EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4101526/17

Held in Glasgow on 19, 20 & 21 February 2018

Employment Judge: P Wallington QC (sitting alone)

Mr Thomas Reeves	**Claimant** **Represented by:** **Mr C Mochan - Representative**
Glasgow Housing Association	**Respondent** **Represented by:** **Mr R MacKay - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant`s complaint of unfair dismissal is not well founded and is dismissed.

REASONS

1. In this case the claimant Mr Thomas Reeves complains that he was unfairly dismissed by the respondent Glasgow Housing Association. It is not disputed that he was summarily dismissed, with payment in lieu of notice, on 23 January 2017, and that at that stage he had 13 years` service, and it is not disputed that his claim was presented in time.

2. I heard evidence over three days on oath from Mr J Ross, Ms J Russell and Ms O Paton for the respondent, and from the claimant in person. I was also referred to a considerable number of productions within a joint bundle prepared by the respondent`s solicitors.

3. The respondent`s witnesses all appeared to me to be honest and truthful witnesses. I found Ms Paton in particular to be an impressive witness, with a clear command and understanding of the material which had been placed before her and her colleagues on the appeal panel which rejected the claimant`s appeal against dismissal. I also found Mr Ross to be a helpful and conscientious witness. I had more difficulty with the evidence of Ms Russell; whilst I had no reason to doubt that she was doing her best to give specific answers, she had a marked tendency to be more concerned about saying what she wished to say rather than necessarily focusing on and answering specific questions. However, I do not consider that this detracted from the reliability of her evidence.

4. I had considerably more difficulty with the claimant`s evidence. He often appeared to contradict himself, and had considerable difficulty on a number of occasions in explaining the contradictions. Whilst he was emphatic in maintaining his innocence of the substantive allegations in respect of which he had been dismissed, I was ultimately not persuaded that his evidence was fully credible. Where his evidence differs on points of fact from that of the respondent`s witnesses, and unless the documentary evidence establishes otherwise, I am satisfied that the respondent`s witnesses are to be preferred.

5. The claimant also challenged the accuracy and completeness of the notes of the investigatory interview, the disciplinary hearing and the appeal on a number of points. Unfortunately, on nearly all of these issues the relevant witnesses for the respondent were not challenged, and therefore did not have an opportunity to address the discrepancies the claimant asserted. In these circumstances, and with one exception to which I refer in my findings in fact, I accept the accuracy of the respondent`s record of the various stages of the

disciplinary process, including the record of the investigatory interviews conducted by Mr Ross.

6. With those preliminaries, I turn to my findings in fact.

Findings in Fact

7. The respondent is a not for profit company and registered charity which has responsibility for a large estate of social housing across Glasgow. It came into existence in 2003 when Glasgow City Council divested itself of its council housing stock and this, together with the employees responsible for the maintenance and tenancy relations for the council housing stock, was transferred to the respondent. The respondent is part of the Wheatley Group, a large group of social landlords operating across Scotland.

8. The claimant was employed by the respondent, initially in 2004 in the capacity of Concierge, and latterly as an Environmental Operator, working nightshifts. His duties included supervision of the respondent`s properties in the South division of Glasgow, which involved night time patrols, uplifting of bulky refuse for collection by the refuse collection service, and security matters. He had relatively little contact with tenants in the course of his duties.

9. In September 2016 the claimant received a final written warning for unauthorised absence and failure to comply with the respondent's reporting procedures (pages 57-60). The warning was effective for 12 months, and the letter setting it out concluded with a statement that '*should there be any repeat of unacceptable behaviour or conduct of any nature then this may lead to the next stage of the disciplinary procedure, up to and including dismissal'.* The claimant did not appeal against this warning.

10. The staff of the respondent`s South Environmental Services division were invited to a Christmas party, organised by the respondent, which took place on the evening of Friday 9 December 2016, at the Ex-Servicemen`s Club in

Drumbeck. Approximately 150 people attended, all employees of the respondent (but some may have been there as spouses or partners of employees, a point not addressed in evidence). It is the incidents which occurred during that evening, involving the claimant and a number of other employees, which led to the dismissal of the claimant, and to the award of a formal written warning and demotion to one other employee, Christopher Rough, and a first written warning to a further employee, Victoria McMaster.

11. It is not necessary for me to make full findings as to what in fact happened, beyond a brief outline indicating the principal allegations against and by the claimant. Before doing so I should explain that the names of those involved, other than the claimant, were anonymised by the respondent during the disciplinary process, albeit that the claimant was able to guess who each of the seven individuals were; and by agreement during the proceedings before me that anonymity was retained for all of the witnesses other than Mr Rough and Ms McMaster. They are therefore referred to, as they were in the documentation generated by the disciplinary process, as witnesses 1 to 7, witness 4 being Mr Rough and witness 2 Ms McMaster.

