



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

10

Case No: 4107545/2017

Held at Glasgow on 1 and 2 October 2018

Employment Judge: Mr J D Young (sitting alone)

15

Robert Keill

Claimant:
Represented by:-
Mr P Harvey,
Solicitor

20

FedEx UK Limited

Respondent:
Represented by:-
Mr C Adjei, of Counsel

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Judgment of the Employment Tribunal is that the claimant was not unfairly or
wrongfully dismissed by the respondent and the claims are dismissed.

REASONS

1 The claimant presented a claim to the Employment Tribunal complaining that
he had been unfairly dismissed by the respondent. He sought compensation
35 by way of remedy. He also complained of wrongful dismissal and sought
payment in lieu of notice for that breach of contract.

E.T. Z4 (WR)

2 The respondent admitted dismissal but denied it was unfair or wrongful. They considered that they were entitled to summarily dismiss the claimant for gross misconduct and so no notice pay was due.

3 There was no dispute that the reason for dismissal related to misconduct
5 being one of the potentially fair reasons set out in Section 98 of the Employment Rights Act 1996 (ERA). The issues for the Tribunal related to the test set down in **British Home Stores Ltd v Burchell [1978] IRLR 379** namely:-

10 (a) Whether the respondent entertained a belief in the guilt of the claimant of misconduct.

(b) Were there reasonable grounds upon which to sustain that belief.

(c) At the stage at which the respondent formed that belief had the respondent carried as much investigation into the matter as was reasonable in all the circumstances.

15 (d) If the respondent met that test then was dismissal the appropriate sanction.

(e) If not, was there any issue of contributory fault on the part of the claimant.

20 (f) If the claimant was successful in his claim what was the appropriate compensation payable.

(g) Were the respondents in any event in breach of contract entitling the claimant to a payment in lieu of notice.

Documents

4 The parties had helpfully liaised in producing a Joint Inventory of Productions
25 for the hearing and certain productions were produced in the course of the hearing without objection. The productions were paginated 1 – 122. Reference in this decision to documents are to the paginated numbers.

The Hearing

- 5 At the hearing evidence was given by (i) Jason Plant, Transport Manager for the respondent who had been employed by them since August 2016. He was based in Newcastle; (ii) Raymond Masterson, Managing Director of Ground
5 Operations for the respondent's FedEx Express Business. He was based at Eurocentral, Motherwell and had been employed by the company since June 2017. Previously he had been employed for 27 years by TNT Express as General Operations Manager before that company was acquired by the respondent and (iii) the claimant.
- 10 6 From the documentary productions produced, and admissions made, and relevant evidence heard I was able to make findings in fact on the issues.

Findings in Fact

- 7 The respondent operates a transport business collecting and delivering parcels on behalf of third party customers on a national and international
15 basis. It operates in the United Kingdom from over 54 sites including depots at Holytown near Glasgow and Stoke.
- 8 Charnock Richard Service Station is used by the respondent as a driver changeover point. Those driving goods vehicles from Holytown would take a break at this service station whilst waiting for vehicles from the South
20 (normally Stoke) to arrive. These drivers would then drive vehicles North. The same system operated for vehicles coming South to North. Thus Stoke based drivers arrive on the northbound side of the motorway and go to the southbound side; and those from Holytown arrive on the southbound side go to the northbound side. They usually wait in vehicles for lorries to arrive to
25 effect an immediate changeover.
- 9 The claimant was employed by the respondent as an LGV driver at their depot in Holytown. He had continuous employment with them from 30 July 1993 until that employment was terminated on 11 August 2017. He drove heavy goods vehicles from Glasgow to Charnock Richard Services. The incident

which led to the dismissal of the claimant took place on 10 June 2017. Prior to that time the claimant had not been involved in disciplinary procedure.

The Respondent's procedures

- 10 The respondent have in place an "Acceptable Performance and Conduct
5 Procedure" (28A – F) which was applicable to the claimant. In terms of that
procedure prior to any formal action being taken an appropriate investigation
would be carried out to "establish all the facts concerning the alleged breach
of discipline by the employee". In some circumstances suspension on full pay
may be appropriate pending the outcome of the investigation. Thereafter an
10 employee would be invited to a disciplinary hearing on at least 24 hours'
notice at which time the allegation and copies of any relevant documentation
would be given to the employee. The employee had the right to be
accompanied at that hearing.
- 11 At the disciplinary hearing the respondent's concerns are presented to the
15 employee who is given the opportunity to respond. In the event of dispute as
to the facts the manager will take "the decision based on balance of probability
as to which version of events is true". Notes are taken of the disciplinary
hearing.
- 12 If an employee's misconduct warrants disciplinary action the manager has a
20 discretion as to sanction. Where there is a finding of gross misconduct
dismissal may be considered. Examples of gross misconduct are given which
include "acts or threats of physical violence against others".
- 13 Employees have the right of appeal against any imposed disciplinary action.

Incident with the Claimant

- 25 14 Around 2.20am on Saturday 10 June 2017 the claimant was involved in an
incident with a colleague named Alistair Peat at Charnock Richard Services.
As a result of that incident the claimant was suspended on 12 June 2017 and
invited to an investigation meeting on 15 June 2017. The purpose of the
meeting was to give the claimant the opportunity to "provide an explanation"

for the altercation which occurred. The claimant was advised that whilst suspended he should not enter the respondent's property or make contact with any member of its staff, customers, clients or agents without permission. Peter Scott, the respondent's Transport Manager was to conduct the investigation (33A – B).

15 In the course of that investigation information was gathered from:-

- (a) Chris Gore on 14 June 2017 who was an employee of the Shell Petrol Station at Charnock Richard Services. He provided a statement (34/36). He advised that he heard an argument on the forecourt around 2:20 hours on Saturday 10 June 2017. As that ensued "an Asian male (customer)" came into the shop and said "there's a fight going on and he has just headbutted him". Mr Gore went outside and saw two males on the ground "to the right of the main shop door". He states he saw "a bald headed male and another male who I know as Alistair on the floor. I know Alistair as a FedEx driver because he comes into the shop very regularly. I saw that the other male who was wearing a black jacket and had a bald head was on top of Alistair and had his hands on his head/face area. I heard the male shouting "are you done now, are you fucking done now?" ". He states that he went over to the males and tapped the "aggressor on the shoulder and told him he couldn't do that. I pulled the male's top slightly to get him to get off Alistair". He noted that Alistair had sustained a cut to his nose that was bleeding and one of his eyes had swollen up. He states that Alistair went to clean himself up and he went to check on the "other driver" who appeared "quite angry and agitated". He could see no injury on that driver. He asked if he wanted the police or ambulance and was told it was "all sorted". Mr Gore returned to the shop to check on Alistair and after a few minutes the other driver came into the shop from the forecourt and walked towards Alistair. He shouted "make sure you tell them you called me son". That driver then walked out of the shop to his van and drove off. A short time later the police and an

ambulance did arrive. Alistair was checked out and he left. He knew both were FedEx drivers as they were regular visitors to the petrol station.

