EMPLOYMENT TRIBUNALS

Claimant: Mr V Fabian

Respondent: Co-Operative Group Limited

Heard at: Manchester **On:** 7 February 2018
12 March 2018

Before: Employment Judge Rice Birchall

REPRESENTATION:

Claimant: In person
Respondent: Mr England, Counsel

JUDGMENT having been sent to the parties on 15 March 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the reasons set out below are provided. For convenience, the terms of the Judgment given on 12 March 2018 are repeated below:

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal fails and is dismissed.
2. The claimant's claims for notice pay, holiday pay, arrears of pay and other payments are dismissed upon withdrawal by the claimant.

REASONS

Introduction

1. Judgment was delivered on the second day of the claimant's claim against Co-operative Group Limited. The case commenced on 7 February 2018 and 12

March 2018 was allocated as a second day (following an aborted second day when the Judge could not attend Tribunal due to snow).

Issues

2. It was agreed at the outset of the hearing that the Claimant withdrew his claims in respect of holiday pay and arrears of pay. Following some discussion, the claimant also agreed that he was paid his notice pay and so his claim for notice pay/wrongful dismissal was also withdrawn.

3. Accordingly, the only claim left to be determined was the claimant's claim of unfair dismissal, in relation to which the issues are listed below.

Unfair dismissal

4. It was accepted by the parties that the claimant was an employee of the respondent with sufficient qualifying service to bring a claim of unfair dismissal.

5. The issues, therefore, for the Employment Tribunal to determine were:

   a. whether the respondent had shown a potentially fair reason for dismissing the claimant; and, if so

   b. whether the dismissal was fair or unfair applying the test in section 98(4) of the Employment Rights Act 1996 (ERA).

6. On point (a) the respondent said it dismissed for a reason relating to conduct, which is one of the potentially fair reasons for dismissal within section 98(2) ERA. The questions therefore for this Tribunal to determine were:

   a. Did the respondent have a genuine belief that the claimant was guilty of the conduct alleged?

   b. Did the respondent in fact dismiss for that reason.

7. As to point (b) if the respondent satisfied the Tribunal that it dismissed for a reason related to conduct, the next issue for the Tribunal to consider would be whether, in the circumstances, the respondent acted reasonably or unreasonably in treating the claimant's conduct as a sufficient reason for dismissing her.

8. If the Tribunal found that there was an unfair dismissal, the Tribunal would go on to determine:

   a. Whether either party unreasonably failed to follow the ACAS Code of Practice on Discipline and, if so, to what extent, if any, should any award of compensation be increased or reduced under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

   b. Whether the claimant caused or contributed to his dismissal in such a way that it should result in a reduction of any compensation that might be awarded.

c. If the dismissal was found to be procedurally unfair, what the percentage chance was that the claimant would have been dismissed fairly in any event had a fair procedure been adopted.

9. Any other issues relevant to remedy would be addressed in evidence and submissions only after a decision had been made as to whether the dismissal was fair.

Evidence

10. The Tribunal had the benefit of a bundle of documents, and was taken to a number of documents within it.
11. All the statements were taken as read. The Tribunal heard the respondent's evidence first.
12. The Tribunal heard evidence from the claimant for himself and from Mr Gary McMahon, the respondent's Head of Central Operations and the Dismissing Officer, on behalf of the respondent. There was a witness statement from RE, who did not give evidence.
13. As far as the Tribunal's assessment of the oral evidence is concerned, the claimant's evidence was, at times, difficult to follow and seemed contradictory. He raised a lot of issues which had not been raised at the various hearings including, for example, evidence about angles at which people had been standing which, he said, was evidence that he could not have been staring at RE.
14. I particularly considered that Mr McMahon was a witness of truth.

Disclosure

15. At the outset of the hearing, there was a brief discussion about disclosure, as the claimant had brought some documents with him to the hearing. However, the claimant confirmed that he was not seeking to disclose additional documents at that stage but that he might want to do so, if appropriate, during the course of the hearing. It was therefore agreed at the outset of the hearing that, if the claimant sought to rely on any of the documents during the course of the hearing, a decision would be made at that time about their relevance. In fact, the claimant did not seek to rely on the documents during the course of the hearing.

Facts

16. The claimant was employed by the respondent as a Warehouse Operative from 17 March 2013 until his dismissal on 29 June 2017.

