



EMPLOYMENT TRIBUNALS

Claimant: Mr S G Norris

Respondent: Royal Mail Group Limited

Heard at: Manchester

On: 28 February 2019

Before: Employment Judge Sharkett
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr J Gregson, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unlawful deduction of wages is dismissed upon withdrawal by the claimant.
2. The claimant's claim for unfair dismissal is not well-founded and is dismissed.

REASONS

1. The claimant brings claims of unfair dismissal and unlawful deduction of wages. At the beginning of the Hearing it was agreed that the claimant had been paid all outstanding wages owed by the respondent and this part of his claim was dismissed upon his withdrawal.

2. The claimant was accompanied by his father at the Hearing and was unrepresented. Prior to hearing any evidence I explained the procedure the Hearing would follow and the legal test to be applied by the Tribunal in determining whether or not his dismissal had been fair or unfair. I explained that it was not the role of the Tribunal to determine whether or not the claimant was 'guilty' of the alleged misconduct, but rather whether the person who dismissed him held a genuine belief that he was responsible for the alleged misconduct and if so whether it was reasonable for them to hold that belief, based on the evidence before them at the

time. Having explained this I then set out the issues to be determined by the Tribunal as:

- a. Can the respondent show a potentially fair reason for the dismissal (the respondent seeks to rely on the potentially fair reason of conduct)
 - b. Did the respondent have a genuine belief that the claimant had carried out the alleged misconduct If so,
 - c. Was the genuine belief held on reasonable grounds i.e. had a reasonable investigation been carried out in accordance with *Sainsbury Stores v Hitt*.
 - d. Did the respondent follow a fair procedure allowing the claimant to know the case he was required to answer and affording him a fair opportunity to respond to the allegations. If so,
 - e. Was the reason to dismiss, for the reasons given, within the band of reasonable responses available to a reasonable employer in all the circumstances of this particular case.
 - f. If a fair procedure was not followed, thus rendering the dismissal unfair, what would have been the likelihood of the claimant being dismissed had a fair procedure been followed, based on the information before the Tribunal (applying the principles in *Polkey*).
 - g. If the Tribunal find that the claimant was unfairly dismissed, should any compensation awarded to the claimant be reduced to reflect any culpable or blameworthy conduct on the part of the claimant that contributed to his dismissal.
 - h. Should the Tribunal increase or decrease the amount of any compensation awarded to reflect the failure on either party to follow a relevant ACAS code
3. The claimant represented himself and gave evidence in support of his claim. The respondent was represented by Mr Gregson, solicitor, who called the following witnesses:
- a. Mr Peter Kelly -dismissing officer
 - b. Mrs Erica Wilkinson -appeals officer, to give evidence in support of the claim.
4. In preparation for the Hearing the parties had produced a joint bundle of documents running to 197 pages in all. All references to page numbers in this Judgment are references to pages in the bundle unless otherwise stated.
5. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. The fairness of a conduct dismissal is governed by section 98(4):

“Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(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”.

6. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal subsequently approved in a number of decisions of the Court of Appeal. The “**Burchell test**” involves a consideration of three aspects of the employer’s conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

7. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613**.

8. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

9. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

10. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23**. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer’s actions and decisions fell within that band.

11. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

Relevant Findings of Fact

12. Having considered all the evidence, both oral and documentary the Tribunal made the following findings of fact. These facts are not a rehearsal of all the evidence heard but are the relevant facts upon which the Tribunal has reached its decision.

13. The respondent is a large organisation with over 140,000 employees and access to specialist human resources (“HR”) support and advice.

14. The claimant was employed as an Operational Postal Grade based at the Radcliffe Delivery Office, and commenced employment on 6 January 2003. His employment was terminated on 7 June 2018 by reason of gross misconduct.

15. At the time of the relevant incident the claimant was working on restricted duties due to an injury to his back which was believed to be as a result of a slipped disc in his spine. These duties had been agreed with his line manager Mr Rowbotham.