5 (b) Alistair Peat attended a meeting with Peter Scott. Notes of that meeting were taken (38/42). He also provided a witness statement (43/45). He advised that he had sustained injury at the incident. He explained that the system of changeover of drivers from Northbound to Southbound involved taking a car on the Northbound service area to the Southbound or vice versa. On this occasion he proceeded to the Northbound area in a car and parked. He then walked to the petrol station where the claimant stood. He stated the claimant was very aggressive. The issue appeared to be that the claimant felt Alistair Peat was not acting fairly in the use of cars made available for drivers to get from one service area to the other. The claimant appeared to consider that Mr Peat was acting as if he was entitled to his own private vehicle to the exclusion of others. Mr Peat maintained that the claimant continued to be aggressive and said "let's go round the side and sort this out" but at that point he did not think violence would occur. He stated that when they got to the side of the building he did not "raise my hand" but that the claimant said "we will sort this now, ripped his hi-vis vest off and bang I ended up on the ground. He stuck the head on me. My hands were at my side he was the aggressor I was not. I landed on my side he was on top of me threatening me shouting and he was pulled off me by a worker at Charnock." He stated Chris Gore had helped him to the service station building and that he had phoned "Rob" and at that point the claimant came into the petrol station and said "if you hadn't called me son I wouldn't have butted you". He thought that "Rob" must have heard that on the phone. He stated that while he was at the petrol station waiting on an ambulance which had been called "a gentleman approached and said witnessed the whole thing and nothing to do with me, it was the other guy". He stated that person had given him his business card and said "if I need a witness he

10

15

20

25

30

would no problem". In the witness statement prepared by Alistair Peat and handed to the investigating officer the name of the witness was given together with his address and telephone both landline and mobile. Mr Peat stated he had attended casualty on 12 June 2017 where his injuries were x-rayed but the swelling did not allow for accurate results. As well as injuries to his face he stated he had injuries to his left wrist on impact with the ground.

- (c) The claimant provided information to Peter Scott at a meeting on 12 June 2017 in terms of the notes taken of that meeting (47/51). He has also provided a statement on the incident on 10 June 2017 (32/33). The concern of the claimant on 10 June was that Alistair Peat was not being considerate or fair in sharing a car with other drivers. That would mean that other drivers require to sit four in a car or wait outside while Alistair Peat would secure a car for himself. He took issue with Mr Peat on this. An argument ensued and continued at the side of the building. The claimant's position was that Alistair Peat grabbed hold of him and pulled him forward. As a result the claimant fell forward and Mr Peat fell backwards over a grit bin at the side of the petrol station. It was in that circumstance that injury was sustained. He stated that both men were on the ground and Mr Peat was "elbowing me trying to get me, shouting when he gets up this won't be finished, he flipped over, he was shouting I put my arm around him to calm him down and realised his face was bleeding." The claimant advised he restrained Mr Peat and told him that he would get up if he calmed down. At that point the service station manager came out and took Mr Peat inside. He stated he went into the service station about 15 minutes later and noted that Mr Peat was "on the phone reporting to Stoke". He stated that there was no punching and that "two of us went over the grit bin, no punching, I'm surprised there was even blood." He stated that he had no injuries other than being "winded when he fell". He also advised that many drivers were upset with Alistair Peat because he intimidated them. He referred to an incident when keys

were thrown at a driver called George Cummings and there were other incidents on Mr Peat being difficult with drivers.

(d) Peter Dove provided a statement of 17 June 2017 (52). However he stated that by the time he had arrived at the service station the incident was over and the "police and ambulance were on site".

(e) A statement from Howard Rowe (53) advised that he was at the service station waiting on the northbound area. He stated there was an "altercation between Rab and Alistair outside the petrol garage". This was over Alistair Peat using one car for himself without consideration to other drivers as there were "five people in one car" and "the second card could not be found as usual it would disappear with Alistair and turn up just as his truck would turn up". He stated that he saw "Alistair arguing with Rab in an aggressive manner and point at Rab with his finger". He did not wish to get involved. He then "heard Alistair say to Rab "do you know who I am" in an extremely provocative manner. The next thing they were down the side of the garage on the ground. I did not see who hit who but Alistair was the aggressor. The garage attendant came out to separate them and took Alistair into the garage". He advised that he himself had suffered from the aggressive manner of Alistair and that he had a "dislike for every driver and tried to bully them". He stated he was an agency driver and after that incident he said he couldn't work in the environment because of "Alistair aggressive and intimidation (bullying attitude)". However the agency persuaded him to return to the respondent and report the matter to management. A second interview took place with Mr Rowe on 13 June 2017 (54). He was asked why he wanted to leave the respondent and explained he felt that Alistair Peat had been intimidating. He confirmed he could not remember anything further from the night in question and just "heard them arguing and they went around the corner where Rab ended up on top of Alistair, I don't know how".

5 (f) An e-mail of 21 June 2017 was received from Sid Islam who used the e-mail address Sidislamlsc@googlemail.com (59) This was addressed to Peter Scott. His statement was that he had stopped at the service station for some food around 2.30am and could see “some sort of commotion occurring between the two gentlemen in question (Rob Keill and Alistair Peat)”. He then heard shouting once inside the shop and went outside to investigate. He followed them around the side of the service station and noticed “Rob Keill undoing his hi-vis jacket and go into a tussle with Alistair. Suddenly Rob Keill headbutted Alistair Peat whom fell on the floor and Rob continued to get on top and punch Alistair. I immediately ran into the service station calling for help as being a small person I didn’t want to risk taking a beating myself. The service station assistant came outside and separated the two and took Alistair in for some first aid treatment”. The claimant left once his truck arrived and then Mr Islam went into the shop to see if “Alistair was okay, exchanged details and took some pictures for proof then carried on my journey”. He stated “if you need anything else please don’t hesitate to contact me.”

20 (g) Ian McRae provided a statement (55/58). He was critical of Alistair Peat in the use of cars at the service station as he “was to have a car to himself whilst other drivers 4-6 were to squeeze into the one car”. He considered that Mr Peat was trying to “stamp his authority over drivers by demanding certain cars and intimidating drivers and building unnecessary tension”. He narrated other events involving Mr Peat and use of cars and his attitude towards other drivers. He stated that he hoped that “by myself raising these events I can give a better picture and understanding of the aggressiveness, manipulation and intimidation put on people by Alistair Peat”.