Grievance 1

17. In May 2016, RE, a work colleague of the claimant, raised a formal grievance against the claimant (grievance 1), as a result of which the claimant was instructed to "avoid all contact with RE..either whilst at work or at home…". The claimant confirmed that he would follow this instruction.

Grievance 2

18. In February 2017, RE raised a formal grievance against the claimant following a further incident (grievance 2).
19. The claimant was suspended on 21 February 2017 on full pay pending an investigation into grievance 2.
20. An investigation was conducted by Tony Moore.
21. The claimant was represented by his union representative Rob Atkinson at three separate investigation meetings. At the third investigation meeting, the outcome of the investigation was explained to the claimant and he was informed that the matter was being escalated to be dealt with within the disciplinary process in light of the fact that the kind of behaviour under investigation had been raised with the claimant previously and on the basis that the allegations were backed up by colleagues who all agreed that the claimant had spoken about RE in a derogatory sexual manner and that the claimant made derogatory comments about women generally.

Final written warning

22. On 7 April 2017, Gary McMahon, who was appointed to investigate the allegations against the claimant under the disciplinary process, interviewed the claimant, who was accompanied by Rob Atkinson. The disciplinary process was then adjourned for further investigation.
23. During the investigation, the claimant denied the allegations against him and criticised the grievance investigation process. He referred to individuals who hadn't previously been interviewed during the investigation and explained that he believed that there was a vendetta against him.
24. During the investigation, investigation meetings were held with RE; Bernadette Fabian; Erika Gacs; Adam Dulcamara; and Harold Bragg. John Ferguson, shift manager, also provided a statement.
25. Gary McMahon considered RE's evidence and that of Erika and Bernadette and found their accounts consistent with previous accounts. He considered that he had no reason to believe that they would falsify their accounts. He found the claimant's account difficult to follow and it appeared to him that the claimant could not accept that RE did not still want to be friends with him.
26. On 19 April 2017, the claimant was invited to a disciplinary hearing. The allegations put to the claimant in that letter dated 19 April were "alleged repeated and seriously inappropriate behaviour towards female colleagues at the depot over a prolonged period of time in that you have:-

    (1) Made unwanted sexual and derogatory comments and actions towards a fellow colleague causing extreme distress and offence on 20 February 2017; and

    (2) Publicly made a number of derogatory comments about women and these alleged comments are a significant serious breach of the bullying and harassment policy and resulted in colleague complaints of a serious nature.

    Your alleged behaviour and comments go against our organisational values and ethics".

27. A formal disciplinary hearing was held by Jamieson Eessom on 24 April 2017. The claimant was accompanied by Rob Atkinson. The hearing was adjourned and reconvened on 28 April 2017 to allow for further investigation.
28. The hearing resulted in the claimant being given a final written warning on the 11 May 2017. That final written warning (page 213 of the bundle) specifically states that the final written warning has been given because the claimant publicly made a number of derogatory comments about women and that the alleged comments were significant and serious breaches of the respondent's bullying and harassment policy and resulted in colleague complaints of a serious nature.
29. The final written warning further stated that it would "stay on [the claimant's] file and will be live for disciplinary purposes for twelve months" and went on to set out a number of agreed actions as follows: "you must not make any further derogatory comments about women or any other gender within the workplace; you must not discuss any activities in relation to subject matter that can be deemed to be derogatory towards women or any other gender" and it further specifically states: "you must refrain from having any contact with RE".
30. The final written warning specifically stated that the claimant needed to be aware that a further act of misconduct within the next twelve months may result in the claimant's dismissal.
31. On 17 May 2017, a way forward meeting was held with the claimant to discuss next steps following the final written warning. During that meeting, the claimant promised not to speak to any girls, not just RE, and specifically agreed to speak English.
32. Notes of that meeting (page 225) make specific reference to the claimant being asked whether he agreed to speak English so people could understand what was being said. It was explained to the claimant that this was so nothing he said could be used against him as everyone would understand what he said. The claimant confirmed that he agreed.
33. A way forward meeting was also held with RE but she did not wish to engage in mediation or change her shift to avoid the claimant at this stage.
34. The claimant appealed against the final written warning on the basis that there was no evidence of derogatory comments and no breach of the bullying and harassment policy. Following an appeal held by Mike Stewart, General Manager, the decision to issue the claimant with a final written warning was upheld and communicated to the claimant by way of a letter dated 16 June 2017.

