoot was satisfied there had been a heated discussion and physical contact: the fact the claimant had scissors in his hand at the time aggravated it. A key factor in Mr Proudfoot's reasoning was the demeanour of Mr McQueen following the incident. Mr Proudfoot was also of the view that Mr McQueen, an older employee of 46 years' service, who had not complained of a fellow employee before, would not have made up the allegation.

39. Ms Vidler and Mr Proudfoot acknowledged neither they, nor anyone else, had asked Mr McQueen whether he had called the claimant a grass.

40. The claimant, following dismissal, was in receipt of Jobseekers Allowance until mid-April. He thereafter registered with a driving agency and engaged in general haulage and delivery work. The claimant subsequently set up his own company and works as a self-employed driver finding work directly or through agencies. The claimant takes a weekly wage of £192 and £200 for expenses.

Credibility and notes on the evidence

41. I found Ms Vidler to be, on the whole, a credible and reliable witness. I say on the whole because there were four aspects of Ms Vidler's evidence which concerned me. Firstly, Ms Vidler drew an adverse inference from the fact the claimant had, when interviewed by Mr Kirk for the first time, volunteered to Mr Kirk that he had scissors in his hand, but had been holding them by the blade. Ms Vidler questioned why the claimant would have volunteered this information when he did not know the substance of Mr McQueen's complaint. I accept the claimant had not been told the details of Mr McQueen's complaint, but the claimant was party to what had occurred and had been told by Mr Kirk, prior to being interviewed, that Mr McQueen had complained. The claimant was asked by Mr Kirk, at the first interview, to tell him what had happened, and that is exactly what the claimant did. I considered that to draw an adverse inference from this, rather than recognise the claimant honestly included it because it was part and parcel of what happened, was something which required explanation by Ms Vidler.

42. Secondly, Ms Vidler carried out an inspection of the area, took photographs and plotted on the chart the positions of the respective parties and decided where events occurred. Ms Vidler would not be moved from her position notwithstanding the fact the statements of Mr McQueen and the claimant suggested any physical contact had occurred at the top end of the cell in an area where Mr Smith and Mr Sangster would have been able to see.

43. Thirdly, Ms Vidler attached importance to the inconsistencies in the claimant's version of events, but appeared unconcerned by the inconsistencies in Mr McQueen's version of events. Further Ms Vidler accepted during cross examination that the reference to "raised voices" applied to both the claimant and Mr McQueen, and that the reference to "a heated argument" referred to them both being engaged in this. Ms Vidler however made no mention of this during her considerations at the disciplinary hearing, and failed to take it into account.

44. Fourthly, Ms Vidler acknowledged Mr McQueen was not asked whether he called the claimant a grass. Ms Vidler appeared unwilling or unable to recognise the point being made by the claimant, and that was, that Mr McQueen had a motive for making up or exaggerating the incident. Ms Vidler, instead of investigating or considering what the claimant said, instead considered the report on downtime. This completely missed the point of what she was being told by the claimant.

45. I considered these four points made it essential to carefully scrutinise the evidence of Ms Vidler, and to give consideration to the claimant's assertion that the sanction of dismissal was pre-determined insofar as Mr McQueen's version of events was going to be accepted regardless of what the claimant said.

46. I did not find Mr Proudfoot to be an entirely credible witness: he gave the impression during his evidence that the decision to dismiss was beyond question, and he was dismissive of many of the questions asked in cross examination. Mr Proudfoot told the Tribunal that Mr McQueen was an elderly employee who had been there a long time, and that he was a "good guy who did the job the right way". It was clear from this comment that Mr McQueen's

evidence was preferred to that of the claimant for this reason, and it again raised the question whether there was anything the claimant could have said to change that view.

47. I found the claimant to be a credible and reliable witness who gave his evidence in an honest and straightforward manner. I accepted the criticism the claimant tried, during the disciplinary hearing, to play down what had happened, and this was demonstrated by the fact he had initially referred to "tugging" the sleeve of Mr McQueen, and changed this to "flicking" the sleeve.

Respondent's submissions

48. Ms McCluskey submitted the claimant had been dismissed for reasons of conduct, which is a potentially fair reason falling within section 98(2)(b) of the Employment Rights Act. Further, dismissal for this reason, and given the procedure followed by the employer, was fair.