12. Briefly what was alleged by various of the witnesses to have happened began with a discussion at the bar during the course of the evening between the claimant and Mr Rough, then a Team Leader within the Environmental Service, and who is the claimant`s nephew. It was alleged that the claimant and Mr Rough exchanged words over their respective children, and that subsequently, either shortly thereafter or some time thereafter, in the course of the evening, both men went outside; it was disputed which of them led and which followed. Outside there was an argument, which became heated and was at the least at the level of an altercation, in the course of which it is variously alleged that the claimant headbutted Mr Rough, that the two came head to head, that they came face to face but not head to head, that Mr Rough suffered a bruised nose, and (although this allegation was not pursued by the claimant) that the claimant was headbutted by Mr Rough.

13. It was further alleged that one of the causes of this altercation was the claimant having called witness 3, who was described in evidence as Mr Ross`s girlfriend, as a "*whore*". It was also alleged that the claimant spoke to Ms McMaster (who, rather confusingly, was described in the statement taken by Mr Ross as Mr Rough`s partner) in extremely unflattering and abusive terms, and that he attempted to assault her, causing her to go over on her ankle. It was further alleged by a number of the witnesses that the claimant repeatedly shouted that he was a gangster, and was going to "*get*" various individuals, that he called Mr Rough "*you wee prick*", and threatened to kill him. The claimant denies all of these allegations, save that there was an altercation in the street, albeit that he asserted that did not take part in any of the shouting or abuse, and that he turned round and stood face to face with Mr Rough when, as he asserts, the latter followed him out of the hall and pushed him in the back.

14. The next day, Mr Craig Hay, a Manager with the respondent, received an anonymous whistleblowing telephone call (page 62). The person making the call, whose identity was not made known to the Tribunal, gave an outline of some of the events I have referred to above, including specifically an allegation that the claimant headbutted Mr Rough and threatened to kill him, in the presence of several witnesses, and that the claimant pushed and tried to punch Ms McMaster, again witnessed by several members of staff, and that the doorman thereafter refused the claimant readmission to the hall.

15. Following this anonymous call, on the next working day, Monday 12 December 2016, the respondent decided that the claimant should be suspended pending a disciplinary investigation into the allegations reported by the whistleblower.

16. The letter notifying the claimant of his suspension (page 63) set out the allegations that were to be investigated as:

- *You were involved in an altercation with a member of staff during a work night out and acted in an inappropriate manner*
- *You were verbally abusive towards two members of staff*
- *You physically threatened a member of staff*
- *You physically assaulted members of staff: namely you headbutted one member of staff and pushed and tried to hit another member of staff.'*

17. Also on 12 December 2016, Mr Bell, an Environmental Support Manager, was asked, in view of the allegation of an assault on Mr Rough, to interview the latter. He did so, and reported that Mr Rough '*was very reluctant to say anything until the point when he said No I Do Not wish to say anything about any Allegations that may have been made at the GHA staff Christmas night out'.* (page 61.)

18. Mr Ross was designated as the manager who was to investigate the allegations against the claimant. Mr Ross wrote to the claimant on 13 December 2016 summoning him to a meeting on 15 December 2016 to discuss the allegations, which were set out in the same terms as had been done in the suspension letter. The meeting was later rescheduled to 16 December 2016 to enable the claimant's trade union representative to be present.

19. In the meantime Mr Ross began the task of interviewing witnesses. He interviewed a total of seven individuals, in addition to the claimant, seeing witnesses 1 to 4 on 15 December, and witnesses 5 to 7 on 16 December 2016, after he had interviewed the claimant. In each case, Mr Ross had prepared a list of questions, and the notes of each interviewee's responses were recorded by a note taker under the individual questions (the notes of interviews of witnesses 1 to 4 are at pages 67-98, those of the claimant's interview at pages 99-109 and those of witnesses 5 to 7 at pages 110-136). Mr Ross was not challenged in evidence as to the accuracy of the notes, and

I accept that they are a broadly accurate record of the questions asked and witnesses' answers in each case.

20. Witnesses 2 and 3 both appeared to be very concerned about possible repercussions if they were identified as witnesses, and were at various points during the interviews '*visibly upset*'. Witness 3 in particular said that she was staying with her mother as the claimant knew where she lived, and that threats had been made to Mr Rough's family. Mr Ross offered witnesses 2 and 3 support from the respondent's confidential care service, and made inquiries of the respondent's HR department as to the anonymisation of witnesses. He then decided that all of the witnesses should be anonymised. This had the important consequence that they could not be called to give evidence in person at any subsequent disciplinary hearing.

21. In addition to interviewing the witnesses and the claimant, Mr Ross had the benefit of an email from Mr Lambie, an Area Housing Manager, on 19 December 2016 (pages 123-4) in which he passed on a summary of a telephone conversation he had had with witness 5 on 15 December 2016, before she had been interviewed by Mr Ross. The claimant later misunderstood this as being Mr Lambie's own evidence of what had occurred and complained that Mr Lambie was not called as a witness at the disciplinary hearing. In fact Mr Lambie had not attended the event, as was confirmed to the claimant during the appeal hearing.

