EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: S/4103298/2018

Heard in Glasgow on 4, 5 and 6 September 2018

Employment Judge: Lucy Wiseman

Mr Colin Hart	**Claimant** **Represented by:** **Mr R Lawson - Solicitor**
Glasgow City Council	**Respondent** **Represented by:** **Ms B Robertson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that the claimant was unfairly dismissed. The Tribunal decided to make an order for reinstatement. The order for reinstatement must be complied with by the 14 January 2019.

2. The respondent shall pay to the claimant the sum of **Twenty Thousand, One Hundred and Twenty Five Pounds and Ninety Six Pence £20,125.96** in respect of arrears of pay for the period between the 16 October 2017 and 14 January 2019. The respondent shall also restore to the claimant all rights and privileges (including seniority and pension rights).

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 9 March 2018 alleging he had been unfairly dismissed. The respondent entered a

response admitting the claimant had been dismissed for reasons of conduct, but denying the dismissal was unfair.

2. I heard evidence from Mr Raymond Sutton, Area Manager for Parks Operations and Streetscene, who took the decision to dismiss; Ms Elizabeth Hamilton, HR Officer, who provided HR support to the Personnel Appeals Committee; the claimant and Mr George Murdoch, HGV Driver employed with the respondent and the workplace Unite trade union representative.

3. I was also referred to a folder of jointly produced documents. I, on the basis of the evidence presented, made the following material findings of fact.

Findings of fact

4. The claimant commenced employment with the respondent on the 21 September 2009. He was employed as a Land and Environmental Operative based at the St Rollox depot. He was part of the Rapid Response Team, which consisted of a driver and one or two operatives, whose duties included attending at Scotstoun every Wednesday to assist the Refuse Collection Vehicle crew with taking refuse bins from the private lane to the Refuse Collection Vehicle and back again.

5. The Rapid Response Team from the Western depot also attended on Wednesdays to assist with the same duties.

6. On Wednesday 6 September 2017 an incident occurred between the two Rapid Response Teams. The incident was caused by the St Rollox team believing the Western team had taken their tea-break at the wrong time in order to avoid assisting with the work.

7. The Rapid Response Teams each reported the incident to their supervisor upon return to their respective depots. Mr Robert Coletta, Supervisor at the Western depot, contacted Mr George Hanvidge, Supervisor at the St Rollox depot, regarding the incident, following which each supervisor took statements from the men involved.

8. Mr Ryan, Mr McKelvie and Mr Russell told Mr Coletta there had been an argument and made clear they wanted to have clarity regarding the time of tea breaks. Mr Russell made no mention, on the 6 September, of any (alleged) assault by the claimant on Mr Ryan or of a hammer.

9. The claimant and Mr Donnie Laing provided a statement on the 6 September (page 54). They stated they had been working when they noticed the Western team had left. They asked the driver of the refuse vehicle where they had gone and he told them they had gone for their tea break. They asked the Western team, upon their return, why they had not taken their tea break at the correct time, and an argument had broken out.

10. Mr Michael Ryan from the Western team provided a statement on the 6 September (page 56). Mr Ryan stated the St Rollox team were angry about the Western team going for their tea break at 10am because they understood the tea break time had been changed to 9am. Mr Ryan went to speak to the claimant and Mr Laing because they were shouting about the Western team being “lazy bastards” and “taking the pish”. Mr Ryan spoke to the claimant and Mr Laing regarding their respective understanding of the tea break times but he walked away when they kept shouting at him. Mr Ryan told Mr John Russell what had been said. The claimant then approached Mr Russell, who tried to calm him down. The shouting and throwing of insults continued. Mr John Dockerell, the driver of the Refuse Collection Vehicle, intervened and dispersed the St Rollox team.

11. Mr Brian McKelvie from the Western depot also provided a statement on the 6 September (page 57). He stated he noticed there was some sort of confrontation between, he thought Mr Russell and Mr Laing, but he had been at the back of the bin lorry and had not heard much.

12. Mr John Russell from the Western depot provided his statement on the 11 September 2017 because, after initially reporting the incident to the supervisor on the 6 September, he had left on annual leave in the afternoon. Mr Russell, in his statement (page 55) stated Mr Dockerell, the driver of the refuse collection vehicle, told him Mr Laing was not happy about the Western team

having taken their tea break at 10am, because the times for tea breaks had changed to 9am approximately a month earlier. He noted Mr Ryan had gone to speak to the claimant and Mr Laing, and when he returned he was holding the side of his face and said the claimant had just hit him. Mr Russell thought he was joking, but then the claimant walked towards them saying to Mr Ryan that he had not hit him but had pushed him. Mr Russell stepped between the claimant and Mr Ryan to try to diffuse the situation; an exchange had taken place and the claimant told Mr Russell to give him his phone number so they could take it out of work. The claimant went to the vehicle and returned with a ball-pein hammer. Mr Russell asked what he intended to do with it, and the claimant responded "don't think I won't". The claimant walked back towards the vehicle, and Mr Laing got out and approached Mr Russell. Mr Laing stood very close to Mr Russell and called him a "fat lazy bastard" and moaned about the tea break. Mr Laing made reference to Mr Russell not knowing who he was, and if he saw him out in the street … Mr Russell told Mr Laing to get out of his face and put the palm of his hand on Mr Laing's fleece to push him away.

13. A decision was taken to suspend the claimant following receipt of Mr Russell's statement (page 47).

14. Mr David MacIntyre, Supervisor (at the Western depot) was appointed to conduct an investigation into allegations that the claimant had assaulted Mr Ryan and threatened violence towards colleagues verbally and with a weapon.

15. Mr MacIntyre interviewed the claimant, who was accompanied by Mr Mills, trade union representative, on the 14 September (page 58). The claimant told Mr MacIntyre that the St Rollox team had taken their tea break at 9am, and had been working when the Western team arrived at approximately 9.45. The Western team spoke to Mr Dockerell, the driver of the refuse collection vehicle, and then left to take their tea break at 10am. There had been an argument about it when the Western team returned. The claimant, who had been sitting in the vehicle, called Mr Ryan a liar regarding the tea break time.

Mr Ryan had walked away, and the claimant got out of the vehicle to apologise to Mr Ryan for calling him a liar. The claimant explained he had known Mr Ryan for years. Mr Laing followed the claimant. Mr Russell intervened, and then Mr Russell and Mr Laing had started arguing. Mr Russell had poked Mr Laing in the stomach and Mr Laing said something about being assaulted.

16. The claimant was asked whether he had removed a ball – pein hammer from the vehicle, and denied it, stating "never happened". The claimant also denied that he had hit Mr Ryan and denied that he said "I didn't punch you I pushed you".

17. Mr MacIntyre interviewed Mr John Russell (page 62). Mr Russell responded "no comment" to almost all of Mr MacIntyre's questions.

18. Mr MacIntyre interviewed Mr Russell again on the 19 September (page 64). Mr Russell again refused to answer any questions. He was asked if the initial statement he provided was a true and accurate reflection of events which occurred, and he, in response, stated "no comment". Mr MacIntyre advised that if Mr Russell did not intend to say anything further, he would take the statement as "a factual, actual and truthful account of what occurred on that day". Mr Russell said he was sticking by his original statement.