49. Ms McCluskey referred to the case of **British Home Stores Ltd v Burchell 1980 ICR 303** and submitted Ms Vidler, at the time of reaching the decision to dismiss, reasonably believed the claimant physically assaulted Mr McQueen. The investigation and disciplinary hearing gave Ms Vidler reasonable grounds upon which to sustain this belief.

50. Ms McCluskey referred to page 91 where Ms Vidler had summed up her conclusions, and those were that the initial discussion had become a heated argument, contact had taken place and the claimant admitted to tugging Mr McQueen's sleeve, although he sought to minimise this to flicking the sleeve, the claimant had scissors in his hand and Mr Proudfoot had told the Tribunal that scissors should be kept in the safety pouch when not in use. Ms Vidler attached weight to the fact the claimant had volunteered having scissors in his hand. She also had regard to Mr McQueen's length of service, the fact he had not previously complained of a work colleague and his demeanour when reporting the incident. She concluded he was unlikely to have made up the allegation.

51. Mr McQueen was not asked if he had called the claimant a grass. However, Ms McCluskey submitted the issue of downtime had been fully explored. And, in any event, even if Mr McQueen had called the claimant a grass, it did not detract from the fact Ms Vidler had grounds upon which to sustain her conclusions.

52. The claimant, in his evidence today, said the flick/tug happened at the start of the Theta 1 cell, and that coincided with the investigation notes of Mr McQueen. Ms McCluskey submitted the precise location of the flick/tug did not matter because it did not impact on the reasonableness of Ms Vidler's conclusion.

53. Ms Vidler had to balance the fact there were no independent witnesses to the physical assault, and the fact it would have happened quickly in an obstructed area. She had to balance the credibility and reliability of Mr McQueen and the claimant. Mr McQueen's version of events was consistent and he was a long serving employee who had not made any previous complaints. In contrast, aspects of what the claimant said were contradictory.

54. Ms McCluskey submitted the respondent had satisfied the three limbs of the ***Burchell*** test. She invited the Tribunal to find the dismissal was fair. If however the Tribunal found the dismissal unfair, she submitted there should be a reduction to compensation of 100% in respect of **Polkey** and contributory fault. The claimant had admitted to contact with Mr McQueen whilst holding scissors in his hand, and in the context of a factory workplace, this was unacceptable.

55. Ms McCluskey noted the claimant had provided proof of earnings for the period since dismissal, with the exception of the period July to December, when no wage information had been provided. Furthermore, it appeared that from December onwards, the claimant's earnings had increased significantly.

Claimant's submissions

56. Mr Bryce submitted the issues in this case focussed on the investigation carried out by the employer and whether they had reasonable grounds upon which to sustain their belief. Mr Bryce invited the Tribunal to find the respondent failed on all of the ***Burchell*** hurdles.

57. Mr Bryce submitted there was confusion about who had been responsible for carrying out the investigation: was it Mr Kirk or Ms McVinnie? Ms Vidler's evidence had been that it was Mr Kirk who conducted the investigation. Mr Bryce also questioned who had decided upon carrying out additional investigations after the claimant had been suspended.

58. The claimant's position was that there had been a verbal exchange with Mr McQueen, and he had been called a grass. Mr McQueen had turned away, and the claimant had tried to catch his attention by tugging/flicking on his shirt sleeve. The claimant followed Mr McQueen down the cell because he had not heard him, and there was further discussion.

59. The witnesses could only say they heard raised voices: no-one saw anything. Ms Vidler, it was submitted, adopted the approach that the witnesses did not see what happened, rather than accepting that if they saw nothing, then that was because nothing happened. Mr Bryce submitted that it was only now that people were asking about positions and lines of sight. The claimant said the tug/flick took place at the top of the cell in the line of sight of Mr Smith and Mr Sangster. Mr McQueen's statement appeared to support this. There was, in contrast, nothing to support the view (adopted by Ms Vidler) that contact had happened anywhere else.

60. The claimant thought the outcome of the process was predetermined. The claimant was suspended and invited to a disciplinary hearing on the strength of the initial statements of Mr McQueen and himself. The additional investigation was undertaken after the decision to proceed to a disciplinary hearing for gross misconduct.

61. Mr Bryce submitted Ms Vidler had relied on inconsistencies in the claimant's version of events. Ms Vidler, in cross examination, accepted there were also inconsistencies in what Mr McQueen had said. There was also a glaring omission insofar as Mr McQueen was not asked whether he had called the claimant a grass. This was important because it was the motive for the false allegation.