22. The replies to questions given by the witnesses differed considerably both in terms of what they had seen, and the perspective they had of the events about which they were asked. In order to clarify what the evidence established, Mr Ross prepared a chart (pages 137-141) setting out in relation to each of the four allegations the evidence given by each of the seven witnesses and the claimant himself. I accept this chart as an accurate summary of the evidence collected in the interviews.

23. The chart highlights the range of evidence, in part explained by different witnesses having seen different parts of the series of events, but also pointing to a division of the seven witnesses into two camps. The account given by Mr Rough (witness 4) was strongly supported by the evidence of witnesses 2 and 3, both of whom were described as in some kind of relationship with him, either as partner or girlfriend.

24. Witness 1 claimed to have seen nothing beyond Mr Rough having been drunk. Witness 5, who had before her interview identified herself as a friend of the claimant's partner, said that she had not seen an altercation between the claimant and Mr Rough, but did hear them shouting at each other, and also heard the claimant call witness 2 '*a fat cow'*.

25. Witness 6 said that she saw the claimant acting in a challenging way towards Mr Rough, that he threatened to kill Mr Rough, that he called witness 2 '*you fat slag*' and *'you fat ugly tart'* and that he was shouting '*I'm going to kill you, I'm a gangster*'. Witness 7 said he heard the claimant call a female '*you fat cow*' and that he had observed the claimant and Mr Rough arguing. He, along with witness 5, recorded having seen witness 2 attempt to strike the claimant, but the notes do not indicate whether this was before or after he had used offensive language towards her.

26. Mr Ross had also questioned witness 6 over reports given to him by other witnesses that she had spent some time during her working hours on the Monday following the Christmas party making telephone calls and sending texts from a private booth in the office. The witnesses suggested that she had been in contact with a friend of the claimant. She explained that she had been speaking to a union representative to clarify her own position.

27. Mr Ross's chart finally records the evidence given by the claimant, which painted Mr Rough as an aggressor, who was verbally abusive to him, shouting '*fuck your kids*'. He also confirmed that there had been an altercation in the street between him and Mr Rough, but added that the two had made

up the following day and spent the day together. He denied headbutting Mr Rough but admitted that there had been head to head contact between them. He also referred to witness 2 being verbally abusive to him.

28. I am satisfied that Mr Ross's chart is a fair and balanced summary of the more detailed notes of individual witnesses' evidence as recorded in the notes of the individual interviews. The claimant later complained that the way that Mr Ross had questioned the witnesses was biased, and pointed in support of this submission to a number of apparently leading questions put to witnesses. However I do not accept that Mr Ross was doing anything other than asking witnesses whether they had witnessed the particular acts attributed to the claimant by the anonymous whistleblower. It was the allegations, rather than any intent by Mr Ross to make out a case against the claimant, that shaped the questioning. This point was in any event not put to Mr Ross in cross-examination.

29. Having prepared and considered his chart, Mr Ross produced a report dated 10 January 2017 setting out his findings (pages 142-151). The bulk of this lengthy and thorough report was a summary, giving more detail than in the chart, of the evidence given by each of the seven witnesses and by the claimant; the notes of the interviews were appended. This was followed by a summary, which referred to the fact that the claimant was under a live final written warning, and identified the numbers of witnesses who had stated that they had seen or not seen particular incidents, but did not attempt to make any judgment as to whether the claimant was guilty of any of the specific counts against him. Rather it set out the options available to the Senior Officer to whom the report was addressed (Ms Russell) as being:

- A decision that there was no reason to believe that the allegations had taken place;
- A decision that it was not necessary to proceed to a formal disciplinary hearing;

- A decision that there may be reason to believe that the allegations took place (which would require a disciplinary hearing);
- A decision that further investigation was required before a decision could be made; or
- A decision that alternative action was necessary.

30. Separately from completing his report on the allegations against the claimant, Mr Ross decided that the evidence he had gathered provided a basis for possible disciplinary action against Mr Rough, and against witness 2. He reported these views, and at some point before the disciplinary hearing against the claimant, a parallel process was instituted against the two, which in due course (the tribunal was not given a precise time line) led to Mr Rough being demoted and given a final written warning, and witness 2 being given a first written warning. In accordance with the respondent's practice of treating disciplinary proceedings as confidential, the claimant was not advised of the steps being taken in the other cases.

31. Ms Russell considered Mr Ross's report, and quickly decided that there should be disciplinary proceedings, the charges being those originally set out in the suspension letter (see paragraph 16 above). The claimant, who had remained suspended since 12 December 2016, was notified by a letter dated 12 January 2017 (pages 153-4) of the disciplinary hearing, to be held on 17 January 2017. The letter contained a warning that the matters of which he was accused could be considered gross misconduct which could result in dismissal. The claimant was advised of his right to be accompanied and offered the services of the respondent's Confidential Care service. Mr Ross's investigation report and all its appendices (which included all of the notes of interviews) was enclosed.