30 16 In a further letter of 4 July 2017 the claimant was advised that the investigation was “still ongoing” and he was invited to an additional investigation meeting for “further clarity” on some points arising on 7 July 2017 (60/61). Notes of

that meeting were taken (63/64). At that time the claimant advised that there was a heated conversation about Mr Peat's use of car and that to get out of the way of customers they went "away from the main door about 10 to 12 feet away less than a minute away. It was not on a back alley or anything. We were moving to make way for customers out of the vicinity of the building.". At that point he states that discussion "got more heated. He pulled me over and we lost balance and fell. I am sorry that he got injured. It was not him pulling me and me pulling him." He confirmed that after 10 minutes or so he had gone to see if Alistair "was okay to make the journey but Alastair was on the phone". He was concerned about many others in the organisation knowing about the incident and pictures were being shared of injuries. Also one person had told the claimant that he had been assaulted by Alistair Peat.

Further witness statements were then taken from:-

(a) Wayne Carnwell (65) on 12 July 2017 who did not witness the incident and "only spoke to Robert to exchange the vehicle, nothing was mentioned about anything that had gone on".

(b) Iain McRae (66) on 14 July 2017 by way of second interview who confirmed that in his view Mr Peat was quite threatening on some occasions to the point of being intimidating.

(c) Alistair Peat 14 July 2017 by way of second interview (68/74). He maintained his position that the claimant took an aggressive attitude towards him at the service station regarding the use of cars. There was a discussion as to whether there was camera coverage of the area concerned. Mr Peat stated that "if there was going to have been any violence I would go into the trees not in the full view of camera city. It was brought to my attention from other people that they think he took me round the corner to be out of the view of the cameras". He stated he was not aware of anything that he could have fallen over in the area. Mr Peat was also questioned over other issues which had arisen in the investigation as regards allegations of an intimidating and threatening attitude. A discussion ensued on

these matters with Mr Peat questioning who had made these allegations and what evidence was available. He stated that this “had become a witch-hunt” and continued to ask who was making allegations against him (70/74).

- 5 (d) Rob Fissasegola. He was the person who was on the phone to Alistair Peat when the claimant returned to the inside of the building. He stated that he did not “hear anything that R Keill said he had already left in the vehicle back to area 60”.

Disciplinary Hearing

- 10 18 The claimant was then invited by letter dated 27 July 2017 to a formal disciplinary meeting to take place on 3 August 2017 (76/77). At that time he was advised that there would be discussed alleged gross misconduct in relation to the events at the service station on 10 June 2017. The claimant was provided with all the statements and information that had been gleaned
15 in the course of the investigation. The disciplinary meeting was to be taken by Jason Plant, the Transport Operations Manager.

- 19 At the disciplinary hearing the claimant was accompanied by Thomas McDowall. Brief notes of that hearing were produced (79/80). In the course of the hearing the claimant reiterated his position that Alistair Peat had “pulled
20 me and we lost balance, landing on a grit bin. I was on top of him to restrain him as he was trying to elbow me, and that was the end of the incident when he stopped”. He had given the issue of camera coverage no thought. He stated “I thought there would be cameras there”.

- 20 On the statement of Mr Islam he stated that he did not recall taking off his hi-
25 vis jacket and there were no punches thrown. He stated he had talked to Mr Islam about half an hour before the incident and well before 2.30am when Mr Islam said he arrived at the service station. He indicated he had talked to Mr Islam about his private licence plate and food available at the services. He stated that on Alistair Peat’s statement there was noted “Mr Islam’s telephone

numbers and must have been in contact with him. Mr Islam asked if I was okay at the time.”

21 On the statement by Chris Gore he stated he had no recollection of Mr Gore tapping him on the shoulder. He had apologised to him about the situation.

5 22 He did not remember Mr Peat calling him “son in a demeaning way” and said that “if he did it would not antagonise me. It’s not a big deal.”

23 He denied causing Mr Peat any injury. He was concerned that Mr Peat was breaching the terms of any suspension as he had been showing photographs of injuries to other employees. He repeated that other drivers were being
10 intimidated.

24 Mr Plant was aware of a grievance which had been lodged by Mr Cummings alleging that Alistair Peat had thrown keys at him in a vehicle .He advised that incident had taken place approximately one year prior to the hearing and mediation had been recommended between the two individuals., However
15 they had not agreed to mediation and the outcome was that the grievance was not upheld due to a lack of evidence in respect of the allegation made.

25 Mr Plant was unaware of how the statement from Mr Islam had been received. It was part of the pack of information presented to him in relation to the disciplinary hearing. He had attempted to contact Mr Islam prior to making a
20 decision. He had called him and received no response. He had left a voicemail message. He had also e-mailed Mr Islam on 4 August 2017 (117) asking:-

“● you stated that you saw Rob Keill headbutt Alistair Peat, could this have been mistaken with Rob and Alistair falling over together after
25 Alistair may have pulled Rob towards him?

- You also said that Rob continued to punch Alistair when on top of him, was this clear to see, and did Alistair retaliate in any way by elbowing or punching etc.?

- Has either of the two drivers been in touch since the incident and if so what has been discussed.”

26 He received no response to that e-mail or voicemail message and so he had no further information on those enquiries. He did regard the evidence of Mr Islam to be “key”. As he had not received a response to his enquiry he
5 advised he required to make a decision on the information available. Mr Plant did not know if Alistair Peat had ever been in touch with Mr Islam. He did not think Mr Plant had been asked that question.

27 Mr Plant made no enquiry with the manager of the service station or other
10 investigation as to whether there was any CCTV footage of the area in question. He had no knowledge of any outcome of police enquiries.

28 Mr Plant decided to dismiss the claimant. He advised him of that decision by letter of 9 August 2017 (81/82). He considered the actions amounted to gross misconduct. He advised that the reason for his decision was:-

15 “• You admitted to being involved in a heated argument on 10 June 2017 at Charnock Richards Services with another FedEx employee, whilst representing FedEx in the course of your duties. The heated argument was also witnessed by the independent witness.

• It is my belief based on evidence available that this resulted in you acting in physical violence against another FedEx employee, namely headbutting the individual.
20

• This incident occurred in a public area at Charnock Richards Services and we are in receipt of a witness statement from a member of the public and an employee of Shell Garage, therefore I find your actions have harmed the organisation’s reputation.
25

- For the reasons detailed above I find your actions on 10 June 2017 have resulted in a serious breach of trust and confidence.”