62. Mr Bryce referred to the initial statements of Mr McQueen on 24 January where he said the claimant had asked if he was ok; and later when he said the claimant had said “hi pal”. Mr McQueen admitted his response to that had been to say “you are no pal of mine”. This was all supportive of the fact there was an issue between the two men and that issue was being a grass.

63. Mr Bryce submitted the investigation process was flawed and unreasonable for these reasons.

64. Ms Vidler’s conclusions were set out on page 91. She believed an assault had happened when the claimant grabbed Mr McQueen’s polo shirt around the neck area; this continued for some time while Mr McQueen walked down the cell, with the claimant holding on and waving scissors.

65. Mr Bryce submitted there was nothing to support these conclusions and therefore there could not have been a genuine belief it occurred. The fact there was a heated argument was not in dispute. The claimant was criticised for suggesting it was not always heated, but the claimant was supported by Mr McQueen. The claimant’s position that there had been a tug/flick of the sleeve was discounted in preference for Mr McQueen’s version of events. Ms Vidler attached adverse weight to the fact the claimant had volunteered that he had scissors in his hand. Mr Bryce submitted the claimant had been asked to tell Mr Kirk what had happened, and he did: there was nothing suspicious about this.

66. Mr Bryce noted it was said repeatedly that Mr McQueen had no reason to make up the allegation. However, the claimant told them of the motive for this, but the respondent discounted it without investigation. Ms Vidler referred to downtime, but this was not the issue.

67. Mr Bryce noted weight had been attached to the demeanour of Mr McQueen when reporting the incident. He submitted the description included the word “angry”, but this had not been relied upon by the respondent who had been selective.

68. Mr Bryce submitted there had been insufficient evidence to justify the conclusions and therefore there had not been genuine belief. He submitted the most telling comment had been made by Mr Proudfoot when he told the Tribunal Mr McQueen was elderly, he had been there a long time and was a good guy who did the job the right way. Mr Bryce submitted this was evidence of pre-judging the issue.

69. Mr Bryce invited the Tribunal to find the dismissal was unfair and to make an award of compensation. He submitted the investigation had been so fatally flawed it was not possible to say what would have happened if a fair procedure had been followed. A schedule of loss had been provided.

Discussion and Decision

70. I firstly had regard to the terms of section 98 Employment Rights Act which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2). If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair under section 98(4). This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

71. I next had regard to the case to which I was referred. The Employment Appeal Tribunal (EAT) said, in the case of **British Home Stores Ltd v Burchell 1980 ICR 303** that the employer must show the reason for dismissal and must show that:-

- it believed the employee was guilty of misconduct;
- it had in mind reasonable grounds upon which to sustain that belief and
- at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

72. This means that an employer need not have conclusive direct proof of the employee's misconduct, but must have a genuine and reasonable belief, reasonably tested (**Weddell and Co Ltd v Tepper 1980 ICR 286).**

73. The respondent in this case admitted it had dismissed the claimant, and asserted the reason for the dismissal was conduct. The claimant did not dispute this was the reason for his dismissal, although he challenged whether the respondent had a genuine belief in this on the basis the respondent did not have reasonable grounds upon which to sustain that belief. I was satisfied, there being no dispute regarding the matter, that the reason for the claimant's dismissal was conduct. This is a potentially fair reason for dismissal falling within section 98(2)(b) Employment Rights Act. I must now continue to consider whether dismissal for that reason was fair.

74. I decided it would be appropriate to consider the investigation undertaken by the respondent. An employer should carry out a full investigation before deciding whether dismissal is a reasonable response in the circumstances. The employer's task is to gather all the available evidence and once in possession of the full facts, the employer will be in a position to make a reasonable decision about what action to take. I had regard to the fact that the more serious the allegations against the employee, the more thorough the investigation conducted by the employer ought to be. In the case of **ILEA v Gravett 1988 IRLR 497** the then President of the EAT noted, with regard to the amount of investigation required to be carried out, that at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase.

75. Ms Vidler told the Tribunal that Mr Kirk, Shift Co-ordinator, carried out the investigation into the incident. I accepted that evidence insofar as the initial investigation carried out on 24 January was conducted by Mr Kirk in the presence of Ms McVinnie from HR. However, thereafter it appeared HR took over the conduct of the additional investigation.