16. On 19 December 2017 the claimant attended work on an early shift. It is the claimant’s case that because he was on restricted duties he had not been able to carry out the same duties as his work colleagues and this had given rise to comments from his colleagues about the amount of work he did. It is also the case however that this work environment was one where there was a significant amount of banter between colleagues and that the claimant was one of the main protagonists. In oral evidence he agreed that he would take part in this banter and react to comments made to him.

17. On the morning of 19 December 2017 after carrying out some of his work the claimant decided to take a cigarette break. Others were continuing to work and one of his colleagues, Mr Holt, shouted to him about him taking a break while others were working. It is not clear what the exact words used were but it is accepted that there were a number of expletives used and that the claimant challenged Mr Holt by telling him to ‘shut your mouth right now – if you have anything more to say come outside’(p90). There is some dispute about what followed but as a result of something further Mr Holt said or did the claimant flew into a range and came back into the workplace to challenge him. It is the claimant’s case that Mr Holt slammed the door shut on him and as a result he suffered pain and this was what made him react. There was then some physical contact between the claimant and Mr Holt which resulted in the claimant falling to the floor and suffering a broken femur and wrist. The claimant accepts that he was verbally aggressive towards Mr Holt (p62), and had momentarily lost his temper and wanted to ‘break his bloody neck’ when he went rushing back in. He denies however that he hit or attempted to hit Mr Holt explaining that he had slipped on cardboard or something else on the floor and that as his leg gave way he reached out to Mr Holt to save himself by grabbing Mr Holt on the shoulder. The claimant accepts that this might have been misinterpreted by Mr Holt or anyone watching, as an attempt to hit him but asserts this was not the case (p80).

18. The claimant was taken to hospital and was then absent from work for a number of weeks as a result of his injuries. He maintains that before he was taken to hospital the two men (he and Mr Holt), had agreed to forget the matter.

19. The incident was witnessed by Mark Williams who reported the matter to the Mr Robotham the delivery office manager when he arrived at work. During the course of the morning and while Mr Holt was out delivering post Mr Holt sent a text to Mr Robotham giving his explanation of the incident (p 158):

“Right, basically what’s happened is we were having a row over Stu having a fag break while there’s work to be done. It’s got a bit heated and Stu got a grip of me and took a swing at me. It didn’t land and I got a grip of him and swung back in defence but it didn’t land either. While we had hold of each other his leg gave way and he fell over. Obviously straight after we shook hands and apologised to each other as we know we’re both just worn out after working so many hours and the pressure of our job at this time of year combined with our home life stressors just came to a boil.”

20. It is the respondent’s case that while the claimant was in hospital Mr Robotham and he produced the following statement from that conversation:

“How it started was I finished up doing specials, booked them all out. At 6.00am having a fag when something’s come back round. Pony made banter saying ‘Stuart outside having a fag’ so we shouted at each other and Stuart said ‘no here let’s go outside’ [step outside]. Tony came to the door and slammed the door. It hurt me and I saw red. Then I went back in and said ‘fucking knob’ and both started swinging punches. Didn’t connect and then I slipped and fell on my side. When I was in agony on the floor I shouted ‘come here, Tony, let’s shake hands and forget about it’. All sorted out between and we’re like brothers, friends over 20 years. (You stormed back in and threw first punch because Tony slammed door) This was when he was in hospital.”

21. During the course of oral evidence the claimant was adamant that he had not spoken to Mr Robotham while he had been in hospital. The Tribunal find that the claimant may have forgotten or misremembered the conversation with Mr Robotham as there is documentary evidence which, on the balance of probabilities, tends to show a conversation did take place. For example a text from the claimant to Mr Robotham (p161):

“Hi pal, can you do me a favour. Can you note my accident down in the accident book for me for future reference. Accident happened on Tuesday 19 December at 6.05am. Slipped. Broken hip left side, fractured wrist also left. Ambulance required. Will sign it off when I’m fit enough to return. Date of return ???”.