19. Mr MacIntyre interviewed Mr Coletta on the 14 September (page 65). Mr Coletta told Mr MacIntyre that Mr Ryan, Mr McKelvie and Mr Russell had spoken to him upon their return to the depot on the 6th September to inform him that there had been an argument with the team from St Rollox regarding tea breaks. Mr Coletta spoke to Mr Hanvidge who told him his team had reported there having been an argument and the driver of the Western team vehicle squaring up to one of them. Mr Coletta took statements from the three men: he considered Mr Russell's version of events had flowed, but was not sure when asked the same question of Mr Ryan's version of events. Mr Coletta accepted that no-one on the 6th September had made mention of a hammer, and Mr Ryan did not say he had been assaulted. Mr Coletta accepted he had not considered the possibility that Mr Russell had squared

up to one of the St Rollox team and had embellished or fabricated his statement in case the incident was reported.

20. Mr MacIntyre interviewed Mr Ryan on the 14 September (page 67). Mr Ryan confirmed the incident had been reported to Mr Coletta because there had been a heated argument and they wanted clarity on the correct time for the tea break. Mr Ryan told Mr MacIntyre that there had been no physical contact between him and the claimant or Mr Laing; he had not been holding his face when he got back to speak to Mr Russell and he had not seen a hammer. Mr Ryan also confirmed that he had bumped into the claimant on his day off and the claimant had apologised to him for the way he had spoken to him that day.

21. Mr Ryan was interviewed again on the 19 September (page 70). Mr Ryan did not know why Mr Russell said he (Mr Ryan) said he had been punched, and could only suggest he had not heard properly because of the noise of the bin lorry. He again confirmed he had not been punched or pushed by the claimant. Mr Coletta had noted a mark on Mr Ryan's face when he returned to the depot, but there was doubt whether this was a bruise or some dirt. Mr Ryan, when asked about this, said it might just have been a mark but was nothing to do with that day.

22. Mr MacIntyre interviewed Mr John Dockerell, Refuse Collection Vehicle Driver (page 72). Mr Dockerell told Mr MacIntyre he thought the incident had been blown out of all proportion and that "shouting was all that happened": there had not been any fighting. Mr Dockerell did not see any physical contact between the individuals concerned and did not see anyone with a hammer. Mr Dockerell confirmed he had had a hammer in the cab because he was going to do a job at a family member's home later that day.

23. Mr MacIntyre also interviewed Mr McKelvie (page 74). Mr McKelvie did not see or hear much of what went on that day but he was able to confirm that he had not seen anyone with a hammer. He had worked with the claimant and Mr Laing at St Rollox and confirmed there were no problems in their working relationship.

24. Mr MacIntyre interviewed Mr Laing (page 76). Mr Laing provided his version of events which confirmed there had been an argument with the Western team regarding tea breaks. He confirmed he had not witnessed any physical contact or anyone with a hammer. He confirmed Mr Russell had put his hand on his stomach, and in response to this Mr Laing had said "oh I'm being assaulted". Mr Laing told Mr MacIntyre that, in retrospect, he thought he had over-reacted when making that statement, and he did not want to make an issue of it.

25. Mr MacIntyre prepared an Investigation Report (page 49) in which he summarised the interviews with the various witnesses and set out his conclusions. He concluded an incident had taken place and that parties were trying to play down the seriousness of what had taken place. He noted there were contradictions between the accounts of the operatives regarding the severity of the incident. Mr MacIntyre felt that Mr Russell's account of what happened, together with the information provided by Mr Coletta, was most accurate. Mr MacIntyre acknowledged Mr Russell had not co-operated with the investigation but had maintained he was sticking by his statement. Mr MacIntyre noted Mr Coletta had made reference to seeing a mark on Mr Ryan's face/nose when he returned to the depot, and this led him to believe the version of events provided by Mr Russell and that the claimant did hit Mr Ryan and did brandish a ball-pein hammer. He concluded that given the seriousness of the allegations the matter should proceed to a disciplinary hearing.

26. Mr Raymond Sutton, Area Manager for Parks Operations and Streetscene, was asked by Ms Anne Fleming, HR, to chair the disciplinary hearing. Mr Sutton was provided with a copy of the investigation report, the witness statements and the correspondence.

27. The claimant was, by letter of the 21 September (page 48) invited to attend a disciplinary hearing in relation to allegations that he (a) assaulted a colleague, Mr Ryan and (b) threatened violence towards colleagues verbally and with a weapon. Mr Sutton clarified that the "colleagues" referred to in the second

allegation related to Mr Russell and the verbal threat related to Mr Russell's assertion the claimant had said he would "take it outside the work" and that there had been talk of a phone number. Also, Mr Russell had asked the claimant what he was going to do with the hammer and the claimant had responded "don't think I won't".

28. The disciplinary hearing took place on the 16 October and notes of that hearing were produced at pages 84 – 99. Mr Sutton chaired the hearing and present were Ms Fleming, HR, the claimant, Mr George Murdoch trade union representative and Mr MacIntyre who presented the management case. Mr MacIntyre called Mr Ryan, Mr Coletta, Mr Russell, Mr McKelvie, Mr Dockerell, Mr Hanvidge and Mr Laing as witnesses.

29. The role of the HR Advisor at a disciplinary hearing is as set out in the respondent's Discipline and Appeals Procedure (page 129 – 142). The HR officer is present to "help interpret the Discipline Procedure in terms of practice throughout the Council" and in cases of gross misconduct, the HR Officer will be present to "provide advice".

30. The witnesses were each questioned about their statements. Mr Sutton accepted Mr Ryan's position was that he had not been assaulted by the claimant, but Mr Sutton felt Mr Ryan was trying to play down what had happened because it was a serious matter and he did not want to get the claimant into trouble.

31. Mr Russell refused to answer most questions at the disciplinary hearing, beyond confirming that his statement was a true reflection of what had happened.

32. Mr Sutton adjourned the disciplinary hearing and, during the recess, he and Ms Fleming, reviewed the statements and notes of the hearing. This was a situation where there were five witnesses on one side saying there had been a heated argument but there had not been an assault or a hammer. Mr Sutton further acknowledged that the reference to a mark on Mr Ryan's face could

not be relied upon because Mr Coletta was not sure if it was a bruise or some dirt.

33. Ms Fleming advised Mr Sutton that it was reasonable to believe Mr Russell's statement was a true reflection of what happened on the day and that the claimant was guilty of the allegations. Mr Sutton relied on that advice and concluded that he believed Mr Russell's statement because of the description of the hammer, the fact the claimant had apologised to Mr Ryan and because he could not believe Mr Russell would make it up.

34. Mr Sutton took HR advice regarding possible sanctions but understood that because of the seriousness of the allegations, the sanction was summary dismissal. Mr Sutton accepted that advice and decided to summarily dismiss the claimant.

35. The claimant was advised of the decision when the disciplinary hearing was reconvened. The decision was also confirmed in writing by letter of the 17 October (page 82). The letter was drafted by Ms Fleming and signed by her on behalf of Mr Sutton.

36. Mr Sutton was unaware during the disciplinary hearing that Mr Russell had told Mr MacIntyre that he wanted to withdraw his statement. Mr Russell was informed by HR that if he did so he may face disciplinary action for providing false information.