29 Mr Plant advised he had decided to summarily dismiss effective from 11 August 2017 without entitlement to notice pay. The appellant was advised of his right of appeal.

30 Mr Plant had also been dealing with disciplinary measures against Mr Peat in
5 tandem. No papers were produced in respect of that enquiry. The outcome was that Mr Peat was also dismissed. Mr Plant considered that there were acts of aggression from both the individuals concerned and these actions were not acceptable.

Appeal

10 31 The claimant appealed the decision to dismiss. He instructed solicitors in the matter. The grounds of appeal formed:-

(1) Letter from the claimant (84A – B) which indicated that the punishment was too severe and inconsistent with similar events that had taken place at Stoke. He also indicated that the decision had
15 been made on the basis of the statement from Mr Islam “but no consideration to Mr Rowe’s statement about Mr Peat being the aggressor.” He complained that he had not been allowed to contact “Mr Peat’s witnesses” when suspended while Mr Peat had “blatantly disregarded the investigation procedure” by showing photos and
20 commenting on the incident. He wanted to know “how many times Mr Peat contacted Mr Islam to verify his statement.” He did not believe Mr Islam could have heard or seen anything from his stated viewpoint. He considered that his 24 year service with exemplary discipline record had not been taken into account over “nothing
25 more than an accident.”

(2) A summary of points of appeal (83/84) were submitted by the solicitor for the claimant. Those grounds were essentially:-

(a) That the instigator of the incident was Mr Peat and not the claimant. The e-mail sent to the respondents from Mr
30 Islam was “on the bidding of Mr Peat” and was not properly

investigated. The respondent should have enquired of Mr Islam to obtain further and clearer information. It was understood that the e-mail from Islam was obtained after contact with Mr Peat.

5 (b) There was a failure to carry out a reasonable investigation and no reasonable grounds to conclude gross misconduct. The incident occurred at the side of the Shell station late at night and could not have been witnessed to any significant extent. It could not be concluded that damage
10 was suffered to the reputation of the respondent.

(c) There was a failure to consider the disciplinary record of the claimant. The respondent failed to take into account the evidence that Mr Peat was the aggressor on other occasions in considering the circumstances.

15 The solicitors for the claimant had also attempted to contact Mr Islam by e-mail (84a). No response was obtained from the e-mail address utilised which was sidislamisc@googlemail.com.

32 The claimant's appeal was heard by Raymond Masterson on 1 September 2017. The claimant was accompanied. The claimant produced a letter for
20 the appeal hearing of points he wished taken into account (108/111). Notes were taken of the meeting and a summary produced (85 – 106).

33 The notes of the appeal indicate the following issues were covered in discussion:-

25 (a) That the punishment was too severe and there was inconsistency in approach given Mr Peat's actions.

(b) That the claimant did not consider Mr Islam's statement accurate. He confirmed he had spoken to Mr Islam prior to the incident and that conversation was amicable. He thought that Mr Peat had "coerced him" into the statement and "called him numerous times",

and Mr Rowes' statement "ignored, by passed" and "Mr Islam wasn't even there." The claimant also advised that he had been trying to "contact him (Mr Islam) for 2.5 weeks and can't by e-mail, call. How can my solicitor get an unbiased view?. Mr Peat had his mobile, everything we haven't had a chance to ask him why he gave that statement."

(c) The claimant did not believe his 24 years' service had been taken into account.

(d) He handed to Mr Masterson a letter he had received from George Cummings regarding an "unprovoked assault" and experience with Mr Peat as evidence of inconsistency (113/116) He also stated that other drivers who had not been dealt with in the same way. He referred to two ANC drivers and another "one was the VMUS" (Vehicle Maintenance Unit and and Shunter).

Mr Masterson advised the claimant that he would wish to make an investigation into the points raised and adjourned the appeal hearing at that point. He then made further investigation by speaking to Jason Plant to understand why he had made his decision to dismiss. Notes were taken of that meeting. It covered both the reasons for dismissal of the claimant and Alistair Peat and was a critical examination of the position (92/104).

Mr Masterson also visited the Charnock Richards Service station to view the site. He spoke with an employee at the Shell garage and asked if there was any CCTV footage available. He was told that there was no coverage in the area in which the incident took place. There was coverage at the door of the shop but that had been recorded over by the stage Mr Masterson made his enquiry.

He also made a call to Mr Islam but received no response and reviewed the two incidents which the claimant had said were similar to his own case.

At the same time he interviewed Mr Peat in relation to his appeal against dismissal. Mr Masterson advised that the appeal from Mr Peat was heard on

the same day (1 September 2017) as that of the claimant. No notes of that discussion or other documentation was produced.

38 A further meeting with the claimant was arranged for 8 September 2017 after those further enquiries had been made by Mr Masterson. At that time he told
5 the claimant that his appeal had been unsuccessful and gave him reasons. Those reasons formed the basis of his subsequent letter of 22 September 2017 to the claimant (105/106).

39 In that letter he advised that he had considered other cases within the respondent operation and in respect to "one specific case at Parkhouse" he
10 agreed that the decision involving the claimant was "inconsistent with that outcome however that decision was a number of years ago, is not binding and other more consistent decisions had been made since." He advised that the decision did not reflect the written policies or expectation of employees that physical violence was not acceptable.

15 40 Mr Masterson was also satisfied that there were consistent statements amongst Mr Islam, Mr Gore and Mr Peat and considered that the statement from Mr Rowe was "deliberately evasive". He considered there was sufficient evidence to reach a decision that there was a headbutt on Alistair Peat whose injuries were consistent with that action. He did not believe that had both
20 fallen to the ground as suggested by the claimant that Alistair Peat would have sustained injuries to the front of his face and to the extent that was evident. He thought Mr Rowe had seen the event but had chosen not to provide a full and thorough account to protect the claimant.

41 He considered that physical assault was unacceptable and could not be
25 justified. He considered that dismissal was a reasonable outcome in the circumstances.

Events after termination

42 In cross-examination the claimant advised that he had e-mailed Mr Islam on 29 September 2017 (112) and had received a response. The e-mail address
30 used was Sidislam@googlemail.com. He stated that Mr Islam had phoned

him back “in 5 minutes” and they had talked of the incident. The claimant stated he asked Mr Islam why he had not answered any previous calls from FedEx and stated that they had not been in touch with him. He had put his position to Mr Islam and Mr Islam had said that it “could have happened that way but would not be supplying any other statement”. The claimant was asked if he had advised his solicitor of that contact and stated “yes”. He did not know why his solicitor had not indicated that to the witnesses of FedEx and advised that he was simply “answering questions you were asking me”. The claimant denied that in truth there was no response from Mr Islam.