32. Prior to the hearing the claimant produced a written statement (pages 155-6) in which he complained of having had insufficient time to prepare, bias on Mr Ross' part in the way the witnesses were interviewed (see paragraph 17

above as to this), and the anonymisation of the witnesses, which resulted in the claimant not being able to challenge what they said. He also complained that no steps had been taken to identify the anonymous informant and asked that the complainant be identified, and (wrongly, albeit he did not then know this) that he was the only person who had been suspended. Finally he asked for more time to prepare, and stated that he was in the process of trying to source CCTV footage which might have been available. (There was however no evidence before the Tribunal as to whether there was in fact any CCTV coverage of the locations (inside or outside the hall) where the incidents were alleged to have occurred.)

33. In the event the hearing on 17 January 2017 lasted only a few minutes. Ms Russell chaired the hearing. The claimant complained of having had insufficient time to prepare, and handed in the statement referred to above. An issue as to the appropriateness of the presence of Ms Jayne Simpson as HR adviser was addressed: she had not, as the claimant had thought, been the person whom the anonymous complainant had contacted. Ms Russell then postponed the hearing to the following day, stating that she was not comfortable proceeding in view of the claimant's statement that he had not had time to prepare.

34. On 18 January 2017 the claimant had a family emergency (his young son had to be rushed to hospital) and in consequence the hearing did not take place on that date. It was rescheduled to 23 January 2017, and finally took place then; a note of the hearing, which I accept to be broadly accurate, is at pages 164-181. The claimant was accompanied by his union representative, Mr Meechan. The claimant confirmed at the start of the reconvened hearing that he had had sufficient time to prepare.

35. The format of the hearing was that after the opening formalities, Ms Russell read out a formal response to the points in the claimant's written statement (pages 182-3); the claimant stated that he was happy with what he had heard. Mr Ross was then called in to present his report and be questioned on it by

the claimant and Ms Russell. He then left, and Ms Russell asked the claimant a series of pre-prepared questions. Then, after an adjournment lasting about an hour, the meeting was reconvened for Ms Russell to give her decision.

36. Ms Russell found each of the four allegations to be made out. She found the first (being involved in an altercation) to amount to misconduct. She found the second allegation (being verbally abusive to two members of staff) to be serious misconduct; I accept Ms Russell's evidence that she regarded that as interchangeable with gross misconduct, the word used in the respondent's disciplinary procedure. The third allegation (physically threatening a member of staff) was also categorised as serious misconduct. Ms Russell split the fourth allegation into two parts; that the claimant had headbutted Mr Rough and that he had tried to hit another member of staff. She stated that she had concluded that the claimant had made head to head contact with Mr Rough amounting to a form of head butt, and that there was sufficient evidence that he had pushed and attempted to hit witness 2. Both parts of the allegation were therefore upheld and Ms Russell found these too to amount to serious misconduct.

37. Turning to the sanction, Ms Russell referred to the extant written warning, the claimant's case that Mr Rough had been the instigator and his length of service. She expressed concern that the claimant had said that if the same events occurred again he would act in the same way as he had on 9 December 2016. She concluded that for the first allegation alone the appropriate penalty would have been a final written warning, but for the allegations found to amount to serious misconduct the appropriate sanction, independently of the current final warning, was dismissal without notice. This was the penalty awarded; however the claimant was given payment in lieu of his entitlement to 12 weeks' notice. In her evidence Ms Russell was at a loss to explain why payment in lieu should have been considered appropriate, and stated that this was a mistake. I accept that it probably was a mistake; it was in any case in the claimant's favour. Having checked that the claimant

understood the position and advised him of his right of appeal, Ms Russell concluded the meeting.

38. The claimant's dismissal on 23 January 2017 was formally confirmed in a lengthy decision letter from Ms Russell dated 1 February 2017 (pages 198-207) in which she set out in detail her findings, and her analysis of the evidence leading to those findings, and her reasons as to penalty.

39. It will be noted that in my summary of the hearing no reference is made to the calling or questioning of witnesses. The witnesses could of course not be called in person without loss of their anonymity (albeit that the anonymity was in name only, as the claimant was able to deduce who each of the witnesses were, almost certainly correctly so in each case). Ms Russell's evidence was that she offered the claimant the opportunity to put his questions to the witnesses to her, which she would then ask the witnesses. The claimant in evidence denied that he had been offered this opportunity. There is no reference to any such offer in the detailed notes of the proceedings, and in her response to the claimant's original written statement, in which he complained of being deprived of the opportunity to challenge the witnesses, Ms Russell made no reference to this alternative. There is a reference to the point in the decision letter sent following the claimant's appeal (see page 256); the letter records that Ms Russell told the appeal that she had offered the claimant the opportunity to give her questions which she would ask the witnesses but he had chosen not to take the offer up.

40. Thus *either* no such offer was made to the claimant, and he did not therefore have any opportunity to have questions put to any of the witnesses, but he did not pursue the point: he is recorded as saying that he was happy with Ms Russell's response, and is not recorded as having raised the question of not being able to put questions to the witnesses at any point during the proceedings; *or* the offer was made but not taken up. Either way, the claimant did not actively pursue the issue, despite having had at least one opportunity to do so, when asked by Ms Russell whether he was happy with her response

to his initial statement. I therefore find that there was no refusal by the respondent to provide a facility for questions to be put to the witnesses.