37. Mr Sutton did not give consideration to whether Mr Russell may have had cause to make a false statement or embellish what had happened. Mr Sutton was of the view that "no man worth his salt" would make a false statement. Mr Sutton relied on Mr Russell's written statement notwithstanding Mr Russell stated, during the disciplinary hearing, that it was Mr Laing and not the claimant who had asked for his phone number and notwithstanding his acknowledgement that the conflict between the two supervisors' version of events was a cause for concern because they may each have been trying to protect their team.

38. The claimant appealed against the decision to terminate his employment (page 39). The appeal hearing took place on the 30 November before the respondent's Personnel Appeals Committee. Ms Elizabeth Hamilton, HR Officer, was present to support the panel and make the necessary arrangements. The claimant was provided with a copy of the appeal papers provided to the appeal panel.

39. The appeal panel allowed the claimant to produce an additional document for the hearing. The document was signed by the Cleansing and Parks department employees at St Rollox depot. They described the claimant as a "very friendly, courteous, generous and hardworking colleague".

40. The appeal papers did not include a copy of the notes of the disciplinary hearing. Ms Hamilton accepted these notes would have been helpful to the appeal committee.

41. The management case was presented by Ms Fleming, HR. It is usual, in appeal hearings, for the key witness to be called to give evidence and be questioned by the other side and the panel. Ms Fleming called Mr MacIntyre and Mr Sutton to speak to the investigation and the decision to dismiss: she did not call Mr Russell as a witness.

42. The claimant was represented by Mr McGonnigle, Unite trade union, who called Mr Murdoch, Mr Ryan and Mr Laing as witnesses.

43. The appeal panel did not refer to Mr Russell's statement during the course of the hearing or during their deliberations.

44. The appeals committee rejected the claimant's appeal, and this was confirmed by letter of the 30 November 2017 (page 127).

45. The respondent has recently offered permanent contracts to a number of temporary workers. Mr Sutton estimated that approximately 100 permanent contracts had been offered. There was also an ongoing recruitment drive to fill vacancies in the various depots. The claimant's job has not been filled.

46. The claimant got on well with colleagues and supervisors. He understood from his colleagues there would be no difficulty if he returned to work.

47. Mr Sutton would not reinstate the claimant because of the duty of care to all employees. He however accepted none of the people involved, except Mr Russell, had considered the incident serious and they had not had concerns regarding their safety.

48. The claimant has, since his dismissal, been in receipt of Universal Credit. He has applied for a number of jobs but has not been successful.

Credibility and notes on the evidence

49. I found the claimant to be a credible and reliable witness: his position was that the incident as portrayed by Mr Russell simply had not happened. He accepted there had been a heated argument, but rejected the suggestion he had assaulted Mr Ryan or threatened anyone with a hammer.

50. I also found Mr Murdoch to be a reliable and straightforward witness. He told the Tribunal about the discussion which had taken place with Mr MacIntyre regarding Mr Russell wishing to retract his statement. This matter had been raised at the appeal hearing (page 119) but dismissed by Ms Fleming. Mr Murdoch also spoke of a general concern of the trades unions regarding the role of HR in disciplinary hearings. The concern was that the “guidance” from HR tended to be what the sanction should be, rather than advising on policy or consistency.

51. Ms Hamilton was a credible and reliable witness who gave her evidence in a straightforward manner. The difficulty with Ms Hamilton’s evidence regarding the appeal hearing was that she could only give an account of her involvement, and not any insight into whether particular matters had been taken into account or noted by the appeal panel.

52. I found Mr Sutton to be a straightforward witness, but it appeared from his evidence that he had blindly relied on, and accepted, Mr Russell’s statement without testing it or taking into account points raised in the hearing which

impacted on the statement. I deal with this in detail below, but two particular examples of this are (i) Mr Sutton accepted that during the disciplinary hearing Mr Russell clarified that it was Mr Laing and not the claimant who had asked for his phone number. Mr Sutton told the Tribunal he "didn't know why Mr Russell would change from his original statement" and in any event he "still believed Mr Russell's statement". (ii) Mr Sutton repeatedly stated "why would Mr Russell make it up?", however, having identified this as an issue, he took no action to probe, test, challenge or consider this issue.

Claimant's submissions

53. Mr Lawson noted there was no dispute between the parties that the claimant's dismissal was for the potentially fair reason of conduct. Accordingly, the issue for determination by the Tribunal was whether dismissal for that reason was fair or unfair in terms of section 98(4) Employment Rights Act. Mr Lawson in particular referred the Tribunal to **British Home Stores Ltd v Burchell 1980 ICR 303** and submitted the Tribunal had to determine the fairness of the dismissal having regard to the tests set out in that case.

54. Mr Lawson, having regard to Mr Sutton's evidence, noted Mr Sutton concluded the claimant was guilty of the allegation that he had verbally threatened Mr Russell based in part on his finding that a comment was made to Mr Russell by the claimant regarding his phone number. This finding was made despite Mr Russell having stated during the disciplinary hearing that it was Mr Laing who had made the comment. Mr Lawson submitted there was no reasonable basis on which to concluded that the claimant made any threat in this regard.

55. Mr Sutton based his conclusions on his feeling that "*no man worth his salt"* would make up such an allegation in order to get others into trouble. Mr Sutton admitted he did not know anything of Mr Russell's background, and Mr Lawson submitted this was not a reasonable ground upon which to base an assessment of credibility in the circumstances.

56. Mr Sutton attached considerable weight to the fact Mr Russell referred in his statement to a particular type of hammer. He accepted when questioned that it was possible Mr Russell may have made up, or embellished, his statement to make it seem believable. Mr Lawson submitted this was not a reasonable ground upon which to conclude that Mr Russell's statement was credible, particularly when the weight of evidence pointed to the claimant not being guilty.

57. Mr Lawson noted that reliance appeared to have been placed by Mr Sutton and the appeal panel on Mr Coletta's assessment of the credibility of Mr Russell's statement. The assessment of credibility ought, it was submitted, to have been undertaken by the decision-makers, not by an individual who was not involved in the investigation. There was also reason to doubt Mr Coletta's credibility because of the inconsistency between his position and that of Mr Hanvidge regarding whether Mr Hanvidge had been informed of the incident by his team by the time he received the phone call from Mr Coletta. This inconsistency was apparent at the disciplinary hearing but was ignored or overlooked by the respondent at both the disciplinary and appeal hearings.

58. Mr Sutton accepted during cross examination that Mr Coletta's credibility could have been undermined if he had been motivated by trying to protect his own team. Mr Sutton, despite having acknowledged this, did not analyse it or consider whether less weight should have been attached to the statements.

59. Mr Sutton also accepted during cross examination that if Mr Russell faced the possibility of disciplinary proceedings arising from his role in the events of the 6 September, this could provide motivation for him to provide an untruthful statement. Mr Sutton however did not consider this point at any time during his deliberations.

60. Mr Lawson submitted, with regard to Ms Hamilton's evidence that she had been unable to say whether the appeal panel knew what the dispute on the 6 September was about. The appeal panel, despite this, appeared to rely on the fact the teams had reported the incident. Mr Lawson submitted that on a reasonable analysis of the statements and comments made by witnesses

during the disciplinary and appeals process, it was clear that the primary motivation of the employees in reporting the matter was to clarify the time of the disputed tea breaks. Mr Sutton accepted this analysis.