Mr Robotham’s response to the claimant:

“Also, which version do you want me to put in the accident book? The first version you told me that you fell over each other, you and Tony, or the fact that you had a punch-up which caused you to fall on the floor breaking your hip and wrist.”

A further text from the claimant:

“How would you like me to do that? What time do I have? I’m stuck in hospital till whenever. I’ve a broken wrist, which happens to be the one I write with,

and if you have already typed my statement I gave over the phone the other day then please include with the letter. I will check over it and sign it and return it if I'm happy with it."

22. On 11 January 2018 the claimant gave Mr Robotham a slightly different version of the incident:

"I went round and decided to do the special first (131 in total). I decided to book these in and allocate them and also pulled our redeliveries for that day. At 6.00am most of us who smoke normally take five minutes to have a cig and a brew. On this morning the early sorters had already been out and had their five minutes cig break when I finished my workload. I got my PDA to go and do the tracked. The only person round there was Pony (Andrew Freedman) who has already thrown his walk off, which was a bit annoying. I said 'cheers for helping, Pony'. I put my PDA down and said I was going for a cig. I then overheard Pony say to Tony Holt 'look at that lazy bastard, he's gone out for a cig'. Then Tony Holt started to call me, effing and jeffing at me saying 'look at that lazy bastard' so I retaliated saying 'mine your own effing business' or of some sort. 'I have never asked you to help me so go back to your frame'. It continued with the verbal aggressive language so I said 'if you have an issue then come outside'. Anthony opened the door and we verbally started effing and jeffing. You remember saying 'go away' and then Anthony slams the door shut, which knocked me on the doorframe. That did hurt me and I had a pain in my leg. I went straight back in and Tony had already walked off and he was near the end of the IPS and I gripped him on his right shoulder and I slipped on a piece of card and my leg give out. I got this pain down my left side so I threw my weight over to my right and I grab his shoulder to keep myself upright. I was in agony at this point. I couldn't keep myself up so I fell to the floor in agony. It all happened so fast. I don't fully recall everything that went on. I want to make it clear that I did see him raise his hand up but he didn't hit me. If Tony is saying I hit him then I didn't. The only time I might have caught him is when I was trying to keep myself upright."

23. Mr Robotham also obtained a statement from Mr Williams (p55) who confirmed that in addition to using bad language towards each other, the two men squared up to each other and after a push from Mr Norris, Mr Holt started to swing punches at Mr Norris' head area which he dodged and swung a punch or two back at Mr Holt and the two grappled momentarily.

24. Having completed his fact-finding interviews Mr Robotham referred the matter to Mr Kelly as he considered that what was alleged to have occurred on the morning of 19 December 2017 would, if found proven, be a breach of the respondent's Conduct Policy and Business Standards and might attract a penalty higher than that which he was authorised to impose. Mr Kelly reviewed the information obtained by Mr Robotham and decided that on the basis of the information before him there was a disciplinary case to answer. He also noted that the claimant's account of what had happened had changed from his initial account which was obtained shortly after the incident. He noted that the initial account of the claimant was consistent with the accounts of Mr Holt and Mr Williams and considered that in changing his account the claimant was potentially attempting to deceive the respondent. In light of this in addition to the charge of aggressive and abusive behaviour towards another member

of staff he also included a charge of alleged deception at the fact-finding meeting of 11 January 2018.

25. The claimant was invited to attend a disciplinary meeting on 1 February 2018 but responded on 31 January to say that he was unable to attend due to his illness. A referral to occupational health subsequently followed as the claimant continued to maintain that he was not well enough either to attend a disciplinary hearing or provide written responses to the allegations against him. Occupational health recommended that the claimant would benefit by having the disciplinary matter dealt with and the respondent attempted to accommodate the claimant's needs offering him four different dates and the opportunity to attend a venue closer to home. Although there was considerable delay between the incident and the meeting taking place it did ultimately occur on 4 April 2018.