41. The issue of possible CCTV footage was raised by the claimant again at the hearing on 23 January 2017. Ms Russell indicated that she agreed with Mr Ross's view that the witness statements were sufficient. The claimant did not seek to contest this view, or ask for additional time to try to obtain the footage himself; the matter was simply dropped.

42. The claimant notified his wish to appeal, initially by a letter of 4 February 2017 (page 208). He amplified this in a further letter dated 9 February 2017, in which he set out the grounds in summary, and developed each ground at some length (pages 209-221); however although dated 9 February, this document was not completed until shortly before the appeal hearing, and not provided to the respondent before the hearing took place. It was therefore not seen by the appeal panel before the appeal hearing began. The grounds in summary were these:

- *The complaint was bias* [sic], *baseless, and was not impartial* [it is clear from the development of this ground that the complaint was that the complaint was baseless and it was the investigation that he said was biased and not impartial].
- *The investigation was limited in its scope*
- *There was an assumption of my guilt prior to the gathering of facts.*
- *The anonymity of witnesses was both excessive and unfair.*
- *New evidence has come to light.*[This appears to relate to the claimant's assertion that the whistleblower was Mr Rough; the point is not otherwise further developed in the detailed grounds of appeal.]

43. On the first point, the principal issue raised was the bias the claimant said was apparent in Mr Ross's questions. The second point, that the complaint was baseless, focused on the fact that none of the witnesses had said that

they had seen the claimant headbutt Mr Rough, and that Mr Rough had denied being headbutted. The issue of Mr Ross's lack of impartiality referred to his having checked the claimant's disciplinary record and referred to the live warning, and his failure to refer to the participants having been drinking He also referred to the email from Mr Lambie, which he (wrongly: see paragraph 21 above) stated to be Mr Lambie's own account of events, and complained that Mr Lambie had not been called as a witness at the hearing. The claimant also raised the question why Mr Ross, rather than Mr Bell, his line manager, had been appointed to conduct the investigation. In fact, as was pointed out to the claimant at the appeal hearing, the respondent's disciplinary procedure does not allow for the employee's line manager to conduct a disciplinary investigation.

44. In relation to the limited scope of the investigation, the claimant's complaint was that only he had been suspended. He said that Mr Rough and witness 2 should also have been suspended and investigated; he was apparently unaware that this is precisely what had happened. He alleged that the anonymous whistleblower was in fact Mr Rough, but he provided no evidence as to whether that was in fact the case, and the relevance of the point, if true, was not explained. He set out what he said were inconsistencies in the evidence which neither Mr Ross nor Ms Russell had properly addressed, and concluded that he would accept dismissal after a fair hearing, but that he had not received a fair hearing.

45. The claimant wrote to the respondent on 10 February 2017 (page 232) stating that it was important that Mr Ross and Mr Hay (who had received the anonymous allegations) attended the appeal as witnesses. Mr Wood, an Employee Relations Business Partner, replied on behalf of the respondent on 14 February explaining that the procedure did not allow for their attendance or for the claimant to call witnesses.

46. The appeal hearing was held on 27 February 2017. It was chaired by Ms Clayton, Group Director of Housing Care, sitting together with two members

of the Board of the respondent, Mr Geddes and Ms Majuzk-Soska. The claimant attended together with Mr Munro from his union; Ms Simpson was in attendance as HR adviser, and Ms McMillan took notes. I accept that the notes (pages 243-253) are an accurate summary of what took place at the appeal.

47. The appeal was opened by Ms Clayton explaining the procedure, and asking for the claimant's grounds of appeal, which were then handed in; the panel then adjourned to read them. Ms Clayton then clarified with the claimant that his appeal was based on the disciplinary process having been conducted in a biased way. The claimant then developed his case; this was followed by questions from Ms Clayton and the other members of the panel. Ms Russell was then brought into the hearing to present her report setting out her reasons for dismissing the claimant (pages 236-41); the report broadly repeated the reasons given at the conclusion of the disciplinary hearing, and which had in turn been repeated in the dismissal letter. However, as the report had not previously been provided to the claimant, there was an adjournment for him and his representative to read the document.

48. Ms Russell then spoke to her report, and was questioned about it by Ms Clayton and the claimant and his representative, and the claimant and his representative summed up the case. There was then a further adjournment for the panel to consider their decision. The decision, which was to reject the appeal, was given, Ms Clayton explaining that the panel's reasons would follow in writing. She also explained that the appeal was the final stage in the procedure.

49. Ms Clayton set out the panel's reasons in a letter dated 29 February 2017 [sic- the actual date the letter was sent was not in evidence] (pages 254-7). This letter summarised the disciplinary charges for which the claimant had been dismissed and the principal grounds of appeal set out in the letter of 9 February 2017; pointed out that several of the specific points in the letter had been addressed previously during the disciplinary process; and recorded that

the claimant had clarified that his sole ground for appealing was that '*there was unfairness and bias in the disciplinary process'*.