After termination the claimant was successful in obtaining agency work with W H Malcolm & Co before becoming permanently employed. It was agreed that his basic award if successful would amount to 20 x £489 and that loss of statutory rights would amount to £500.

On compensatory award there was calculated an amount of £470 representing loss of wages in the week commencing 11 August 2017 and a further £166.95 in the week commencing 19 August 2018 as part of that week was spent in training. He had taken a week’s holiday in the week commencing 27 August 2018 as that was pre-arranged. His claim in respect of holiday pay for that week which he would have obtained had he been employed by the respondent was put at £470.

Submissions

I was grateful for the full submissions that were made by the respective representatives. No discourtesy is intended in this summary of the submissions made.

For the respondent

It was submitted that misconduct was a reason for dismissal and there was no suggestion that the respondents did not have a reasonable belief that misconduct had occurred. That had not been challenged.

47 There were reasonable grounds to sustain that belief because:-

- (a) It was clear from the claimant's first statement that he is annoyed about the situation with the cars at Charnock Richards Service station. He is the one who is angry.
- 5 (b) The independent evidence of Mr Islam who had no "axe to grind" was clear. There was no evidence that Peat had pressurised Islam. He was an independent witness who saw the headbutt on Peat.
- (c) Mr Gore who worked for Shell had no reason to fabricate. There was no basis for the claimant to say that he was a friend of Peat. The
10 evidence of Gore was not challenged by the claimant. While he did not say there was a headbutt he states the claimant was on top of Peat with his hands on his head/face which was inconsistent with the claimant's position. The "Gore" evidence was close to the Islam account of the events. It was Gore who pulled the claimant off Peat and that was consistent with the Islam statement. Rowe also stated
15 that. The claimant says that he was standing up when Mr Gore arrived in contradiction to what they stated. The claimant says he apologised to Mr Gore but Mr Gore did not state there was any apology and neither did Mr Islam.
- 20 (d) The claimant's position on the injury seemed to change from it being caused by Peat hitting a grit bin or banged his head on the wall or because he landed on top of Mr Peat. The respondent was entitled to look at the injury and conclude that it was consistent with a clash of heads. Gore also talked of a further incident inside the Shell
25 outlet with the claimant showing continued anger at Peat.
- (e) There was no history of aggression between Peat and the claimant. The claimant relied on others who provided statements but there was no detail of any actual or threatened violence. There was an incident with Cummings but that had never been established as fault
30 by Peat.

48 There had been much investigation carried out as was reasonable in the circumstances. The e-mail from Islam to the investigating officer was part of the investigation. There was no reason why Mr Islam would lie to support Mr Peat when he had had an amicable conversation with the claimant.

5 49 Attempts were made to contact Mr Islam which was a reasonable step to take but without success. The claimant had accepted that there was no evidence to support the proposition that Peat had contacted Islam.

50 In the absence of any response from Mr Islam then the respondents were perfectly entitled to consider the evidence which was available and the
10 evidence to be preferred was that of Gore and Islam. Mr Rowe did not appear to see the incident according to his statement.

51 In the appeal process Mr Masterson had probed Mr Plant about his concerns but that had not undermined the reasons for dismissal. No coverage was available of the area where the two men had come together. An enquiry
15 about the CCTV would therefore not have helped. The only evidence would have been one of a heated discussion outside the shop and that was not disputed.

52 Mr Masterson had to deal with each appeal. He made a conclusion that the claimant was the aggressor and that the headbutt had taken place and so did
20 not uphold his appeal. He took a different position with Mr Peat as he considered that he had been the victim of the assault. He had sought to deal with matters fairly.

53 The sanction was also within the range of reasonable responses. The witnesses all knew that these individuals were FedEx drivers. While the
25 claimant had long service the gravity of the offence outweighed that consideration.

54 Mr Masterson had investigated the allegations involving VMUS. He acknowledged that that decision was poor. It had taken place sometime ago and there had been other incidents where dismissal had been effected. One
30 bad outlying decision did not support inconsistency.

55 So far as the claim for wrongful dismissal was concerned reliance was on the
same facts. The credibility of the claimant was damaged by the assertion that
he had contacted Islam. The e-mail address he used was different from that
which contained Mr Islam's statement. That claim had not been put to the
5 respondent's witnesses.

56 If there was a finding of unfair dismissal then the basic award and amount for
loss of statutory rights were accepted.

57 However it was just and equitable to reduce both basic and compensatory
amounts to nil in light of the behaviour of the claimant and the gravity of the
10 offence.

58 Also even if there was an unfair process to any extent then a fair process
would still have meant dismissal and so there should be a **Polkey** reduction
of 100%.

For the claimant

15 59 It was agreed that the reason for dismissal in this case was misconduct. It
was not disputed that the respondent had a genuine belief in that misconduct.

60 However a challenge was made that there were reasonable grounds upon
which to sustain that belief because:-

(a) It did not follow that because the claimant was irritated about Mr
20 Peat's use of cars that Mr Peat did not become heated in the
discussion that took place and capable of aggression.

(b) The claimant was not indicating that Mr Islam had told lies but simply
he was mistaken in what he had seen. Albeit Mr Plant and Mr
Masterson wanted to question Mr Islam further they had not been
25 able to do so. They had a very limited report from Islam and that
required to be taken into account when considering if there were
reasonable grounds to sustain a belief. The only person who said
there was a headbutt at 2.30am, in the dark, and with a viewpoint
from the rear was Mr Islam. The claimant had his back to Mr Islam

who had no clear view of what took place. It was equally credible that Peat had pulled the claimant forward and they had tumbled over and that Peat had sustained injury in that way.

5 (c) Mr Gore indicated that Mr Peat was often in the service area. The shout that Gore recounts is different to that given by Mr Peat. The account given by Gore was not entirely unsupportive of the claimant. Mr Peat had indicated that the person he was speaking to on the phone in the shop (Rob Fissasegola) would have heard the claimant shout. However Mr Fissasegola states he heard nothing. Indeed
10 his statement was that the claimant had left the store by the time he got a call from Peat which would suggest that there was a lot more said between Peat and Fissasegola than Peat would admit.

(d) Mr Peat did not say that the claimant's hands were at his face. That was an allegation by Mr Gore but there was a tussle on the ground
15 and inevitable confusion and it would be unsafe to base a genuine belief on that evidence.

(e) The injuries were not only consistent with a headbutt. They were also consistent with a fall against a wall or a grit bin.