61. The respondent relied upon inconsistencies in the statements regarding the nature of the argument. Mr Lawson submitted this did not provide reasonable grounds for concluding the claimant was guilty. This was particularly so when the majority of witnesses did speak to there being a heated argument.

62. Mr Sutton accepted the apology did not relate to the allegations against the claimant. This, it was submitted, could not therefore be reasonably relied upon in concluding the claimant was guilty.

63. Mr Sutton conceded the only direct evidence of the claimant being guilty of the alleged misconduct was the eight lines in the statement of Mr Russell. Despite this, Ms Hamilton confirmed the appeal panel did not refer to the statement during the appeal or during their deliberations.

64. Mr Lawson submitted that both Mr Sutton and the appeal panel appeared to have put weight on the fact that Mr Russell's statement did not change. This, it was submitted, ignored the fact that Mr Russell largely refused to answer any questions after providing his initial statement and his position was therefore largely incapable of changing. Further, it ignored the fact that during the disciplinary hearing Mr Russell was recorded as changing his position relative to his statement with regard to who was said to have asked for his phone number.

65. Mr Lawson invited the Tribunal to note that despite the crucial nature of his statement, Mr Russell was not called as a witness for the management case at the appeal hearing. The respondent's witnesses could not explain the reason for this, beyond the fact it had been HR's (Ms Fleming) decision. Mr Lawson submitted it was critical for the appeal panel to hear from Mr Russell in order to test his credibility. Further the appeal panel, not having had sight of the notes of the disciplinary hearing, and not having asked any questions

of the dismissing manager, it was difficult to see what grounds the appeal panel had to justify their decision.

66. Mr Lawson submitted the respondent was not informed of the hammer or the assault until five days after the event despite Mr Russell having spoken to his supervisor immediately after the argument occurred. This was not taken into account at the disciplinary hearing. This factor, it was submitted, supported the position that the incident did not occur. The fact Mr Ryan, Mr Russell and Mr McKelvie went back to the depot and spoke with Mr Coletta, and did not refer to any assault, threats or hammer being brandished, was not considered by the respondent.

67. Mr Lawson invited the Tribunal to note that Ms Hamilton told the Tribunal that she did not recall any discussion between the members of the appeal panel regarding whether or not there had been discussion regarding retraction of Mr Russell's statement. Mr Murdoch and the claimant remembered this being raised at the appeal hearing, and notes (page 119) refer to this discussion (although the word recorded was "redacted" rather than "retracted"). The appeal panel did not appear to have had any regard to this, and given Mr Russell's statement was essentially the only evidence that supported the allegations against the claimant, this, it was submitted, rendered the dismissal unfair. No reasonable employer would have adopted this approach having particular regard to the paucity of evidence against the claimant.

68. Mr Lawson submitted that aside from the issue of retraction, it must have been clear to Mr Sutton and the appeal panel that Mr Russell had chosen not to co-operate. The appeal panel did ask some questions about this matter, but there was no evidence before the Tribunal regarding their conclusions. Ms Hamilton told the Tribunal the appeal panel did not comment further on the matter beyond the questions they asked.

69. Mr Lawson invited the Tribunal to note that Mr Sutton stated he did not consider imposing a sanction short of dismissal because of the violent nature of the alleged gross misconduct. It was submitted that the unfairness of this

was not cured on appeal because the appeal panel did not explore other disciplinary options in detail.

70. Mr Lawson referred to **Foley v Post Office 2000 ICR 1283** and submitted the range of reasonable responses test was not one of perversity. A reasonable employer could be expected to consider the following:-

- blemishless employment record;
- no other incidents of a similar nature;
- length of service and
- the reaction of the claimant's colleagues to the events that led to his dismissal. Five witnesses did not regard the matter as being serious, and, it was submitted, that was the case regardless of whether or not they were telling the truth. The letter produced at the appeal hearing (page 127) was signed by 38 colleagues. It was unsolicited and made clear they had no issue with the claimant's conduct.

71. Mr Lawson submitted limited weight could be attached to Ms Hamilton's evidence given she was not a decision maker in the appeal process.

72. The respondent did not impose any disciplinary sanction, or even investigate, the allegations made by Mr Russell to the effect Mr Laing had threatened him with violence. This was despite the fact several witnesses spoke to physical contact having taken place between Mr Laing and Mr Russell.

73. Mr Lawson submitted there was an inexplicable omission for the minutes of the disciplinary hearing not to have been before the appeal committee. This was particularly so because those minutes included witnesses, including Mr Russell, being questioned about their recollection of events.

74. Mr Lawson further submitted that the extent of HR's involvement in the disciplinary procedure was a matter of concern. Ms Fleming's input appeared to breach the respondent's Policy. It was submitted that in recommending to Mr Sutton that the allegations should be upheld and by recommending the

sanction he should impose, Ms Fleming went far beyond offering advice. The letter of dismissal was prepared and signed by Ms Fleming; management's case at appeal was prepared and presented by Ms Fleming and it was her decision as to who to call as witnesses for the appeal hearing. Mr Lawson invited the Tribunal to accept Mr Murdoch's evidence regarding the concern of the trades unions generally regarding the extent of HR's involvement in disciplinary decisions.

75. Mr Lawson invited the Tribunal to find the dismissal unfair. The claimant was seeking reinstatement and Mr Lawson referred to section 116 Employment Rights Act. He submitted the claimant did not cause or contribute to his dismissal, and there did not appear to be any impediment to his reinstatement: reinstatement was practicable.

76. Mr Lawson, in the alternative, invited the Tribunal to make an award of compensation and a schedule of loss had been updated. The claimant had mitigated his losses and documents regarding his job applications had been produced.

77. Mr Lawson submitted that in order for any deduction to be made for contributory conduct, the Tribunal would have to make findings in fact about the employee's conduct for the purpose of deciding the extent to which his conduct contributed to his dismissal. The claimant's undisputed evidence was that he was not guilty of the alleged misconduct that resulted in his dismissal. Therefore, unless the Tribunal was prepared to prefer the content of Mr Russell's statement of the 11 September 2017, part of which had been refuted by Mr Russell himself, to the evidence given by the claimant under oath, it was bound to find as a matter of fact that the claimant was not guilty of the alleged misconduct. In those circumstances, it was submitted, no deduction for contributory conduct could be made.

Respondent's submissions

78. Ms Robertson set out in her written submission the findings of fact she invited the Tribunal to make, and further invited the Tribunal to accept the evidence

of the respondent's witnesses as honest, credible and reliable and to prefer their evidence to that of the claimant in any conflict.

79. Ms Robertson referred to section 98 Employment Rights Act and also to the case of **British Home Stores Ltd v Burchell 1978 IRLR 379**. It was submitted that Mr Sutton believed the claimant guilty of misconduct: he believed the claimant had assaulted Mr Ryan and had threatened violence towards colleagues both verbally and with a hammer on the 6 September 2017.