26. The claimant had prepared a written statement for the disciplinary hearing and he was also given a full opportunity to raise any issues he wished. He accepted that he had been verbally abusive to Mr Holt but continued to deny that he had thrown punches at him. He maintained that Mr Williams' statement that punches had been thrown were over-exaggerated and were an attempt to get back at the claimant and Mr Holt due to a practical joke that had happened in the past. The claimant told Mr Kelly that he had a bad back and was unable to carry out the same duties as his other colleagues and that this had led to him being bullied. He had raised this with Mr Robotham but it had not been addressed and he could not take time off work because Mr Robotham had implied that he would lose his job if he did. He told Mr Kelly that as a result of the bullying and the pain in his back for which he was taking strong painkillers his decision making skills had been impaired and this is what led to him reacting in the way in which he did.

27. Mr Kelly investigated the matters raised by the claimant and concluded that although the claimant had raised the name calling with Mr Robotham, he had not raised a formal complaint and the claimant was often the perpetrator of such behaviour himself. He also found that Mr Robotham had not threatened the claimant with his job if he was absent from work but that Mr Robotham had offered the claimant alternative duties so that he would be able to remain in work and thus avoid being placed on the attendance procedure if he had to take long periods of time off work. These duties had been agreed by the claimant. As Mr Kelly had also dealt with the disciplinary hearing of Mr Holt in relation to the same issues he did not find it necessary to interview Mr Williams again as both his statement and that of Mr Holt were not materially different.

28. Having completed his further investigation Mr Kelly concluded that there was evidence to show that the claimant had carried out the acts of alleged misconduct. He came to this decision on the basis of the evidence before him and in particular on the initial account of the claimant, and the accounts of Mr Williams and Mr Holt. He believed on this evidence that the verbal abuse between the claimant and Mr Holt amounted to more than the usual office banter and that punches were thrown during the physical altercation that followed. Mr Kelly had regard to the respondent's Conduct Policy which lists violence and abusive behaviour towards customers or colleagues as specific examples of gross misconduct. He also had regard to the mitigation offered by the claimant as explanation for his behaviour in addition to the fact that he had long service and a clean disciplinary record. Having considered all matters including the inconsistency in the claimant's version of events and the need

for the business to have trust in their employees' interaction with the public, Mr Kelly determined that trust and confidence in the claimant being able to meet the standards and expectation of the business had been lost and that the appropriate sanction was summary dismissal.

29. Mr Kelly explained in oral evidence that he had dealt with the disciplinary hearings of both the claimant and Mr Holt. He confirmed that Mr Holt had been on a two-year serious warning and that he was at a high risk of dismissal for doing anything wrong during the currency of that warning. He explained that in these circumstances the two year serious warning would not have been instrumental in reaching his decision to dismiss Mr Holt because the conduct was so serious that it warranted dismissal. He said that both men were entrusted to work unsupervised and that what had gone on that day had led him to believe that the trust had gone. He went on to explain that working for the Royal Mail involved working unsupervised most of the time and once that trust has gone it is impossible to trust that person out on the streets representing the respondent.

30. The claimant exercised his right of appeal on the basis that Mr Kelly had predetermined the outcome due to the fact that he had previously had issues with the claimant and that he was in any event conflicted in hearing the case because he was good friends with Mr Robotham. He also complained that, his length of service had not been taken into account, that Mr Williams had a motive in exaggerating what had taken place, and that no other witnesses had been interviewed. He also repeated his complaint that Mr Robotham had failed to address his complaint of bullying and that he had received veiled threats of dismissal if he took sick leave. In addition he complained that Mr Kelly had not carried out a proper investigation because he had failed to interview Mr Williams.