Investigation and suspension

35. On 18 June 2017, RE contacted HR regarding an incident between her and the claimant earlier that day. The claimant sought to rely on the fact that RE didn't report the incident immediately but RE's email was timed at 6.20 am and the alleged incident occurred at approximately 5.55 am.
36. In the letter from RE to HR (page 245 of the bundle), RE asked what restrictions were on the claimant and then described what she heard him say, which, she alleged, was as follows: "Morning RE you look so nice, the new hair style is very pretty I have told you you couldn't make me lose my job I missed you so much, I only see you at Facebook, I have seen how nice things you shared, I love you too and I never forced you to hug me".

37. A statement was then taken from RE by Neil Brimelow, Warehouse Team Manager. RE confirmed that the claimant spoke to her in Hungarian. She named two witnesses, both of whom were also approached by Neil Brimelow. RE also alleged that the claimant had stared at her before walking off.
38. Mr Brimelow also met the following witnesses: Will Pilling; Brian Glover; and Mark Ashcroft.
39. An interview was held with the claimant on 19 June 2017. The claimant was accompanied by a union representative, Ian Beesley. Three allegations were put to the claimant, which were read out to him at the outset of that meeting, as follows:
    a. alleged harassment of a female colleague namely RE;
    b. alleged insubordination in that he spoke to the female colleague after being specifically told not to; and
    c. used Hungarian to talk to RE during this incident when he was explicitly told not to.
40. When reminded that he had been told not to speak Hungarian, the claimant replied that he had been told it was not compulsory and he could speak in his own language if he wanted. He alleged that RE had set him up because she had her phone with her and that Mark Ashcroft should be interviewed as he was present at the time of the alleged incident.
41. In summary, the claimant denied the allegations and said RE had approached him and was waiting for him and that he had not spoken to her at all. He further suggested that he had text messages which indicated that RE was asking people to make up statements against him. These text messages were never disclosed to the respondent despite requests for the claimant to do so.
42. The Claimant also made allegations that RE was trying to get him sacked.
43. The meeting notes of that meeting, following which the claimant was suspended on full pay, are signed by the claimant.

Grievance 3

44. As RE raised a further grievance relating to the incident on 18 June 2017, a grievance investigation was conducted by John Ferguson, whose report recommended that a disciplinary investigation should be conducted into the claimant's conduct.

Disciplinary action

45. Gary McMahon was appointed as Disciplinary Officer and wrote the claimant a letter on 23 June 2017 to invite him to an investigation meeting to discuss following allegations against him:-
    a. "Alleged continued harassment of a female colleague, in that on Sunday 18 June 2017 you approached a female colleague and made further unwanted and inappropriate comments and actions towards her. You did this after being issued with a final written warning on 11 May 2017 for making unwanted sexual and derogatory actions and comments towards woman following a complaint from the same female colleague. Your continued actions have caused continued extreme

distress and offence to the colleague and your behaviours and comments go against our Organisation's values and ethics.

b. Alleged serious insubordination in that:

- you were explicitly told not to approach RE in his final written warning and again within the summing up of his subsequent appeal. However you have subsequently approached RE on 18 June 2017 to speak to her and then to stand and stare at her; and

- you were explicitly told not to speak Hungarian, either to RE or in the vicinity of RE during a meeting of 17 May 2017. You then spoke to RE in Hungarian on 18 June 2017.

46. Gary McMahon met with the claimant on 29 June 2017. The claimant was accompanied by Rob Atkinson.
47. At the outset, Gary McMahon tried to confirm to the claimant how serious things had become. The claimant responded: "It isn't because I am innocent".
48. With reference to the Claimant's previous meetings, Gary McMahon confirmed that Mark Ashcroft's statement had not given the evidence the claimant had indicated and in fact had stated that he wasn't in the clock machine area. He also confirmed that he had still received no evidence from the claimant in respect of his allegation that was "being stitched up".
49. The claimant then sought to rely on CCTV evidence but Mr McMahon confirmed that no CCTV was working within the relevant area. The claimant stated that it was not his fault that there was no CCTV.
50. The claimant denied he had approached RE but alleged that RE had been waiting for him and also said that the witnesses had been lying.
51. Gary McMahon found that, on the balance of probabilities the incident between the claimant and RE had occurred. There were corroborating statements and no evidence to suggest the witnesses who had given statements had lied.
52. Gary McMahon decided that the allegations against the claimant should be upheld and that the claimant should be dismissed for serious misconduct. He considered that dismissal was appropriate as there had been a clear breach of the final written warning and he had no confidence that the claimant would follow a further warning. He considered that the claimant had blatantly disregarded agreed actions following the final written warning.
53. The claimant's dismissal was confirmed by letter and the claimant was paid in lieu of notice.