76. Mr Kirk initially spoke with Mr McQueen on 24 January to note the complaint (page 45). He then commenced the investigation by speaking to Mr McQueen again (page 46); Mark Henderson (page 47); the claimant (page 48) and Mr McQueen again (page 49) on the 24th January. The claimant was interviewed again on 25 January (page 53). Mr Kirk was then interviewed on 25 January by Ms McVinnie (page 54).

77. The respondent, at this stage, had only the version of events provided by Mr McQueen and the claimant (Mr Henderson being unable to add anything). A decision was made by HR, on the basis of that evidence, to suspend the claimant and invite him to attend a disciplinary hearing for alleged gross misconduct for assaulting Mr McQueen.

78. A week after the claimant had been invited to attend a disciplinary hearing, a decision was taken by the respondent's HR department to re-open the investigation. I noted neither Ms Vidler nor Mr Proudfoot could explain who made this decision or, more importantly, why. Ms McVinnie, an HR Officer accompanied Mr Kirk whilst he conducted the initial interviews with Mr McQueen, the claimant and Mark Henderson. Mr Kirk and Ms McVinnie must have known, at the time of conducting the initial interviews, that there would have been other employees on shift and in the vicinity of the Theta 1 cell at the time the incident took place. I say that for two reasons: firstly, Mr Kirk was the Shift Co-ordinator and secondly, he had received a phone call from the claimant on the afternoon of 24 January (page 51) stating he had received text messages from fellow employees about what had happened. The claimant was concerned about factory gossip. He was told by Mr Kirk to "not concern himself with this matter".

79. The additional investigations identified two employees who saw and/or heard the incident. Mr Smith (page 59) and Mr Sangster (page 60) were both interviewed on Friday 10 February. A map of the floor layout was then obtained and they were interviewed again on 13 February and asked to identify where on the plan they had been standing and where the incident had taken place. Mr McQueen was also re-interviewed (page 70) and asked to reference the incident to the floor plan.

80. The claimant was not ever shown the floor plan or asked to explain his version of events by reference to the plan.

81. There were two issues which Mr Kirk, Ms McVinnie, Ms Vidler and Mr Proudfoot failed to investigate, and the first issue was whether Mr McQueen may have had a motive for making up, or exaggerating, the incident. The claimant told the respondent on numerous occasions that Mr McQueen had called him a grass, and the reason for that was because Mr McQueen knew the claimant had spoken to his line manager to inform him that downtime was being recorded and caused by having to collect his own materials.

82. The fact there was some issue/friction between the claimant and Mr McQueen was evident not only from what the claimant said, but also from the fact Mr McQueen told Mr Kirk (i) the claimant had asked him if he was ok, and he [Mr McQueen] had ignored him; (ii) the claimant had said “hi pal” and he [Mr McQueen] had replied “you are no pal of mine” and (iii) Mark Henderson (page 47) said he was only really aware there had been a situation as both men had told him “they had a wee niggle”.

83. Ms Vidler did investigate the downtime report, which disclosed that downtime caused by operatives having to collect their own materials accounted for 90 minutes over two months, and that was not of a sufficiently high level to be a concern. Ms Vidler also noted no performance issues had been raised with Mr McQueen.

84. Ms Vidler however accepted at this Hearing that looking at the downtime report would not have disclosed a personal issue/friction between the two men. In order to ascertain this information she would have needed to ask Mr McQueen about it, and this was something she, and everyone else, failed to do. This failure meant no consideration was given, at any time, to whether Mr McQueen may have been ill-disposed towards the claimant and whether any action/s of Mr McQueen should be considered as mitigating the claimant’s misconduct.

85. The second issue which no-one investigated was the fact the evidence gathered from the claimant, Mr Smith and Mr Sangster indicated there had

been raised voices (plural) and a heated argument. Ms Vidler accepted this information suggested Mr McQueen had taken part in the heated argument and had also raised his voice. This matter was not investigated or considered in mitigation.

86. I, having had regard to all of the above points, decided the investigation was flawed for several reasons. Firstly, the fact and timing of the additional investigation left me with the distinct impression the investigation was re-opened in order to look for more information to support the allegation against the claimant. I reached that conclusion because of the timing of the additional investigation and the fact the witnesses (who must have been known of earlier) could have been interviewed at an earlier stage. I also took into account the fact a floor plan was prepared but was never put to the claimant. The respondent failed to give the claimant the same opportunity as all other witnesses including Mr McQueen, to respond to the allegations by reference to the floor plan.