80. Mr Sutton had in his mind reasonable grounds upon which to sustain that belief, based on the information gathered during the investigation and disciplinary process. Mr Sutton, when making his decision, considered the following points (page 45):-

* both crews reported an incident which they had not ever done before;

* Mr Russell's initial statement, including the description of the hammer;

* Mr Russell stating the claimant said to Mr Ryan that he had not punched him, he pushed him;

* Mr Russell stood by his initial statement throughout the investigation and disciplinary process;

* the claimant, Mr Ryan and Mr Russell all described the claimant going back to the vehicle, opening the door but not getting in;

* Robert Coletta saw a mark on the bridge of Mr Ryan's nose which he had not seen earlier;

* the different descriptions of the argument by both crews;

* the claimant apologised to Mr Ryan;

* this was not a minor incident to the employees who reported it;

* the precautionary suspension remained in place until the disciplinary hearing;

* Mr Ryan stated he had not been assaulted;

* no other employees had seen the hammer other than Mr Russell;

* was this purely a heated argument about break times that had been blown out of all proportion;

* the claimant had worked without issue following the incident;

* the claimant denied assaulting Mr Ryan or threatening anyone with a hammer;

* the claimant had 9 years' service and a clear disciplinary record and

* the respondent has a duty of care to provide a safe working environment for employees.

81. Mr Sutton, at the stage he formed that belief, had carried out as much investigation into the matter as was reasonable in the circumstances. All relevant employees had been interviewed and statements obtained.

82. Ms Robertson submitted the HR representative had been present to advise Mr Sutton about any aspect of the discipline procedure, and had acted in accordance with the respondent's Discipline and Appeals Policy. Mr Sutton was not bound by any advice received, and ultimately the decision to dismiss had been his decision.

83. The claimant had an opportunity to appeal against the decision to dismiss. Ms Robertson submitted the appeal hearing was a structured and comprehensive appeal process and that the appeal panel had been entitled to reject the appeal.

84. Ms Robertson referred to the case of **Iceland Frozen Foods Ltd Jones 1982 IRLR 439** and reminded the Tribunal that it had to determine whether the

employer's actions fell within the band of reasonable responses open to an employer. The Tribunal must not substitute its own views as to whether it would have dismissed the employee. Ms Robertson submitted that due to the seriousness of the allegations, dismissal was the appropriate sanction because it was gross misconduct. Ms Robertson invited the Tribunal to dismiss the claim.

85. Ms Robertson submitted that should the Tribunal find for the claimant, then any award of compensation should be reduced because the claimant had failed to mitigate his loss, and had contributed to his dismissal (in terms of sections 122(2) and 123(6) Employment Rights Act). The claimant admitted to having an argument with the Western crew, and admitted to calling Mr Ryan a liar. This, it was submitted, was blameworthy conduct.

86. Ms Robertson confirmed the respondent was not willing to reinstate the claimant because they believed the allegations of gross misconduct.

Discussion and Decision

87. I referred to section 98 Employment Rights Act which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: first, 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). Second, if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair under section 98(4), and this requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

88. The first issue for the Tribunal to determine is whether the respondent has shown the reason for the dismissal of the claimant. The respondent admitted dismissing the claimant and asserted the reason for dismissal was conduct. The claimant did not accept he had done what was alleged, but he did not seek to argue there had been any other reason for his dismissal. I concluded, having regard to this and the matters set out below, that the respondent had shown the reason for dismissal was conduct, which is a potentially fair reason

for dismissal falling within section 98(2)(b) Employment Rights Act. I must now continue to determine whether dismissal for that reason for fair or unfair.

89. I was referred to the case of **British Home Stores Ltd v Burchell** (above) where the EAT held the employer must show that:-

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

90. I had regard to the investigation carried out by the respondent. There was no dispute in this case regarding the fact Mr Davie MacIntyre, Supervisor at the Western depot carried out the investigation by interviewing and collecting statements from those involved. He collected the initial statement of the claimant and Mr Laing, made on the 6 September 2017 (page 54), the initial statement of Mr Michael Ryan, made on the 6 September (page 56), the initial statement of Mr Brian McKelvie, made on the 6 September (page 57) and the initial statement of Mr John Russell, made on the 11 September (page 56).

91. Mr MacIntyre interviewed each of those witnesses, and also Mr John Dockerell and Mr Robert Coletta. There was no suggestion Mr MacIntyre ought to have interviewed others.

92. Mr John Russell was interviewed on the 14th and 19th September. He refused to answer Mr MacIntyre's questions and either responded "no comment" or he would refer Mr MacIntyre to his statement. Mr MacIntyre concluded the second interview by advising Mr Russell that if he did not intend to say anything further in response to the questions asked, then Mr MacIntyre would take his statement "as a factual, actual and truthful account of what occurred on that day". Mr Russell was asked if he agreed to this and responded "I am sticking by my original statement".

93. Mr MacIntyre proceeded on the basis Mr Russell's statement was a factual, actual and truthful account of what occurred on the day and on that basis he recommended the case move to a disciplinary hearing.

94. Mr MacIntyre produced an Investigation Report (page 49). Mr MacIntyre set out his conclusions:-

    (i) he concluded an incident had taken place and that parties were trying to play down the seriousness of what had occurred;

    (ii) there were contradictions between the various versions of events;

    (iii) Mr Russell's account of what happened, in conjunction with information provided by Mr Coletta, was the most accurate.

    (iv) Mr Coletta noticed a bruise, or mark, on Mr Ryan's face/nose when he returned to the depot and

    (v) Mr George Hanvidge had not known of the incident before Mr Coletta contacted him.

95. Mr MacIntyre did not explain the basis upon which he reached those conclusions, and this is a matter to which I return below because the same issues arise regarding Mr Sutton's decision.

96. Mr Raymond Sutton went through the same process of interviewing the witnesses at the disciplinary hearing. Mr Sutton accepted this was a situation where, of all the people interviewed, Mr Russell's statement was the only statement to support the allegations against the claimant: no other witness said the claimant assaulted Mr Ryan, no other witness said the claimant told Mr Ryan "I didn't punch you I pushed you" and no other witness said the claimant had a hammer. Mr Sutton took his decision based on Mr Russell's statement. The key issue in this case was the reasonableness of Mr Sutton's decision to rely on Mr Russell's statement when virtually all other evidence pointed to the contrary.

97. I considered Mr Sutton's decision to rely on Mr Russell's statement was undermined by the fact he failed to give consideration to points disclosed during the disciplinary hearing and which impacted on the allegations against the claimant; failed to consider whether Mr Russell may have been motivated to exaggerate or make a false statement; failed to consider points which he accepted were important and was guided by HR advice which meant only one decision was available to him. I described (above) that there was a blind reliance on Mr Russell's statement: it appeared there was a determination by the respondent to rely on Mr Russell's statement come what may. I, in reaching these conclusions, had regard to the following matters.

98. Firstly, there was no dispute in this case regarding the fact the two teams returned to their respective depots and informed their supervisor an incident had occurred. Mr Russell, Mr Ryan and Mr McKelvie spoke to Mr Coletta and told him there had been an argument and they wanted clarification regarding the time of tea breaks. Mr Coletta confirmed Mr Russell had been the spokesman for the group. No mention was made at this time of any alleged assault on Mr Ryan or any hammer. Mr Sutton, when asked about this, admitted he would have expected those matters to have been raised.

99. Mr Sutton also accepted the primary motivation for reporting the incident had been to seek clarity regarding the time for the tea break, and that the men had not regarded the incident as serious. Mr Sutton, having accepted the primary motivation for reporting the incident was to seek clarity regarding the tea break, did not question why no mention had been made of the alleged assault, and did not test the credibility of Mr Russell.