31. Ms Wilkinson, an independent casework manager who has worked with the respondent for approximately forty years dealt with the claimant's appeal as a full re-hearing. She met with the claimant and his union representative on 4 July 2018 and received further documents for her to consider from him the following day. Following the meeting she interviewed further members of staff who it was said would have witnessed the incident in addition to those already interviewed. It was during her interview with Mr Robotham that further evidence came to light, in particular the text message exchange between Mr Robotham and Mr Holt which confirmed punches had been thrown (p148) and the telephone note made of the conversation Mr Robotham had with the claimant which confirmed that both had swung punches (p54).

32. Ms Wilkinson also investigated why the incident of 19 December 2017 had not been entered in the accident book and was satisfied that as the incident would be regarded as an 'incident' as opposed to an accident in the workplace, it would not be reportable under ERICA (145-147).

33. Ms Wilkinson sent copies to the claimant of the further information she had received as a result of her investigation and asked for his comments. He responded by letter of 25 July (p151-157). Ms Wilkinson then considered the matter in light of all the information she had received.

34. Ms Wilkinson decided that there was inconsistency in the claimant's later version of what had happened on 19 December 2017 and that his first accounts

were consistent with those of Mr Holt and Mr Williams. Ms Wilkinson interviewed Mr Williams and found his evidence to be consistent and credible and she could find no reason not to accept his evidence. In respect of Mr Holt, she noted that Mr Williams had reported the matter to the police so it would not be in his best interest to make up his version of events given the potential impact on him not only with his employment. On this basis and in light of the fact that the claimant's early account was not materially different to the versions offered by the other two witness, Ms Wilkinson decided that the account of Mr Holt and Mr Williams was the correct version of what had taken place. In addition, there was no evidence from other witnesses she interviewed that would lead her to any other finding than that given by the two men.

35. In oral evidence the claimant questioned why Ms Wilkinson had not interviewed the cleaner given that it was his case that he had slipped on the floor. Ms Wilkinson explained that the cleaner did not witness anything and the cleanliness of the floor was not an issue.

36. Ms Wilkinson found no evidence that Mr Kelly had pre-determined the outcome of the disciplinary but was satisfied in any event that she was hearing the matter afresh from an independent and impartial point of view given that she had no previous knowledge of the claimant.

37. Ms Wilkinson could find no evidence that the claimant had been led to believe that his job was at risk if he was absent from work due to sickness and Mr Robotham had taken active steps to assist him in staying in work because he knew the claimant had a family and mortgage to pay and was at a stage 2 and did not want to risk him triggering a consideration of dismissal. Ms Wilkinson determined that it was appropriate for a line manager to have a discussion surrounding the potential implication of further absence in such circumstances. During the course of her further investigation she further found that all the witnesses interviewed reported that there was a good level of banter within the department and that the claimant was one of the main instigators of this behaviour and gave as good as he got. She considered that as an employee with over twenty years service the claimant was aware of the policies and procedures available to him and he had not formally raised a complaint of bullying. She further found that Mr Kelly and Mr Robotham had never met outside work socially and there was no evidence to support a suggestion that their relationship as 'friends' had any bearing on the case.

38. Ms Wilkinson did not find any evidence that the claimant had previously asked to be referred to occupational health and that this only arose as a result of the claimant staying he was unable to attend a disciplinary hearing due to ill health.

39. Ms Wilkinson considered the mitigation put forward by the claimant including the anxiety and depression caused by the conduct proceedings and the impact on his family. Ms Wilkinson determined that as an employee of the respondent it would not be acceptable in any circumstances to behave in the manner in which the claimant and Mr Holt did and she was not satisfied that a similar incident would not occur in the future. She explained in oral evidence that throughout the appeal process, although the claimant apologised for his actions, he did not accept what he had done and sought only to apportion blame to others. She was also satisfied that in changing his version of events of the 19 December the claimant had attempted to deceive the respondent.