87. Secondly, the respondent failed to investigate whether Mr McQueen had a motive for making up, or exaggerating, the incident. They also failed to investigate and consider whether Mr McQueen had raised his voice and taken part in the heated argument. These matters go not only to motive, but also to mitigation.

88. Thirdly, the respondent simply accepted Mr McQueen's version of events because he was "a good guy" rather than carrying out an open minded investigation to gather all available evidence including evidence in support of, as well as against, the employee concerned.

89. I next had regard to the issue of whether the respondent had reasonable grounds upon which to sustain their belief the claimant assaulted Mr McQueen. Ms Vidler's conclusions were set out at page 91 and they were as follows:-

- there had been a very heated argument between the claimant and Mr McQueen;

- the claimant made contact with Mr McQueen with considerably more force than a "flick of the finger": the incident was more aligned to what Mr McQueen had described and more in keeping with the claimant's initial statement;

- the claimant volunteered the presence of scissor and the orientation in which he was holding them only because he expected to be asked about them and

- Mr McQueen had no reason to make up such a serious allegation against the claimant unless the assault took place, and this was supported by Mr McQueen's demeanour (as noted by Mr Kirk) when the formal complaint was made.

90. I was satisfied Ms Vidler had reasonable grounds upon which to sustain her belief there was a heated argument between the claimant and Mr McQueen. The claimant accepted this during the disciplinary process, and Mr Smith and Mr Sangster both confirmed they had heard and witnessed a heated argument.

91. Ms Vidler also had reasonable grounds upon which to sustain her belief that the claimant had made contact with Mr McQueen with more force than a flick of the finger on his sleeve. The claimant, when first interviewed, told Mr Kirk he had "tugged" Mr McQueen's sleeve. I acknowledged the claimant sought to downplay this in the disciplinary hearing when he referred to "flicking" the sleeve, however given the claimant's first description of the incident, when it was freshest in his mind, I was satisfied Ms Vidler had reasonable grounds upon which to sustain a belief that the contact was more akin to tugging than flicking.

92. Ms Vidler, in her conclusions, went further than concluding the claimant had tugged Mr McQueen's sleeve. She concluded the contact was more akin to what Mr McQueen had described. I concluded Ms Vidler did not have reasonable grounds upon which to sustain that belief for three reasons.

Firstly, I considered Mr McQueen's description of the incident in each of his statements lacked consistency. I noted that in his first statement he said the claimant "grabbed [him] by the neck of [his] shirt". In the second statement he said the claimant "had [him] by the throat" and in the third statement he said the claimant had grabbed him by the front of the shirt.

93. Secondly, Ms Vidler's conclusion that the incident had occurred down the Theta cell at a point where Mr Smith and Mr Sangster could not see what was happening was not supported by the evidence of Mr McQueen and the claimant. Mr McQueen, in his third statement (page 70) and when asked to identify where the incident had taken place by reference to the floor plan, said the claimant had grabbed him by the front of his shirt at the beginning of the Theta cell. The claimant also told Ms Vidler the incident had occurred at the start of the cell. Ms Vidler, notwithstanding this information, persisted in her view of where the incident had occurred.

94. Thirdly, it appeared Ms Vidler accepted Mr McQueen's version of events because he was "a good guy" and had no reason to make up such a serious allegation, rather than because it was supported by a thorough and open-minded investigation.

95. Ms Vidler had reasonable grounds upon which to sustain her belief the claimant had scissors in his hand during the incident. Ms Vidler drew an adverse inference from the fact the claimant had volunteered the presence of scissors and the orientation in which he was holding them only because he expected to be asked about them. I considered Ms Vidler did not have reasonable grounds upon which to draw such an adverse inference, for two reasons. Firstly, the claimant was told by Mr Kirk that Mr McQueen had complained. The claimant was subsequently asked to give his version of events, and that is what he did: he included the fact he had scissors in his hand because it was a true fact. Secondly, I acknowledged the fact there was a dispute regarding how the scissors were being held, but the material fact was that the claimant had the scissors in his hand during the incident, in circumstances where the scissors should have been returned to the pouch

after use. It was the fact the claimant had scissors in his hand which aggravated the incident, not the way in which the blade of the scissors was pointing.