50. Ms Clayton referred to, and rejected, the claimant's argument that because the original complainant had sought to withdraw the allegations, the investigation should have been drooped, observing that once the complaint had been made the respondent had a duty to investigate it. She also set out a reasoned rebuttal of the claimant's case that there were too many inconsistencies in the witness statements, highlighting in particular that witnesses acknowledged by the claimant to be sympathetic to him had confirmed key elements in the charges, and that he had accepted both that he was involved in an altercation and that he had come '*head to head*' with Mr Rough. She concluded that Ms Russell had been entitled to reach the conclusions she did, that the claimant was aware of the potential consequences for his employment of the incident and that he had shown no remorse. The letter ended by recording the panel's decision that the appeal was rejected.

Relevant law

51. In this case there is no dispute that the claimant as an employee with 13 years' service had the right not to be unfairly dismissed, that he had been dismissed, and that his claim had been presented timeously. The relevant law is therefore section 98 of the Employment Rights Act 1996. By section 98(1) it is for the employer to show what was the reason or principal reason for the dismissal and that the reason was one of the reasons listed in section 98(2) or some other substantial reason of a kind such as to justify the dismissal. In this case there was no dispute that the reason was that the claimant was found to have committed serious, or gross, misconduct, and that this, as a reason relating to conduct, is one of the potentially fair reasons listed in section 98(2).

52. Accordingly the law relevant to the issues in dispute is section 98(4). This provides that the tribunal must determine (there being no burden of proof on either party) whether in all the circumstances, including the size and administrative resources of the employer, and having regard to the reason shown by the employer) the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee; this is to be determined in accordance with equity and the substantial merits of the case.

53. A reason for dismissal is a set of facts known to, or beliefs held by, an employer leading the employer to dismiss. The question for the Tribunal is thus not whether the claimant was or was not guilty of the misconduct with which he was charged, but whether the respondent acted reasonably in forming and acting on a belief that he was guilty. In cases of dismissal for reasons of conduct, the key authority remains the venerable case of **British Home Stores Ltd v Burchell [1978] IRLR 379.** This case established that what the Tribunal must decide is whether the employer (in the shape of the dismissing manager) held an honest belief that the employee was guilty of misconduct; whether there were reasonable grounds for that belief; and whether there had been a sufficient investigation.

54. In applying the **Burchell** test it is important for the Tribunal to remember two points. The first is that the test is an objective one of the reasonableness of the employer's actions, not of the Tribunal's own opinion of the fairness of the dismissal: the tribunal must be careful to avoid substituting its own view for that of the employer. I remind myself accordingly. The second is that in determining the reasonableness of the employer's actions in dismissing, there may be a range of reasonable responses open to a reasonable employer. It is only if the decision to dismiss falls outwith that range that the Tribunal is entitled to find that the employer acted unreasonably. This test applies equally to the decision to dismiss itself, and to the investigation: see **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.**

55. Subject to these important points, the questions to be addressed include whether the employer followed a fair procedure in the process of dismissal, including the investigation and any appeal, as well as the disciplinary hearing; and whether the sanction was in the circumstances disproportionate, so as to be outwith the range of reasonable responses.

56. Amongst the very numerous authorities on the application of section 98(4), a number were cited by Mr McKay, for the respondent, and by Mr Mochan for the claimant. Some of the authorities relate to issues not in contention given my findings in fact, but it is necessary to refer to a number which are relevant.

57. **Ulsterbus Ltd v Henderson [1989] IRLR 251** is a decision of the Northern Ireland Court of Appeal on the point whether a dismissal is rendered unfair if the employee does not have the opportunity to question the witnesses on whose evidence he is found guilty of misconduct. The court overturned a finding of unfair dismissal, concluding that it was an error on the part of the Tribunal to hold that it may in certain circumstances (the instant case being by implication one) be necessary to hold a quasi-judicial investigation with witnesses being available for cross-examination. The Court observed that whilst some employers might consider that necessary or desirable, it was insupportable to find that an employer who failed to do so was acting unreasonably. (The witnesses in that case were passengers who had reported the claimant bus conductor for not issuing tickets for which payment had been taken.)

58. The decision in **Ulsterbus** was followed, and the principle it established confirmed, by the Employment Appeal Tribunal in **Santamera v Express Cargo Forwarding t/a IEC Ltd, EAT/780/01**, where the employee was dismissed on charges of bullying and intimidation of a work colleague. Whilst there was no issue of anonymisation of witnesses, the case is otherwise very similar to the present case, in that the employer took statements from witnesses (including the alleged victim), which were made available to the claimant, but refused her the opportunity to have the witnesses attend the

disciplinary hearing and be cross-examined; indeed the witnesses were reported to have refused to attend the hearing because they felt intimidated by the presence of the claimant.