Appeal against dismissal

54. The claimant appealed against the decision to dismiss him (page 290). His letter of appeal included the claimant's grounds of appeal as follows: I believe the witness statements are untrue as they contradict each other and the investigation was flawed.
55. Mike Stewart was appointed to hear the appeal and he met with the claimant on 26 July 2017.
56. The claimant stated that he believed RE was there at his clocking out time because she knew he would be there; that they didn't speak to each other and

that he didn't stare at her. He stated that the witnesses had said that had happened because RE had told them to get him sacked. He could not however offer a plausible explanation for why they would lie for RE. He said he had proof, and said it was in Hungarian, but then he stated that it was just obvious because the statements were different.

57. He also said that RE should have raised the issue with a manager if the mattes were serious.
58. The claimant referred to the fact that he and RE had been flatmates and that they had been friends. He also said he loved RE as a friend and said he didn't "want to have sex with her or relations."
59. Mike Stewart adjourned the meeting to conduct further investigation interviews with John Ferguson; Brian Glover; Mark Ashcroft (who confirmed he did not see the conversation at the clock machine); Will Pilling; and RE. In the meeting with RE she confirmed that she had recorded the conversation with the claimant and that it had taken place at 557am.
60. A further meeting took place between the claimant and Mike Stewart at which the appeal outcome was delivered to the claimant. The claimant was accompanied by Jill Cooke. It was confirmed to the claimant that the appeal was not upheld.
61. A letter confirming that the appeal was not upheld (page 336) specifically states that Mr Stewart's conclusions are that the claimant stated Mark Ashcroft was present on the date in question but that in a second interview on 2nd August 2017 Mark Ashcroft states that he didn't see him and RE at the clock machine. Further, on re-interviewing Brian Glover on 12 August 2017 and Will Pilling on 4 August Mike Stewart had requested that they both should draw a diagram to show where all the parties were alleged to have been standing. Both clearly outlined the same location for all the individuals involved. They also both mentioned the fact that the claimant did make a point of engaging with RE. Mr Stewart therefore upheld the decision that dismissal was the appropriate sanction.
62. It was confirmed that Mr Stewart's decision concluded the appeal process.

The Law

63. It was pointed out to the claimant, following his submissions, that Brexit is totally irrelevant to the Tribunal's decision and has not been taken into account in any way. Instead, it was explained to the claimant that the Tribunal would apply the law of unfair dismissal as set out below.

<u>Unfair Dismissal</u>

64. An employee has the right under section 94 ERA not to be unfairly dismissed (subject to certain qualifications and conditions set out in ERA).

Reason for Dismissal

65. When a complaint of unfair dismissal is made, it is for the employer to prove that it dismissed the claimant for a potentially fair reason, namely a reason falling within Section 98(2) ERA or some other substantial reason of a kind

such as to justify the dismissal of an employee holding the position which the claimant held.

66. A reason relating to the employee's conduct is a potentially fair reason falling within Section 98(2).

67. Where an employer alleges that its reasons for dismissing the claimant was related to her conduct the employer must prove:-

    i. that at the time of the dismissal it genuinely believed the claimant had committed the conduct in question and

    ii. that this was the reason for dismissing the claimant.

68. The test is not whether the Tribunal believes the claimant committed the conduct in question but whether the employer believed the claimant had done so.

Fairness

69. If the respondent proves that it dismissed the claimant for a potentially fair reason, the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) ERA.

70. Section 98(4) ERA provides that "the determination of the question whether

    (a) the dismissal is fair or unfair (having regard to the reason shown by the employer) 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".

71. The Employment Appeal Tribunal (EAT) set out guidelines as to how this test should be applied to cases of alleged misconduct in the case of **British Home Stores Limited –v- Burchell** 1980 ICR 303. The EAT stated that what the Tribunal should decide is whether the employer who discharged the employee on the grounds of the misconduct in question "entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. First of all there must be established by the employer the fact of that belief, that the employer did believe it. Secondly that the employer had in its mind reasonable grounds upon which to sustain that belief and thirdly that the employer at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, has carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

72. The concept of a reasonable investigation can encompass a number of aspects including: making proper enquiries to determine the facts, informing the employee of the basis of the problem, giving the employee an opportunity to make representations on allegations made against them and put their case in response and allowing a right of appeal.