96. Ms Vidler also concluded Mr McQueen had no reason to make up such a serious allegation against the claimant unless the assault took place, and this was supported by Mr McQueen's demeanour (as noted by Mr Kirk) when the formal complaint was made. I have set out above the fact the claimant suggested, during the disciplinary process, that Mr McQueen did have a reason to make up/exaggerate his version of events. I have also set out (above) that Ms Vidler did not investigate whether Mr McQueen called the claimant a grass, or whether there was any friction between Mr McQueen and the claimant; and she did not investigate or consider whether Mr McQueen had raised his voice and taken part in the heated argument. I concluded that in the absence of investigating the points put forward by the claimant, Ms Vidler did not have reasonable grounds for believing Mr McQueen had no reason to make up such a serious allegation.

97. I, in conclusion and having had regard to all of the above points, was satisfied Ms Vidler had reasonable grounds upon which to sustain the belief there had been a heated argument, the claimant had tugged the shirt sleeve of Mr McQueen and had had scissors in his hand during the incident.

98. I next considered whether the dismissal of the claimant for reasons of misconduct in these circumstances was fair or unfair. I had regard to the case of **Iceland Frozen Foods Ltd v Jones 1983 ICR 17** where the EAT reminded Tribunals that they must not substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine 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. If the dismissal falls within the band, the dismissal is fair: if the dismissal falls outside the band it is unfair.

99. I, in considering the fairness of the dismissal, accepted the respondent believed the claimant guilty of the misconduct in question and that they had reasonable grounds upon which to sustain their belief that a heated argument had taken place, the claimant had made contact with Mr McQueen by tugging his sleeve and the claimant had been holding scissors throughout the exchange. I also had regard to the fact the investigation carried out by the respondent was flawed. The impact of the flawed investigation meant the respondent did not (i) not investigate with the claimant his version of events using the floor plan; (ii) investigate, or consider, whether Mr McQueen had a motive for making up or exaggerating the incident and (iii) they did not investigate whether Mr McQueen had raised his voice and taken part in the heated argument, or consider whether this may mitigate the claimant's actions.

100. I also considered the investigation flawed because there was a focus on gathering information to support the allegation, rather than gathering all evidence both for and against the claimant. This was illustrated by the fact the investigation was re-opened (without explanation) and the respondent's acceptance of Mr McQueen's version of events at face value and without challenge because they considered him to be "a good guy".

101. I decided, having had regard to the above points, that the decision to dismiss fell outside the band of reasonable responses: the flawed investigation rendered the decision to dismiss unfair.

102. Ms McCluskey invited me, should I find the dismissal unfair, to have regard to the principles of **Polkey** and contributory conduct. The **Polkey** case (**Polkey v A E Dayton Services Ltd 1988 ICR 142**) firmly established procedural fairness as an integral part of the reasonableness test under section 98(4). Accordingly, if an employer fails to adopt a fair procedure at the time of dismissal, the dismissal may be unfair; but, the Tribunal must go on to ask what the percentage chance of dismissal would have been if the employer had adopted a fair procedure.

103. I decided that if the employer had carried out a reasonable investigation, addressing the points set out above, there was a 50% chance the claimant would still have been dismissed for reasons of conduct. I say that because I acknowledge that if the respondent had conducted a reasonable investigation and found there was friction between the two men, and Mr McQueen had called the claimant a grass, the respondent would have required to consider the issue of motive and mitigation. I considered that if Mr McQueen's evidence had been considered in a balanced manner, and if the issue of mitigation was considered, there would be a 50% chance the claimant would have received a disciplinary sanction less than dismissal. The effect of my decision is that compensation (compensatory award) will be reduced by 50%.

104. I next considered the issue of contributory conduct. Section 123(6) Employment Rights Act provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding.

105. The Court of Appeal, in the case of **Nelson v BBC (No 2) 1980 ICR 110** said that three factors must be satisfied if the Tribunal is to find contributory conduct:

- the relevant action must be culpable or blameworthy;
- it must have actually caused or contributed to the dismissal and
- it must be just and equitable to reduce the award by the proportion specified.

106. There was no dispute regarding the fact the claimant took part in a heated verbal argument with Mr McQueen, that he made contact with Mr McQueen by tugging his shirt sleeve and that he had scissors in his hand during this incident. I was satisfied this conduct was blameworthy and that it actually caused the claimant's dismissal. I was further satisfied that it would be just and equitable to reduce the compensatory award to reflect this.