100. I considered the fact no mention was made of the alleged assault or the hammer upon the return to the depot shortly after the incident occurred was a crucial fact. I further considered its importance was underscored by the fact none of those who gave a statement that day referred to these matters. They were only introduced by Mr Russell when he gave his statement 5 days later on the 11 September. Mr Sutton accepted he would have expected the alleged assault and the hammer to have been raised when the incident was

reported shortly after it had occurred. He, however, did not attach weight to this fact or take it into account or challenge Mr Russell why these matters had not been raised on the day. I considered no other reasonable employer would have failed to take this important fact into account.

101. Secondly, Mr Sutton and the appeal panel attached weight to the fact both teams returned to the depot and reported the matter to their supervisor, which was something (they erroneously believed) neither team had previously done. Mr Coletta and Mr Hanvidge however both confirmed that incidents had previously been reported. Furthermore, there was no explanation why, having attached weight to the fact the incident was reported, no weight or consideration was given to the fact no mention of an assault or hammer was made that day.

102. Thirdly, the allegations against the claimant included that he had threatened violence verbally to his colleagues. Mr Sutton clarified that this concerned a threat of violence to Mr Russell, and that the threat had been to take it outside work; talk of a phone number and, with reference to the hammer, the comment don't think I won't. Mr Sutton accepted that during the disciplinary hearing Mr Russell confirmed that it was Mr Laing who had asked for his phone number and not the claimant. Mr Sutton did not accept this and strike out part of the disciplinary allegations; nor did he challenge the reliability of other parts of Mr Russell's statement. He simply stated he "did not know why he [Mr Russell] would change from his original statement". Mr Sutton confirmed that notwithstanding what had been said at the disciplinary hearing, he relied on the written statement. I considered this to be a prime example of blindly accepting the statement: it appeared that even when Mr Russell clarified a point and accepted it was not the claimant, Mr Sutton still preferred to ignore this and rely on the statement.

103. Fourthly, there was a lack of clarity regarding an alleged mark or bruise on Mr Ryan's face. Mr Ryan's position was that he had not been hit by the claimant. Mr Russell, in his statement, referred to having seen Mr Ryan holding his face, although he could not say which side of his face. Mr Russell did not see the

claimant hit Mr Ryan, and his assertion regarding this was based on Mr Ryan having told him he had been hit. Mr Russell, however, accepted he did not know if Mr Ryan had been joking.

104. Mr Coletta referred to noticing a bruise or mark on Mr Ryan's nose which had not been there in the morning. However, he went on to state that it could just have been dirt. Mr Sutton was asked what conclusion he reached regarding this matter, and he replied "none". Mr Sutton did not clarify whether this meant he did not reach any conclusion and therefore did not rely on this matter in reaching his decision. I, in considering this matter, had regard to the document prepared (by Ms Fleming, HR) for the appeal hearing which listed the points considered by Mr Sutton in reaching his decision. The list included the fact Mr Coletta saw a mark on the bridge of Mr Ryan's nose which he had not seen earlier. I concluded from this that Mr Sutton did rely on Mr Coletta having seen a mark on Mr Ryan's face, notwithstanding the fact (i) Mr Coletta had confirmed the mark could have been dirt (ii) Mr Ryan said he had not been hit by the claimant and (iii) Mr Ryan said that even if there was a mark on his face, it had nothing to do with the claimant.

105. Fifthly, Mr Sutton accepted the inconsistency between Mr Coletta saying Mr Hanvidge did not know of the incident prior to his phone call, and Mr Hanvidge saying the claimant and Mr Laing reported it to him upon their return to the depot, may have been down to the supervisors trying to protect their team. Mr Sutton accepted this was a cause for concern, but having accepted that he did not (a) consider it in reaching his decision or (b) consider it when taking into account Mr Coletta's view of the credibility of those men to whom he spoke or (c) consider it when taking into account the conclusions of Mr MacIntyre who is also a supervisor at the Western depot.

106. Mr Coletta was asked during the investigatory interview with Mr MacIntyre, whether Mr Russell's version of events had "flowed". Mr Coletta said it had, and he had had no reason to doubt what he had been told. Mr Coletta was asked the same question about Mr Ryan, and said "I am not sure" and said this was because he had noticed a black mark or bruise on Mr Ryan's face

when the men came in to report the incident. Mr Coletta, having noticed the mark, did not however question Mr Ryan about it. He simply concluded that what Mr Russell told him about an assault must be true because he had seen a mark, notwithstanding the fact he told Mr MacIntyre it "could just have been dirt".

107. Mr Sutton knew Mr Coletta had told Mr MacIntyre the mark may have been dirt, but he did not question either Mr Coletta or Mr MacIntyre further about this. He did not consider the reliability of Mr Coletta's conclusion regarding credibility and he did not consider whether, in addition to this, Mr Coletta was simply keen to protect his team.

108. Sixthly, Mr Sutton accepted Mr Russell's statement in its entirety and without question. Mr Russell would not answer any questions put to him during the investigation by Mr MacIntyre. This meant, as a consequence, that Mr Russell's statement could not be tested in any way. I acknowledge the issue of Mr Russell wishing to retract his statement was not raised during the disciplinary hearing, and I deal with this below in respect of the appeal hearing.

109. Mr Russell answered some of the questions put to him during the disciplinary hearing, and Mr Sutton accepted the following responses had been given:-

(i) Mr Russell was asked if he thought the hammer was going to be used as a weapon, and he replied "don't think so";

(ii) Mr Russell was asked why the claimant asked for his phone number and he replied "that was Donnie not Colin Hart";

(iii) Mr Russell was asked if there was any reason to doubt what Mr Ryan had told him about being hit and he replied "thought kidding on at first". He was asked what changed his mind and he replied "way he was going on. I still do not know if Mr Ryan was. Took his word for it".

110. Mr Sutton, having accepted these responses were given by Mr Russell during the disciplinary hearing, and that they were significant responses, did not give

any consideration to the fact the response (b above) impacted on the allegations against the claimant, and did not give any consideration to the fact the response (c above) meant Mr Russell had not seen an assault on Mr Ryan and did not know if Mr Ryan had been joking about it. In contrast, Mr Sutton did have direct evidence from Mr Ryan that he had not been assaulted by the claimant.

111. Seventh, Mr Sutton attached significant weight to the fact Mr Russell had described the hammer. He said "*the reference to the ballpein hammer alone leads me to believe the statement was factual".* Mr Sutton accepted there was a possibility Mr Russell embellished his version of events (by adding the description of the hammer) to make it more believable. Mr Sutton, having acknowledged that possibility, further accepted he had not given any consideration to this matter at the time of making his decision.

112. Mr MacIntyre was asked, during the appeal hearing (page 114), if Mr Russell had said "ballpein hammer" and he replied "no, ordinary hammer". No weight or further consideration was given to this comment/inconsistency.

113. Eighth, Mr Sutton told the Tribunal that even if there had been no reference to an assault or a hammer, he would still have dismissed the claimant because a threat of violence constitutes gross misconduct. Mr Sutton accepted there was evidence before him of a heated argument during which Mr Laing had been threatening and Mr Russell had "jabbed" Mr Laing in the stomach. There was a reference to Mr Russell "almost squaring up to" Mr Laing. I considered that in these circumstances the statement of Mr Sutton that he would have dismissed the claimant even if there had been no allegation of assault or a hammer demonstrated a lack of balance and objectivity in Mr Sutton's decision making.