73. In 2009, ACAS issued its current code of practice on disciplinary and grievance procedures. The Tribunal must take into account relevant provisions of the code when assessing the reasonableness of a dismissal on the grounds of conduct (section 207(3) TULRCA).

74. Under the Code, employers should give employees an opportunity to put their case before any decisions are made. The Code identifies the need for a disciplinary meeting. It also provides that, when notifying an employee of a disciplinary meeting, the notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. Furthermore, at the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered.

75. The Code also states that an employee who is not satisfied by the outcome of disciplinary proceedings should appeal and should be allowed to do so by the employer. It goes on to state that appeals should be heard without unreasonable delay and should be dealt with impartially (wherever possible by a manager who has not previously been involved in the case).

76. Even if procedural safeguards are not strictly observed, the dismissal may be fair. This will be the case where the specific procedural defect is not intrinsically unfair and the procedures overall are fair (**Fuller –v- Lloyds Bank** 1991 IRLR 336 EAT). Furthermore defects in the initial disciplinary hearing may be remedied on appeal if, in all the circumstances, later stages of a procedure are sufficient to cure any earlier unfairness.

77. In applying section 98(4), the Tribunal must also ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances. The test is an objective one. It is irrelevant whether or not the Tribunal would have taken the same course had it been in the employer's place, similarly it is irrelevant that a lesser sanction may have been reasonable. Rather section 98(4) requires the Tribunal to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (**Iceland Frozen Foods Ltd –v- Jones** 1982 IRLR 439). This "range of reasonable responses" test applies equally to the procedure by which the decision to dismiss is reached (**Sainsbury's Supermarkets Limited –v- Hitt** 2003 IRLR 23).

78. Finally, in **Bandara v British Broadcasting Corporation** UK EAT/0335/15/JOJ paragraph 30 states as follows: "Generally speaking, earlier decisions by an employer should be regarded by an Employment Tribunal as established background that should not be re-opened. It should be

exceptional to do so. An earlier disciplinary sanction can of course only be open to criticism if it was unreasonable by the objective standard of the reasonable employer, but that is not enough, otherwise the Employment Tribunal would have to re-open and re-investigate previous disciplinary sanctions whenever an employee was aggrieved by them. A threshold has to be set. An allegation of bad faith that has some real substance to it, as in *Way* will be one example. So will the absence of any prima facie grounds for the sanction. So will something that makes the sanction manifestly inappropriate. I think a sanction will only be manifestly inappropriate if there is something about its imposition that once pointed out shows that it plainly ought not to have been imposed."

Remedy

79. If a claim of unfair dismissal is well founded, the claimant may be awarded compensation under Section 113(4) ERA. Such compensation comprises a basic award and a compensatory award, calculated in accordance with sections 119 to 126 ERA.

80. Where the Tribunal considers that any conduct of the claimant prior to dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, it must reduce the amount accordingly (section 122(2) ERA). In this regard, the question is not whether the employer believed the claimant committed the conduct in question but whether the Tribunal so believes.

81. So far as the compensatory award is concerned, ERA provides that the amount of compensation shall be such amount as is just and equitable based on the loss arising out of the unfair dismissal. In **Polkey –v- A E Dayton Services Limited** 1987 ICR 142 the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed.
82. Separately, if it appears to the Tribunal that either the employer or the employee has unreasonably failed to follow or comply with the ACAS Code referred to above, the Tribunal may increase or decrease any compensatory award by up to 25% if it considers just and equitable in all the circumstances to do so (s207A TULRCA).
83. Furthermore, where the Tribunal finds that dismissal was to any extent caused or contributed to by any action of the claimant, it must reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s123(6) ERA). As with any reduction under s122(2), the question is not whether the employer believed the claimant committed the conduct in question but whether the Tribunal so believes.

Conclusions

Reliance on the final written warning
84. In dismissing the claimant, Mr McMahon relied on a final written warning. On some occasions, albeit infrequently, reliance on a final written warning is

found to be unsafe or manifestly inappropriate. The Tribunal has concluded that this is not such a case.

85. There is no evidence to suggest that the final written warning was improperly given. There were clearly identified grounds on which to issue the claimant with a final written warning. The allegations against the claimant were very serious and were matters which the respondent considered inappropriate and offensive.