107. I, in deciding the percentage reduction, had regard to the fact the incident took place in a manufacturing factory environment. The floor plan and photographs demonstrate there is not a great deal of room in the aisles between the curing vats and other machinery. I also had regard to the fact a verbal argument is one thing, but making physical contact is quite another. Furthermore, the fact the claimant had scissors in his hand during the incident was an aggravating factor. I acknowledged the claimant wanted to know why Mr McQueen thought him a grass, and he wanted to clear the air, but Mr McQueen walked away and the claimant followed him in circumstances where he did not need to do so. I had regard to Ms McCluskey's submission inviting me to make a 100% reduction to the compensatory award for contributory conduct. I did not consider a 100% reduction just and equitable in circumstances where the employer did not investigate or consider motive or mitigation. I decided in these circumstances that it would be just and equitable to make a reduction of 85%.

108. Ms McCluskey invited me to make the same reduction to the basic award. Ms McCluskey did not make any submissions to explain the basis of making such a reduction. Section 122(2) Employment Rights Act provides that a reduction may be made to the basic award where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award. I had regard to **RSPCA v Cruden 1986 ICR 205** and **Optikinetics Ltd v Whooley 1999 ICR 984** where the EAT recognised the different wording of section 122(2) and 123(6) and held that Tribunals have discretion and are not bound to reduce the basic and compensatory awards by the same amount. However, if a Tribunal does reduce the basic and compensatory awards by different proportions, it should give reasons for doing so.

109. I decided to reduce the basic award by 50%. I decided this was just and equitable having regard to the fact there was a 50% chance the claimant would have been dismissed even if the respondent had carried out a fair procedure. I also had regard to the fact that the claimant's misconduct has

already been taken into account as the basis for the reduction to the compensatory award.

110. I next turned to calculate the award of compensation. The claimant is entitled to a basic award based on his length of service and gross weekly pay (subject to a cap of £479 per week). The basic award is £3,353 (being 7 x £479). I decided the award should be reduced by 50%, and I calculate this to give a revised figure of £1,676.

111. The claimant lost earnings in the period between the date of dismissal (23 February 2017) and the date of this Hearing (4 May 2018). I noted Mr Bryce, the claimant's representative, did not seek any losses beyond 22 February 2018, being one year from the date of dismissal. I accordingly accepted this position and restricted losses to the period of one year from 23 February 2017 to 22 February 2018. This is a period of 52 weeks. I calculate his loss of earnings in this period to be £28,944.

112. The claimant has had earnings during this period which require to be taken into account to reduce the loss. The claimant did not produce any information for wages earned in the months of August to mid-December. I, having had regard to his earnings from Driver Management Ltd, decided it would just and equitable to calculate earnings of £400 per week during this 14 week period (£5,600). I calculate the claimant earned £11, 383 in the period to 12 December 2017 when he set up his own business.

113. The claimant set up in business on his own account as a self -employed Driver on the 12 December 2017. The claimant takes £192 from the business each week, and also £200 for expenses. I calculate that in the period from 12 December to 22 February the claimant has earned £1,920 (being 10 weeks x £192).

114. The claimant's total earnings in the period since dismissal are £13,303. This figure must be deducted from the loss of wages figure (£28,944 less £13,303). I calculate this produces a net figure of £15,641.

115. Mr Bryce did not seek an award of future loss. I did however make an award of £350 in respect of loss of statutory employment rights (£15,641 + £350 = £15,991).

116. I decided, above, that there was a 50% chance the claimant would still have been dismissed even if the respondent had followed a fair procedure. This decision has the effect of reducing the compensation by 50%. I calculate the figure for compensation is reduced to £7,995 (being 50% of £15,991).

117. I must next make the reduction of 85% to reflect contributory conduct. I calculate the figure for compensation is reduced to £1,190 (being 85% of £7,995).

118. I, in conclusion, decided the claimant was unfairly dismissed by the respondent. The respondent shall pay to the claimant a basic award of £1,676 and a compensatory award of £1,190.

119. The claimant was in receipt of Jobseekers allowance from 20 March until 19 April. The Recoupment Regulations apply to this benefit and the effect of the Regulations is explained in the attached note.

Employment Judge: Lucy Wiseman
Date of Judgment: 31 May 2018
Entered in register: 06 June 2018
and copied to parties