114. Ninth, Mr Sutton acknowledged Mr Ryan and the claimant knew each other. Mr Sutton accepted the proposition that the fact Mr Ryan knew the claimant could mean his evidence was more reliable. However, Mr Sutton gave no consideration to this fact. Mr Sutton instead attached weight to the fact the

claimant had apologised to Mr Ryan for calling him a liar, even though he accepted the apology did not relate to the allegations.

115. Tenth, Mr Sutton, on several occasions, asked the question "why would Mr Russell make it up?". He said "I don't see any guy worth his salt doing a false statement". Mr Sutton however acknowledged that Mr Russell may have been motivated to make a false statement if he had been concerned about his own behaviour that day. Mr Sutton accepted there was evidence of name-calling and insults being thrown at Mr Russell, and he accepted there was evidence Mr Russell "jabbed" Mr Laing in the stomach and/or squared up to him. Mr Sutton, despite asking himself why Mr Russell may have made a false statement, gave no consideration to the issue of motivation or retaliation: he simply satisfied himself that "no man worth his salt" would make up such allegations. In contrast to this Mr Sutton (and Mr McIntyre) readily accepted all other employees were lying about what happened, including Mr Ryan whom, they concluded, was lying when he said he had not been assaulted by the claimant.

116. Eleventh, Mr Sutton told the Tribunal that he had taken into account the claimant's length of service and his clean disciplinary record. Mr Sutton however could not explain how these matters had been taken into account in circumstances where the allegations amounted to gross misconduct for which the sanction was summary dismissal.

117. Twelfth, Mr Sutton relied on the inconsistencies in the statements of the claimant and the other employees regarding the nature of the argument, to support his conclusion that they were not telling the truth. Mr Sutton contrasted this with the fact Mr Russell's statement did not change. Mr Sutton failed however to take account of the fact Mr Russell refused to answer any questions during the investigative and disciplinary process and therefore there was no opportunity to explore consistency and credibility. It was of note that on the rare occasion Mr Russell did answer a question, he clarified the comment regarding the phone had been made by Mr Laing and not the claimant. This error/inconsistency was ignored by Mr Sutton. Finally, Mr

Sutton expressed the view that employees were generally reluctant to come forward and get others into trouble. Mr Sutton used that view as the basis for explaining the position adopted for Mr Ryan. Mr Sutton did not, in reaching that view, question Mr Ryan about this. Furthermore, Mr Sutton did not question why – if employees were generally reluctant to come forward – Mr Russell had come forward.

118. I, in addition to the above points, also had regard to the appeal hearing. Ms Hamilton told the Tribunal the appeal panel did not have the notes of the disciplinary hearing in their papers. Ms Hamilton accepted it would have been helpful for the appeal panel to have had the notes of the disciplinary hearing, particularly when it was noted the appeal panel had not understood points made clear during the disciplinary hearing and which were at odds with Mr Russell's statement (for example, the fact Mr Russell stated it was Mr Laing who had asked for his phone number and not the claimant).

119. The appeal panel did not refer to the statement of Mr Russell and Mr Russell was not called as a witness to the appeal hearing. Ms Hamilton accepted the key witness is usually called to the appeal. The appeal panel, in effect, had no opportunity to test the credibility of Mr Russell's statement in circumstances where his was the only statement relied upon. In addition to this, the issue of Mr Russell having asked about retracting his statement was raised during the appeal hearing, but no enquiry was made regarding this matter.

120. The appeal panel did not, and indeed could not, question or consider the motivation of Mr Russell to make a false statement.

121. I considered the way in which the appeal hearing was presented, with neither Mr Russell being present, nor his statement being referred to and the notes of the disciplinary hearing not being available, rendered it virtually an exercise in rubber-stamping the decision.

122. I referred above to the role of HR in this dismissal. There was no dispute regarding the fact Ms Fleming accompanied Mr Sutton to the disciplinary

hearing. Mr Sutton told the Tribunal that he and Ms Fleming reviewed the notes of the hearing. Ms Fleming advised that it was reasonable to believe Mr Russell's statement was a true reflection of what happened that day. Ms Fleming also advised the claimant was guilty of the allegations; and, due to the seriousness of the allegations, her advice was that the sanction should be summary dismissal.

123. Ms Fleming wrote and signed the letter of dismissal. She presented the management case at appeal and made the decision not to call Mr Russell as a witness at the appeal hearing.

124. Mr Murdoch told the Tribunal there has been a concern within the trade union that HR essentially overstep the mark when offering advice during disciplinary hearings. I noted the Discipline and Appeals Procedure sets out the "Role of the Service HR Officer" and makes clear that the HR Officer may advise about any aspect of the discipline procedure, help interpret the discipline procedure in terms of practice throughout the Council and in cases of gross misconduct the HR officer will be present at the hearing to provide advice.

125. I considered Ms Fleming did much more than provide advice in this case. Ms Fleming reviewed the notes of the investigation and disciplinary hearings with Mr Sutton, advised him it would be reasonable to believe the statement of Mr Russell and advised that as the allegations were of gross misconduct the sanction should be summary dismissal. Ms Fleming also prepared the letter of dismissal, prepared the Report on the circumstances leading to the dismissal of the claimant, which included the factors said to have been considered by Mr Sutton in reaching his decision, decided which witnesses to call for the appeal and presented the management case at the appeal hearing.

126. I considered Ms Fleming overstepped her remit in two respects. Firstly, when she told Mr Sutton it would be reasonable to believe Mr Russell's statement was a true reflection of what happened that day and that the claimant was guilty of the allegations. This was particularly so given there had been no investigation or consideration of the issues set out above. Secondly, when Ms

Fleming told Mr Sutton that due to the seriousness of the allegations the sanction he should impose was summary dismissal.

127. Mr Sutton told the Tribunal he made the decision to dismiss. I did not doubt this but Ms Fleming effectively told him what the punishment should be and set him up to make the decision to summarily dismiss, rather than offering advice and leaving Mr Sutton to make up his own mind.

128. I also had regard to the document prepared by Ms Fleming for the appeal hearing (page 41). Ms Fleming noted at page 45 that in reaching his decision Mr Sutton considered (a) both crews reported an incident which they had never done before. This was contrary to the evidence of Mr Coletta and Mr Hanvidge and contrary to what Mr Sutton told this Tribunal; (b) Mr Russell's statement: but Ms Fleming did not go on to clarify that Mr Russell refused to answer questions during the investigation and disciplinary hearings, (c) Mr Coletta saw a mark on the bridge of Mr Ryan's nose. Ms Fleming does not add that Mr Coletta went on to say this could have been dirt. Further, it was not clear from the evidence Mr Sutton gave to this Tribunal whether he did rely on this given the inconsistency between Mr Russell referring to Mr Ryan's face, Mr Coletta referring to a mark on Mr Ryan's nose, Mr Coletta stating the mark could have been dirt and Mr Ryan saying if there was a mark it was nothing to do with the incident. (d) This was not a minor incident to the employees who reported it. Mr Sutton accepted in cross examination that "the incident" which was reported to the supervisors was the fact there had been a heated argument, and no mention was made of any alleged assault or of a hammer. Further, Mr Sutton accepted the employees had not regarded the incident as serious.