(f) The intimidating behaviour by Mr Peat was clear from the evidence
20 of Mr McRae and Cummings. There was also evidence of his aggression in the interview with Mr Plant. His whole manner ran consistent with him being of an aggressive and bullying nature.

61 It was submitted that the investigation was not reasonable. The circumstances under which the e-mail of Islam was sent to Mr Scott had not
25 been explained. It was credible to think that Peat must have contacted or sourced Islam's account and that went to the whole issue of the reasonableness of the investigation.

62 There should have been more enquiry of Islam. Plant had been able to leave a message on his voicemail and yet Mr Masterson had not. If Mr Plant was
30 able to do so then why was Mr Masterson not able to do so.

- 63 The enquiry about CCTV was late in the day and too late to get any coverage from the front of the shop or inside the shop which could have been very relevant. It was not good enough for the respondents to say that they only made enquiries some months later to find that it had been overwritten.
- 5 64 Also Mr Rowe had given a statement but it seemed that there was a determination not to believe what he said. There was no interview with Mr Rowe it would appear. Reliance was placed upon what Peat had said at appeal but why should Rowe not be interviewed also to find out if he was telling the truth. The respondents certainly closed their eyes to that account.
- 10 65 In those circumstances there was no reasonable grounds to sustain the belief.
- 66 It was not reasonable to dismiss given the uncertainties and the circumstances of the evidence of Islam and so the dismissal was unfair.
- 67 Wrongful dismissal was also established for the same reasons. The blood on the jacket was neutral. It was not disputed that an injury had occurred. It did not mean there was a headbutt. The version of events put forward by the claimant was equally consistent.
- 15
- 68 So far as any reductions for contributory fault were concerned if the dismissal was unfair it was hard to see why there should be contributory fault.

20

Conclusions

- 69 In the submissions made there was no dispute on the law and the tests that should be applied. Section 98 of the Employment Rights Act 1996 (ERA) sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages, namely (1) 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) of ERA and (2) if the employer is successful at the first
- 25

stage, the Tribunal must then determine whether the dismissal was unfair or fair under Section 98(4). As is well known, the determination of that question:-

“(a) Depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and;

(b) shall be determined in accordance with equity and the substantial merits of the case.”

70 Of the six potentially fair reasons for dismissal set out at Section 98 of ERA
10 one is a reason related to the conduct of the employee and it is this reason which is relied upon by the respondents in this case.

71 The employer does not have to prove that it actually did justify the dismissal
because that is a matter for the Tribunal to assess when considering the
question of reasonableness. At this stage the burden of proof is not a heavy
15 one. A “reason for dismissal” has been described as a “set of facts known to the employer or it may be of beliefs held by him which case him to dismiss the employee” – *Abernethy v Mott Hay and Anderson [1974] ICR 323*

72 Once a potentially fair reason for dismissal is shown then the Tribunal must
be satisfied that in all the circumstances the employer was actually justified
20 in dismissing for that reason. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

73 The Tribunal requires to be mindful of the fact that it must not substitute its
own decision for that of the employer in this respect. Rather it must decide
25 whether the employer’s response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case (*Iceland Frozen Foods Limited v Jones [1982] IRLR 439*). In practice this means that in a given set of circumstances one employer may decide that dismissal is the appropriate response, while another employer may decide in
30 the same circumstances that a lesser penalty is appropriate. Both of these

decisions may be responses which fall within the band of reasonable responses in the circumstances of a case.

74 In a case where misconduct is relied upon as a reason for dismissal then it is necessary to bear in mind the test set out by the EAT in *British Home Stores v Burchell [1978] IRLR 379* with regard to the approach to be taken in considering the terms of Section 98(4) of ERA:-

“What the Tribunal have to decide every time is broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question (usually, though not necessarily dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief, that the employers did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think 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, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating these three matters we think who must not be examined further. It is not relevant as we think that the Tribunal would itself have shared that view in those circumstances.”

75 The foregoing classic guidance has stood the test of time and was endorsed and helpfully summarised by Mummery LJ in *London Ambulance Service NHS Trust v Small [2009] IRLR 536* where he said that the essential terms of enquiry for employment Tribunals in such cases are whether in all the circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct

of a dismissal in those respects, the Tribunal then had to decide whether the dismissal of the employee was a reasonable response to the misconduct.

76 Additionally a Tribunal must not substitute their decision as to what was a right course to adopt for that of the employer not only in respect of the decision to dismiss but also in relation to the investigative process. The Tribunal are not conducting a re-hearing of the merits or an appeal against the decision to dismiss. The focus must therefore be on what the employers did and whether what they decided following an adequate investigation fell within the band of reasonable responses which a reasonable employer might have adopted. 5
10 The Tribunal should not “descend into the arena” – *Rhonda Cyon Taff County Borough Council v Close* [2008] 1283.

77 Also in determining the reasonableness of an employer’s decision to dismiss the Tribunal may only take account of those facts that were known to the employer at the time of the dismissal – *W Devis and Sons Limited v Atkins* [1977] ICR 662. 15

78 Both the ACAs Code of practice on disciplinary and grievance issues as well as an employer’s own internal policies and procedures would be considered by a Tribunal in considering the fairness of a dismissal. Again however when assessing whether a reasonable procedure has been adopted Tribunals should use the range of reasonable responses test – *J Sainsbury’s Plc v Hitt* [2003] ICR 111. 20

79 Single breaches of a company rules may found a fair dismissal. This was the case in *The Post Office t/a Royal Mail v Gallagher* EAT/21/99 where an employee was dismissed for a first offence after 12 years of blameless conduct and the dismissal held to be fair. Also in *A H Pharmaceuticals v Carmichael* EAT/0325/03 the employee was found to have been fairly dismissed for breaching company rules and leaving drugs in his delivery van overnight. The EAT commented:- 25

“In any particular case exceptions can be imagined where for example the penalty for dismissal might not be imposed, but equally in our 30

Judgment, when a breach of a necessarily straight rule has been properly proved, exceptional service, previous long service and/or previous good conduct, may properly not be considered sufficient to reduce the penalty of dismissal.”

- 5 80 This all means that an employer need not have conclusive direct proof of an employee’s misconduct. Only a genuine and reasonable belief reasonably tested.

Reason for Dismissal

- 10 81 There was no dispute that the reason for dismissal related to the conduct of the employee. It was also accepted that in this case Mr Plant and Mr Masterson of the respondent had a genuine belief in the guilt of the claimant. The issue was whether they carried out sufficient investigation and had reasonable grounds to sustain that belief.