Reason for dismissal

86. The Tribunal is satisfied that the claimant was dismissed for the conduct reason set out in the letter of dismissal.
87. The decision to dismiss came about after a complaint from RE who complained about an incident with the claimant. The respondent investigated the incident. Gary McMahon reviewed the evidence and met with the claimant and then dismissed the claimant with notice, on the basis of a relevant final written warning that was already on his file. The Tribunal is satisfied that at the time that he took the decision to dismiss the claimant, he genuinely believed that the claimant was guilty of misconduct and that he dismissed you for that reason.
88. There was no evidence to suggest that the respondent had an ulterior motive for the decision to dismiss the claimant as suggested by the claimant or at all.
89. It was transparently obvious from Mr MacMahon's evidence to the Tribunal that they held a genuine belief based on reasonable grounds in the claimant's misconduct.
90. Accordingly, the Tribunal is satisfied that the claimant's dismissal was for a potentially fair reason falling within Section 98 ERA, namely his conduct. The respondent therefore satisfies the first limb of the *Burchell* test.

Fairness

91. The claimant did not raise any issues about the procedure adopted, which the Tribunal is satisfied falls within the range of reasonable responses:
    a. The claimant was fully aware of the allegations against him and was given an opportunity to make representations and to put his case in response. The claimant knew what he was being accused of and was in a position to prepare a considered response.
    b. The claimant was supported by a union representative at all of the relevant hearings.
    c. The claimant was allowed a right of appeal at which he was again given the opportunity to present his case and put his case forward.
92. The Tribunal is satisfied that the respondent had reasonable grounds on which to base its belief that the claimant was guilty of the misconduct alleged:
    a. Although the claimant denied approaching RE, the witness evidence was consistent that the claimant had approached her and subsequently stared and smirked at her.
    b. The witnesses appeared to have nothing to gain by giving the evidence they did.
    c. The claimant's own evidence was inconsistent at times and difficult to follow throughout the disciplinary process. For example, the claimant

stated that he and RE were friends, not enemies but then stated that she was out to get him.

d. RE had complained about the incident shortly after it had occurred and had been specific about what had been said to her by the claimant as she waited to start her shift.

e. The Tribunal is satisfied that the respondent's belief that the claimant was guilty of the misconduct alleged was based on reasonable grounds. The respondent made proper enquiries to determine the facts and relied on witness evidence to corroborate RE's allegations. RE's version of events was obtained and was supported by Will Pilling and Brian Glover.

93. The Tribunal is satisfied that the respondent, at the stage at which it formed that belief on those grounds, at any rate at the final stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case:

a. Accounts were sought as part of the investigation and were thoroughly reviewed throughout the disciplinary process. Inconsistencies were investigated, for example in relation to Mark Ashcroft.

b. The claimant could not provide any evidence, though he claimed to have it, that the witnesses had been asked to lie or fabricate their evidence. Accordingly, the respondent could not investigate that point further.

c. There were no further matters identified which should have been investigated by the respondent.

d. The respondent clearly gave consideration to the points the claimant made, and adjourned hearings in order to seek further evidence or to further investigate points raised.

94. The Tribunal considers that the claimant's dismissal was within the range of reasonable responses open to a reasonable employer:

a. The conduct with which the claimant was accused was essentially a continuation of the same behaviour dealt with in the final written warning.

b. The final written warning had put the claimant on notice that he could be dismissed in the event of any further act of misconduct within twelve months.

c. The final written warning specifically stated that the claimant was to refrain from having any contact with RE. Even if, as the claimant alleges, RE was effectively lying in wait for him, it was within his gift to ignore her and walk away, knowing the terms of the final written warning which had only recently been issued, and discussed in detail, with him.

d. The conduct alleged was serious and impacted, in particular, on the claimant's colleague RE;

e. The claimant had specifically ignored instructions not to speak in Hungarian which was for his own protection. Even if that had been a recommendation only, as alleged by the claimant, had he complied with the instruction then any words spoken, in particular to RE, could not be open to misinterpretation and more witnesses would have understood what had been said.

95. In all the circumstances of the claimant was fairly dismissed by the respondent.

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Employment Judge Rice-Birchall

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Date 6 June 2018

REASONS SENT TO THE PARTIES ON

7 June 2018

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FOR THE TRIBUNAL OFFICE