40. In reaching a decision to uphold the decision to summarily dismiss the claimant Ms Wilkinson had regard to the respondent Conduct Policy (p24-30) and the fact that it states that *'some types of behaviour are so serious and unacceptable,, it found proved to warrant dismissal without notice (summary dismissal), or pay in lieu of notice'* and the Code of Business Standards (p31-41) which requires employees to be *'open and honest'* towards colleagues. In oral evidence Ms Wilkinson explained that integrity and honesty is at the core of the respondent's business and that if an employee had not been truthful or been deceitful then that would be viewed as a very serious matters.

41. Ms Wilkinson took account of the claimant's long service record and considered whether a suspended dismissal might have been a possible option, however she decided in light of all the circumstances that this was not a risk she was prepared to take and determined that the allegations found proved were so serious that they warranted summary dismissal.

Submissions

42. Having heard the evidence I then heard submissions. The claimant maintained that he had been unfairly treated whilst Mr Gregson submitted that there were reasonable grounds for the belief that the claimant had carried out the acts of misconduct which led to his dismissal. He submitted that any flaws in the procedure carried out by Mr Kelly had been rectified on appeal as Ms Wilkinson had carried out a full re-hearing of the matter and conducted further enquiries before reaching her decision.

43. Mr Gregson reminded the Tribunal of examples of gross misconduct in the Conduct Code and that breach of the code would be a disciplinary issue. The claimant had acknowledged in cross examination that if he had acted as alleged it would have been gross misconduct. Overall the dismissal was fair.

Application of Law to the facts found

44. Three key points emerge from the legal framework summarised above. Firstly, the test is the band or range of reasonable responses. It is an error of law for the Tribunal to substitute its own view on whether the claimant should have been dismissed. That is a particular danger in cases where long-serving employees with a clean disciplinary record have lost their jobs over matters arising from a single incident. Secondly, that test applies to all aspects of the disciplinary process. Thirdly, the appeal is part and parcel of the disciplinary process, particularly where, as in this case, it occurs by way of a substantive re-hearing rather than simply a review of the decision to dismiss.

45. In this case the respondent seeks to rely on the potentially fair reason of conduct as the reason for dismissing the claimant. Although the claimant denies that he threw punches at Mr Holt he does not dispute that the incident of 19 December 2017 occurred, and that during that incident he was verbally abusive and aggressive towards Mr Holt. The claimant does deny that he made any statement to Mr Robotham whilst he was in hospital and therefore he did not change his later statement. The Tribunal notes however there are text messages between the claimant and Mr Robotham which clearly indicate that a previous statement had

been made and that statement differed to his later statement. In the circumstances, the Tribunal is satisfied that the respondent has shown that the reason for the claimant's dismissal was his conduct both in respect of his behaviour of 19 December 2017 and his subsequent change of his version of events.

46. The tool for applying section 98(4) which is conventionally used in cases of this kind is the **Burchell** test. The first part of the test is whether the managers had a genuine belief the claimant was guilty of misconduct. Mr Kelly relied on the statements of Mr Williams and Mr Holt both of whom confirmed that punches had been thrown. In light of this he concluded that the claimant had changed his account of what had happened in order to deceive the respondent. He did not however carry out any further investigation by making enquiries of other witnesses or by speaking to Mr Williams even though it was the claimant's case that there was some history between him and Mr Williams. By contrast Ms Wilkinson did carry out further investigation and in doing so discovered information that had not been available to Mr Kelly. This information included the text messages and statement referred to above which were not available to Mr Kelly when he made his decision. She ensured that she was satisfied that all the claimant's concerns had been investigated and considered by her and that the claimant was afforded an opportunity to respond to the additional information before reaching her decision. In the circumstances the Tribunal is satisfied that Ms Wilkinson held a genuine belief that the claimant had been involved in an incident with Mr Holt on 19 December 2017 during which abusive and aggressive language was used and punches were thrown. She was also satisfied on the basis of the text messages both between the claimant and Mr Robotham and Mr Holt that the claimant had changed his version of what occurred on 19 December 2017. The Tribunal is satisfied that Ms Wilkinson held a genuine belief that the claimant had sought to deceive the respondent in changing his statement.