- 15 82 There was no doubt that there was a heated discussion between the claimant and Mr Peat at the service station. This related to the use by Mr Peat of the cars which were available to take drivers from one area of the service station to another depending on whether they were set to drive north or south. The claimant was irritated that Mr Peat “hogged” one of the cars to himself so that he could wait in comfort while others were crammed into a single vehicle or had to wait on the forecourt. He felt that was unfair and discourteous. Perhaps it was, but it would appear that he was in an agitated state by the time Mr Peat arrived at the service area around 2.30am on the morning of 10 June 2017.

- 25 83 It seemed that from there words were exchanged and the argument escalated. It would be hard to say that Mr Peat was the entirely innocent party in this situation. There was evidence being presented to the respondent of Mr Peat’s behaviour with the cars that could be a source of irritation to any driver. However the respondent would be reasonable in accepting that the initial aggression came from the claimant.

84 From the evidence there is some dispute about who it was who suggested
the argument continued around the side of the service station. The claimant
in his initial statement of 10 June 2017 (32) states Mr Peat suggested that
whereas Mr Peat says it was the claimant who made the suggestion (39). In
5 any event neither appeared reluctant to continue the argument at the side of
the building.

85 The respondent were faced with a position where claimant and Mr Peat
essentially blamed each other. The claimant maintained that Mr Peat
suddenly pulled him towards him and they both tumbled and as that occurred
10 Mr Peat either hit his head on a grit bin or the wall or the claimant landed on
top of him in a way that he sustained injury. The position of Mr Peat was that
the claimant suddenly headbutted him and put him to the ground.

86 There is no suggestion that there were any other witnesses to this incident
other than those questioned by the respondent. Those in the immediate
15 vicinity appeared to be Mr Islam; Mr Gore and Howard Rowe.

87 It would not appear that Mr Gore had any reason to be biased or to
manufacture a statement. His statement bears to be one that would be
presented to the police (34/36) and is quite fulsome. He recounts an
argument and in particular states that a customer comes into the shop and
20 said "there is a fight going on and he's just headbutted him". Mr Gore
immediately goes outside to see Mr Peat and the claimant "on the floor". He
states the claimant "was on top of Alistair and had his hands on his head/face
area". He also says that he heard a shout coming from the claimant of "are
you done now, are you fucking done now?" He says that he "tapped the
25 aggressor on the shoulder and pulled his top to take him off Mr Peat."

88 He also speaks to the injuries being a cut to the nose of Mr Peat and swelling
to his eye. He recounts that the claimant came into the shop after the event
in a way that he thought meant he was going to start fighting and shouted
"make sure you tell them you called me son".

89 There appeared to be no compelling circumstances to consider why that statement was manufactured to favour Mr Peat or had been prepared on the orders or instructions of Mr Peat. Crucially in that statement Mr Gore talks of a customer coming into the shop stating that he has seen a fight and a person
5 being "headbutted". The only person that could have been "headbutted" would be Mr Peat as there were no injuries on the claimant and he makes no allegation that he was assaulted in that way.

90 The statement from Mr Islam is short and is contained within the e-mail dated 21 June 2017 some 11 days after the incident. It is not known how it is that
10 the investigating officer came by this statement. He was not called to give evidence and so there is no information as to how it was Mr Islam came to know Peter Scott's e-mail address and that he was seeking a statement. There was a suggestion from the claimant that this statement could only have come on the orders of Mr Peat as he was the one who had received Mr Islam's
15 business card with its addresses. At the same time there is no dispute from the claimant that Mr Islam was at the service station. He spoke to him in an amicable conversation although he says that he thought the conversation was half an hour earlier than the incident and did not have any recollection of Mr Islam being in the service station at the time the dispute broke out. However
20 if Mr Islam had gone from the scene by the time the dispute was in progress that would not square with the statement from Mr Gore who indicates a customer came into the shop to tell him of a "fight going on". Neither would it explain how Mr Peat would have got the details of Mr Islam by way of address telephone number had he not been there at the relevant time.

25 91 It may well have been that the statement from Mr Islam was sought from him by Mr Peat. That is not to say that the information he gave was false. His position in the e-mail supports the position of Mr Gore in there being a "some sort of commotion occurring between the two gentlemen" and that he went to investigate shouting. He states "suddenly Rob Keill headbutted Alistair Peat
30 who fell on the floor and Rob continued to get on top and punch Alistair." He says he went into the shop to get help and the service station assistant came out to separate them. There is consistency then between Mr Gore and Mr

Islam in (a) Mr Islam saying he returned to the shop to get assistance and Mr Gore confirming that position in his statement and (b) Mr Islam saying that Mr Gore went outside to separate them and Mr Gore confirming that position.

5 92 The crucial element of Mr Islam's statement of course is that he says that he saw the claimant headbutt Mr Peat. Again there is support for that position as Mr Gore reports a man coming into the shop saying there had been a fight and "he headbutted him."

10 93 It is difficult to know why it is that Mr Islam would use first name terms of the individuals involved if he was simply a passer-by. The statement would suggest he had more information than that. At the same time as indicated even if he had been approached by Mr Peat to give a statement that was not to say it would be fabricated. Neither were there circumstances to consider that Mr Peat had somehow persuaded or pressurised Mr Islam to give a statement that fitted the version of events which favoured Mr Peat.

15 94 Mr Islam does indicate at the end of his statement that he would be happy to be contacted for further information. I accepted that Mr Plant did try to gain further information when he sent him an e-mail and telephoned him and left a message. He got no response. I was not sure of the position of Mr Masterson in this respect. He stated he telephoned only and left no message because the phone did not go to voicemail. It is strange that Mr Plant found a phone that went to voicemail but Mr Masterson did not. It would be odd for a mobile phone not to have that facility. It would be odd if Mr Islam altered his device in the space between Mr Plant seeking to contact him and Mr Masterson trying to contact him.

25 95 In any event I did accept that an enquiry had been made of Mr Islam at least by Mr Plant to see whether he could give any support to the claimant's position that he may have been mistaken in his version of events and that in fact Mr Peat had effectively tumbled and sustained injury in that way. Having no response meant that the respondent required to deal with the information available. As indicated there was reason why they could consider the statement from Mr Islam reliable.

30

96 The respondent also had information from Mr Rowe who was in the service station at the time but discounted that as favouring the claimant.