59. The Tribunal found the dismissal to be fair, and in dismissing the claimant's appeal the EAT affirmed the position as held in **Ulsterbus**. Whilst Wall J acknowledged that there might exceptionally be circumstances where an opportunity for cross-examination of witnesses would be a necessary ingredient of a fair procedure, he went on to point out that a disciplinary hearing was different from a judicial hearing in which proof on the balance of probabilities is required; it was sufficient that there was a reasonable investigation, an honest belief on the part of the employer, and reasonable grounds for that belief, and that in practice it was very rare that there was cross-examination of witnesses in internal disciplinary hearing. This decision is binding on this Tribunal. Whilst each case must depend on its facts and the decision does not create an inflexible rule, unless there are material differences as to the circumstances, the case provides clear guidance as to how I should address the issue of failure to afford an opportunity to question witnesses 1 to 7.

60. Both represerntatives referred me to **Linfood Cash & Carry Ltd v Thomson [1989] ICR 521**, generally regarded as the leading case on anonymisation of witnesses. In that case the evidence used to dismiss three employees consisted solely of allegations by an anonymous informant, the employees therefore having no opportunity to test the informant's allegations; it is thus unsurprising that the dismissal was found to be unfair, and an appeal against that decision failed. The allegations by the anonymous informant in the present case caused the incidents at the party to be investigated, but it was the evidence of the seven witnesses, and the claimant, which were used as the basis for disciplinary action, not the original allegations. The **Linfood** case is thus readily distinguishable on its facts. It also however contains guidance on the use of evidence form anonymous informants; it was not suggested for

the claimant that any particular points in this guidance applied to the present case but had not been followed.

61. Mr Mochan referred me to a series of cases which confirm the proposition that where the reason for dismissal is such that the dismissal carries a particular stigma, or may lead to career loss, as where the reason for dismissal is criminal conduct or the employee is a member of a regulated profession and dismissal may lead to exclusion from his or her profession, a higher standard of investigation is expected of the employer.

62. Thus in **A v B [2003] IRLR 405**, a case also cited by Mr McKay**,** the EAT observed that in determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee, and that serious allegations of criminal misbehavior, where disputed, must always be the subject of the most careful conscientious investigation, focusing on evidence that would exculpate as well as inculpate the employee. The context of these remarks was that the employee, a residential social worker, had been dismissed for having an inappropriate relationship with a 14 year old female resident of the home, including introducing her to cannabis - an obviously very serious, and potentially career-ending allegation. It may be noted that one of the main issues was the employer's failure to disclose to the employee all of the witness statements obtained during the investigation; there was no issue of a disputed refusal to permit cross-examination of witnesses.

63. The other cases cited by Mr Mochan make essentially the same point; they are **Inner London Education Authority v Gravett [1988], IRLR 497**, **Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721** and **Tykocki v Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust UKEAT/0081/16.**

Conclusions

64. I approach the statutory question – did the respondent act reasonably or unreasonably – by reference to the **Burchell** test. The first question is accordingly whether the respondent, in the shape of Ms Russell, had a genuine belief that the respondent had committed the misconduct with which he was charged. I have no reason to doubt that she did genuinely have that belief. The contrary was indeed not suggested by Mr Mochan, and she was not challenged on her evidence that she had reached this conclusion.

65. The next question is whether she had reasonable grounds for that belief. I consider that she did. The very careful analysis of the witness evidence in Mr Ross's chart provided the basis for her findings. Whilst some of the witnesses were clearly unfavourably disposed to the claimant (Mr Rough, and his partner and girlfriend, witnesses 2 and 3, although the claimant himself argued that he and Mr Rough had settled their differences), the statements of the other witnesses, most at least of whom were sympathetic to the claimant, and admissions by the claimant himself, provided sufficient basis for the conclusions reached.

66. In particular the claimant himself had accepted that he had been involved in an altercation with Mr Rough, and that they had come 'head to head'. Whilst Mr Rough himself had not claimed to have been headbutted, there was sufficient evidence from other witnesses, including that Mr Rough had sustained a swollen nose, for Ms Russell to have reasonable grounds to conclude that there had indeed been a headbutting, and that the claimant was in this matter the aggressor (whatever may have been the provocation).

67. In relation to the allegations that the claimant verbally abused witness 2, there was supporting evidence from five witnesses, and also evidence, not contradicted by any of the witnesses, that the claimant had engaged in shouting threats to kill. It is not necessary for me to set out in more detail what is painstakingly analysed in Mr Ross's chart, and in the reasons given by Ms

Russell in her decision letter for finding each of the four charges made out: the documents speak for themselves, and were verified by the (largely unchallenged) evidence of Mr Ross and Ms Russell.

68. Turning next to whether there was a reasonable investigation, a number of points were raised by the claimant, but some at least on false premises, and some were not pursued. Thus the claimant complained that Mr Hay and Mr Lambie were not called as witnesses. The only reason for calling Mr Hay appeared to be to establish the identity of the anonymous informant; but that was irrelevant beyond having been the factual trigger for an investigation. It was not what the informant had said, but what the witnesses interviewed by Mr Ross said, which formed the basis of the disciplinary action. As for Mr Lambie, the claimant had misunderstood his email as eyewitness evidence of Mr Lambie himself, whereas in fact he had not been present and was only passing on what witness 5 had said in a telephone conversation. In both cases it was perfectly reasonable not to involve these individuals further.