129. I considered my conclusion regarding Ms Fleming's role in this case was supported by the fact Ms Hamilton told the Tribunal that advice to uphold allegations and to dismiss was not appropriate.

130. I decided, having had regard to all of the points set out above, that Mr Sutton did not have reasonable grounds upon which to sustain his belief that the claimant was guilty of the allegations. I reached that decision because Mr

Sutton's decision to rely absolutely on Mr Russell's statement was flawed. Mr Sutton as set out above, failed to consider points disclosed during the disciplinary hearing and which impacted on the claimant's guilt regarding an allegation; he failed to consider whether Mr Russell was motivated to make-up or embellish his statement and he failed to consider all or any of the points set out above which he accepted at this Hearing were important.

131. I must now go on to consider whether the respondent's decision to dismiss in the circumstances was fair or unfair in terms of section 98(4) Employment Rights Act. I reminded myself that it is not for me to decide whether I would have dismissed the claimant. The correct approach for a Tribunal to take was set out in the case of **Iceland Frozen Foods Ltd v Jones 1983 ICR 17** where the EAT held the objective test of the band of reasonable responses must be applied. It was stated:

> *"(1) the starting point should be the words of section 98(4) themselves;*
>
> *(2) in applying the section a Tribunal must consider the reasonableness of the employer's conduct not simply whether they (the members of the Tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
>
> *(5) the function of the Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."*

132. I, in considering the fairness of the dismissal, had regard to my conclusion that Mr Sutton's total reliance on Mr Russell's statement was flawed because of his failure to have regard to, and take into account, the points set out above. I considered no other reasonable employer would have failed to:-

- take into account and attach weight to the fact that when the men reported the incident to Mr Coletta, Mr Russell made no reference to any assault or hammer;
- take into account the fact it was not the claimant who asked for Mr Russell's phone number;
- test, probe or challenge Mr Russell's credibility and the issue of whether these allegations had been made up or embellished.
- investigate and have regard to whether the supervisors were trying to protect their teams and
- have regard to the fact that Mr Russell's refusal to co-operate with the investigation and disciplinary hearing meant his statement could not be challenged or tested.

Mr Sutton determined Mr Russell's statement was an accurate account of what happened and nothing could detract him from that view. The fact Mr Sutton told the Tribunal he would have dismissed the claimant even if Mr Russell's statement had not been relied upon, demonstrated, in my opinion, the mindset of Mr Sutton. I also had regard to my conclusion that the appeal panel, effectively (for the reasons set out above) rubber-stamped the decision to dismiss. Furthermore, HR overstepped their remit (as set out above). I decided, having regard to all of these matters, that the respondent's decision to dismiss the claimant fell outside the band of reasonable responses which a reasonable employer might have adopted. The dismissal was unfair.

133. I must now consider the issue of remedy. The claimant sought reinstatement if successful with his claim. I had regard to section 112 Employment Rights Act which provides that if a Tribunal finds a complaint (of unfair dismissal) well founded, the Tribunal shall explain to the claimant what orders may be made

under section 113, and in what circumstances they may be made and ask him whether he wishes the Tribunal to make such an order.

134. I clarified with Mr Lawson that the claimant sought reinstatement. Mr Lawson suggested re-engagement may also be an option for the claimant, but I could not accept that suggestion in circumstances where I had heard no evidence regarding comparable employment or other suitable employment to which the claimant could be re-engaged. I accordingly confirmed that if successful the remedy of reinstatement would be considered (that is, an order that the employee be reinstated in his old job with no financial loss).

135. I, in considering whether to make an order for reinstatement, had regard to the terms of section 116 Employment Rights Act which provides that in exercising its discretion under section 113, the Tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account (a) whether the complainant wishes to be reinstated; (b) whether it is practicable for the employer to comply with an order for reinstatement and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

136. The claimant does wish to be reinstated to his old job. He did not consider there would be any issues with other employees if he returned to work. He had seen Mr Ryan since the dismissal and there had not been any issues.

137. I noted, with regard to (b) above, that the issue of practicability is a question of fact for the Tribunal. I also noted the case of **Meridian Ltd v Gomersall 1977 IRLR 425** where the EAT stated Tribunals should try not to analyse in too much detail the application of the word “practicable”, but should look at the circumstances of each case and take a broad common sense view.

138. Mr Sutton was asked about reinstating the claimant. He said he would not do so because there was a duty of care to all employees. I acknowledged that duty, but I balanced it with the fact Mr Sutton accepted during cross examination that Mr Ryan and Mr McKelvie did not regard the incident as serious and did not have concerns regarding safety. I also had regard to the

fact the claimant's representative produced a letter for the appeal which had been signed by all of his colleagues. Mr Murdoch told the Tribunal that he did not consider there would be any issue if the claimant returned to work, and the claimant's colleagues were very supportive of him.

139. I took into account the fact the claimant does not work in the same team as Mr Russell, nor is he based in the same area. There may be occasions when the teams meet, but I considered those situations could be managed appropriately.

140. I, in addition to these points, also had regard to the fact the claimant's post has not been filled, and there are vacancies within Land and Environmental Services. I concluded, having had regard to the above points, that it would be practicable to reinstate the claimant.

141. I must also consider in terms of point (c) above, whether the claimant caused or contributed to his dismissal and if so, whether it would be just to order reinstatement. Ms Robertson invited the Tribunal to find the claimant had contributed to his dismissal because he took part in a heated argument and called Mr Ryan a liar. There was no dispute regarding the fact a heated argument had taken place involving not only the claimant, but Mr Laing, Mr Russell and Mr Ryan. However, the claimant was not dismissed for taking part in a heated argument and calling Mr Ryan a liar.

142. I have set out (above) my conclusion that Mr Sutton did not have reasonable grounds upon which to sustain his belief the claimant was guilty of the allegations. I concluded, on that basis, that the claimant did not cause or contribute to his dismissal.

143. I decided, having taken into account the above points, that it would be practicable for the respondent to reinstate the claimant.

144. I decided to make an order for reinstatement. Section 114 Employment Rights Act provides that on making an order for reinstatement the Tribunal shall specify:

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee and

(c) the date by which the order must be complied with.

145. The claimant's representative and the respondent's representative were unable to agree the wage figures for the claimant. They did agree the claimant earned £1,431.17 gross per 4 weeks, giving a weekly gross pay of £357.79. They could not however agree the net figures. The respondent's representative produced a figure of £1,257.76 net per 4 weeks, giving a net weekly figure of £314.44. These figures were based on the claimant's salary payments for the 12 weeks prior to his dismissal. The claimant's representative produced a four weekly figure of £1,477.51, giving a net weekly pay of £340.96. These figures were based on the claimant's earnings in the tax year to 30/09/17.

146. I considered the respondent's approach was consistent with the way in which a week's pay is calculated. I accordingly concluded the claimant's gross weekly pay was £357.79, and net weekly pay was £314.44.

147. I decided to make an order for reinstatement. The date by which the order for reinstatement must be complied with is the 14 January 2019.

148. The claimant was dismissed on the 16 October 2017. The date for reinstatement is the 14 January 2019. I calculate the claimant has arrears of net pay for this period in the amount of £20,125.96.

149. All rights and privileges (including seniority and pension rights) are restored to the claimant.

5

Employment Judge: Lucy Wiseman
Date of Judgment: 18 December 2018
Entered in register : 18 December 2018
and copied to parties