97 Mr Rowe provided two statements the first (undated) (53) makes it clear that he did not have much time for Mr Peat. He states that he had suffered from
5 Mr Peat's aggressive manner and "bullying manner". He refers to an incident around the beginning of July 2017. He had other issues as explained in the statement and indeed states that he was persuaded by the agency to stay on despite the aggressive and intimidating attitude he experienced. From his statement he states he went for "a cup of tea" and when coming out of the
10 shop saw there was an altercation as "Alistair was arguing with Rab in an aggressive manner and poking at Rab with his finger." He said he walked away and sat down to have a cigarette and the argument continued. He says he heard Mr Peat say to the claimant "do you know who I am" in an "extremely provocative manner" and "the next thing they were down the side of the
15 garage on the ground. I did not see who hit who but Alistair was the aggressor." It appears the garage attendant asked why he had not sought to stop the incident but it would appear given his slim build and height he did not consider he could act without putting himself at risk. In that statement it appears that Mr Rowe may well have been in a position to see what took
20 place but states that he did not know "who hit who" which of course was the crucial aspect of matters. While he states that "Alistair was the aggressor" he has no detail of how the two found themselves on the ground or any explanation for the injury occasioned by Mr Peat. Thus the statement contains no detail of the actual incident down the side of the garage and no
25 help as to whether the version of the claimant or the version by Mr Peat was correct. It would seem that he wished to point the finger at Mr Peat without giving any detail of how the fight developed.

98 His second statement (54) was more of an enquiry into why he did not wish to come back to the respondent to work. He explained the position but also
30 said that his agency had persuaded him not to move and he had continued. He was asked if he remembered "anything more from the night" and

responded “no just as I said I heard them arguing and then went round the corner where Rab ended up on top of Alistair, I don’t know how.”

99 Other than indicating that he had a bad experience with Mr Peat there was
no light shed on the crucial issue of whether the claimant had headbutted Mr
5 Peat or whether Mr Peat had pulled the claimant causing them to tumble and
Mr Peat sustaining an injury in the fall.

100 As was canvassed there was a failure by the respondent to make an
immediate enquiry as to whether there was any CCTV footage available
which might throw light on this incident. The evidence from Mr Masterson
10 was that he visited the premises to find that there was no CCTV coverage of
the particular area where Mr Peat claimed he was assaulted. There was
coverage of the front of the shop which might have assisted but that had been
overwritten by the time he made that enquiry.

101 There was a failure to take what would appear to be an obvious step for a
15 reasonable employer to take namely ascertain CCTV coverage at an early
stage. That was not done. There was no challenge to the evidence from Mr
Masterson regarding the absence of CCTV in the area where the alleged
assault occurred. I accepted the evidence of Mr Masterson that that was the
case. As it happened nothing would have been disclosed on the CCTV of the
20 actual incident and the crucial element of whether Mr Peat was headbutted
or not. Some assistance might have been gained from footage at the front of
the shop or indeed inside the shop in the aftermath of the incident but the
respondent had reasonably good evidence of the events in those two
locations from Mr Gore and Mr Islam.

25 102 Other than a failure on the CCTV there was no other investigative step that it
was suggested the respondent should have taken but did not. The issue was
essentially down to the weight that required to be given to the competing
events. The respondents had witness statements from two individuals who
could be termed independent in Mr Gore and Mr Islam. There was insufficient
30 evidence to be able to come to any conclusion that Mr Peat had been behind
some fabrication of evidence from these individuals. There was consistency

between these two as regards the incident on the evening. The crucial element was stated by Mr Islam namely that the claimant headbutted Mr Peat. Mr Gore was able to report a customer coming into the shop and indicating that the headbutt had taken place. For the reasonable employer there would be sufficient to come to a belief that took place and that indeed the claimant was at fault. Accordingly considering the material that the respondents had it would be the case that they had conducted sufficient investigation and there were reasonable grounds upon which to sustain their belief in the guilt of the claimant.

Procedure

103 The respondent did follow procedure in relation to the investigation and subsequently disciplinary hearings and appeal. The fact that Mr Plant had dismissed both but Mr Masterson upheld the appeal by Mr Peat would not excuse the claimant. There was no information as to whether there was any sanction on Mr Peat. He may be fortunate in that respect but on the evidence a reasonable employer may well have concluded that the claimant on this occasion was the aggressor.

104 Of course the respondent's procedure does indicate that in the event of dispute as to facts surrounding an alleged breach of discipline then the manager "will take the decision based on balance of probability as to which version of events is true". That is a different test of course on factual matters than as set out in *Burchell*. It might be said that the crucial fact of whether or not the claimant headbutted Mr Peat was a fact which had to be established on the balance of probability rather than a test in line with *Burchell*. However given the evidence which was available and considering whether it was more likely than not that the claimant had headbutted Mr Peat then the available evidence would be appear to pass that test. Accordingly there would not appear to be any procedural failings on the part of the respondent.

Inconsistency

105 The claimant complained of inconsistency of treatment. Mr Masterson investigated a particular incident referred to by the claimant and did find that particular matter to be a “poor decision”. There was a lack of detail about those incidents if there were to be relied upon by the claimant. It is the case
5 that if reliance is to be placed on inconsistency there requires to be very similar facts and circumstances. There was nothing to upset this submission that this incident may have been one “outlying bad decision” which in itself was inconsistent with other occasions where individuals had been dismissed for acts of violence.

10 **Sanctions**

106 The issue of unfair dismissal would then be whether or not having past the *Burchell* test it was reasonable to dismiss the claimant. He had long service and no previous disciplinary record. That long service is a weighty factor. However acts of violence in terms of the respondent’s procedure were
15 regarded as gross misconduct. It may have been that another employer might have given a final written warning. However it could not be said that dismissal was outwith the band of reasonable responses of a reasonable employer. From all accounts it would appear that Mr Peat suffered a nasty blow. There was no allegation from the claimant that he was provoked in any
20 way. His position was that he had not struck Mr Peat. While no doubt Mr Peat could have walked away from the argument as it developed that would not go to excusing the assault. For the reasonable employer the long good service record would be outweighed by the seriousness of the incident itself.

Wrongful dismissal

25 107 While the Burchell test might be met in any particular misconduct case it is a separate matter as to whether or not there was a wrongful dismissal which would entitle the claimant to damages represented by the notice pay. That is a test as to whether on the balance of probability the blow was struck. If so then the breach was by the claimant in acting in an unlawful manner.

108 On the issue of matters being established on the balance of probability that
has been canvassed in relation to the test outlined in the respondent's
procedure. As indicated it is considered that on the evidence available the
respondent met the test that matters were established on the balance of
5 probability.

109 In those circumstances there was no breach of contract by the respondent
and so there could be no wrongful dismissal.

110 Accordingly the claims made by the claimant in this case are dismissed.

10

15

Employment Judge: JD Young
Date of Reasons: 08 November 2018
Entered in register: 14 November 2018
20 **and copied to parties**

25

30