69. Next the claimant complained that he was the only person who had been suspended and investigated for disciplinary offences. But that was simply incorrect, as the claimant knew by the time of his dismissal, if not earlier; the other two protagonists, Mr Rough and witness 2, had been suspended at Mr Ross's prompting, and were disciplined. I should add that the potential issue of disparity of treatment between the claimant and the other two was not pursued by Mr Mochan, and the documentation relating to the reasons for decisions taken in the other two cases was not before the tribunal, and nor was Ms Russell questioned about her reasons for less severe treatment of them. There is therefore no factual basis for criticism of the respondent's treatment of the claimant by reference to the other two cases.

70. A more serious issue is the complaint that Mr Ross was biased in the way he conducted the investigation. I accept that there is reason for concern that some of the questions posed to witnesses (such as 'did you see [the claimant] headbutt Christopher Rough?') could be regarded as leading questions, and

would rightly have been objected to if asked in this way in examination in chief in the Tribunal. However Mr Ross was not examining witnesses in a Tribunal, but carrying out an investigation into a number of allegations against the claimant, including that he had headbutted Mr Rough. It is a counsel of perfection to expect Mr Ross, who is not a lawyer, to avoid questions of this kind in attempting to get to the truth so far as he was able to do so. I am satisfied that Mr Ross approached the investigation with an open mind and no preconception as to the outcome, a point underlined by the fact that he set out his findings in a way which did not seek to pre-empt the decision whether to take disciplinary action against the claimant. Nor does the fact that he consulted the claimant's personnel record and referred in his report to the extant final written warning indicate bias; indeed it would have been a legitimate criticism of his report if it did not refer to a matter which would clearly be relevant if disciplinary proceedings were taken and resulted in an adverse finding.

71. The decision to confer anonymity on the witnesses was not, in my judgement, indicative of any prejudgment of the case. Mr Ross was confronted with witnesses who were clearly fearful of the consequences if they were known to have given evidence against the claimant. The respondent therefore had a duty, as part of its overall duty to take reasonable care for the health, safety and wellbeing of its employees, to respond to their concerns; Mr Ross was in the position of being the respondent's agent, and did what any reasonable manager would have done in the circumstances, namely finding out whether anonymity could be given. On confirmation that it could, he gave all the witnesses anonymity. Some employers might have limited the grant of anonymity to those witnesses who had expressed fear of the consequences of being identified, but I cannot say that no reasonable employer would have extended anonymity across the board.

72. The consequence of the witnesses having been granted anonymity was that they could not be called to the disciplinary hearing to be cross-examined. Following the **Ulsterbus** decision, it would require exceptional circumstances

for that to render the employer's conduct of the matter so procedurally unfair as to fall outwith the range of reasonable responses. So far from there being such exceptional circumstances, the evidence is that the claimant either did not challenge the lack of opportunity to put questions to the witnesses, or did not take up the opportunity offered.

73. No other issues were identified in Mr Mochan's submissions as supporting the claimant's case that the investigation was not reasonable. I find that it fell well within the bounds of reasonableness, applying the range of reasonable responses test mandated by the **Sainsburys** case. There were also no further issues raised as to the procedural fairness of the disciplinary hearing or the appeal. Therefore I find that the respondent held a genuine belief that the claimant had committed misconduct, had reasonable grounds for that belief, and had conducted a reasonable investigation.

74. The only other basis on which a dismissal might be found to be unfair is if the penalty imposed was disproportionate, and outwith the range of reasonable responses. In relation to this, the claimant did not seek to argue that the penalty would have been too severe if he had been guilty as charged. In particular he accepted that the conduct of which he was accused was serious misconduct impacting on the working environment, notwithstanding that it had occurred away from the workplace and not during working hours. Indeed he said in the course of the appeal, and accepted in evidence before the Tribunal, that he would have regarded the dismissal as fair if he felt he had had a fair hearing. I concur that the conduct of which he was found guilty was sufficiently serious that it was at least open to a reasonable employer to regard it as justifying dismissal, independently of the fact that he was on a final written warning the terms of which would have entitled the respondent to dismiss him for any act of misconduct.

75. The one issue it is not necessary, or in the circumstances appropriate, for me to decide is whether the claimant was in fact guilty as charged: whether he was the aggressor or the injured party. In an unfair dismissal case that is not

the question. It is a question which would have arisen in relation to remedy if I had found the dismissal to be unfair, but as I find that it was not unfair, I do not need to make any findings on this point, and I do not do so.

76. For the foregoing reasons I find that the claimant's dismissal was not unfair, and his claim accordingly fails and is dismissed.

Employment Judge: **P Wallington QC**
Date of Judgment: **16 March 2018**
Entered in Register: **22 March 2018**
and Copied to Parties