47. The second part of the test is whether the respondent had carried out such investigation into the matter as was reasonable.

48. In broad terms whilst the investigation during the stage of the procedure carried out by Mr Kelly may have been somewhat flawed, the further investigation carried out by Ms Wilkinson remedied this to ensure that any doubts were, where relevant, addressed. Mr Williams and Mr Holt both gave accounts of what happened very soon after the incident. Whilst the claimant continued to deny he had told Mr Robotham what happened while he was in hospital, the Tribunal found on the balance of probabilities, that in light of the text message exchanged between him and Mr Robotham, he had spoken to Mr Robotham and given him the information that formed the basis of the statement he produced. In addition Ms Wilkinson spoke to other staff who had witnessed the incident and they did not provide information that differed to that of Mr Williams and Mr Holt. It is true that Ms Wilkinson did not interview the cleaner as suggested by the claimant but it was reasonable that she did not do so because she did not witness the incident. Ms Wilkinson did not believe the cleanliness or otherwise of the floor at the time of the incident would assist her given the nature of the allegations she was investigating. Overall Ms Wilkinson ensured that in addition to the information obtained during the investigation carried out initially, she then undertook such further investigation as was reasonable to ensure that she had sufficient information to reach her decision having taken into account the concerns of the claimant. Ms Wilkinson carried out a thorough investigation and

let the claimant comment on what she had found through those enquiries before she made her decision.

49. Overall, therefore, the Tribunal is satisfied that the respondent carried out an investigation which was within the band of reasonable responses.

50. The ACAS Code of Practice on Disciplinary and Grievance Procedures is relevant to this case. The claimant raised a number of criticisms about the disciplinary process but accepts that at the appeal stage Ms Wilkinson had carried out a fair investigation and that he was given an opportunity to comment on any additional information she had obtained before she made her decision. He also confirmed that during the hearing he was given an opportunity to raise any issues he wished.

51. Whilst the Tribunal is satisfied that any defect in the procedure that was followed at the dismissal stage was remedied on appeal, it has non the less considered some of the criticisms raised by the claimant. The Tribunal notes that there was some considerable delay in bringing this matter to a disciplinary hearing and thereafter notifying the claimant of the outcome. The Tribunal were told that some of this delay was as a result of the claimant's refusal to attend because of his injuries. The Tribunal note that the occupational health report obtained by the respondent advised that the claimant was fit to attend and, in their opinion, it would also be beneficial to his well-being. Thereafter the respondent went to some lengths to facilitate his attendance at the disciplinary hearing, re-arranging it on four occasions and offering alternative venues. On balance the Tribunal find that the delay at this stage was to an extent unavoidable on the part of the respondent as a result of the claimant's unwillingness to engage with the process. There was further considerable delay following the disciplinary hearing. Mr Kelly explained that this was caused by his absence of annual leave and the fact that he 'still had his day job to do'. He explained that had the claimant attended the disciplinary hearing when it was first scheduled his leave would not have interfered with the process and there would not have been such a delay. The Tribunal find that whilst that might be true in respect of his absence due to annual leave, the same could not be said for the further considerable delay when he was not on annual leave. The Tribunal have seen no evidence of any further investigation carried out by Mr Kelly which he says added to the delay and in an organisation such as the respondent with such a wealth of HR support available it is not reasonable that Mr Kelly took so long to respond.

52. The Tribunal note that whilst the claimant subsequently complained that Mr Kelly was not an appropriate person to carry out his disciplinary he did not raise this at the time. In any event Mr Wilkinson found that there was nothing to suggest that Mr Kelly was not an appropriate person to carry out the procedure or that he had pre-determined the outcome.

53. Although the claimant was presented with additional evidence at the appeal stage which was available at the time of the disciplinary hearing and should have been disclosed, the Tribunal find that this did not place the claimant at a disadvantage because he was informed of the information and allowed to comment on it before Ms Wilkinson made her decision. The Tribunal is satisfied that the claimant knew the allegations against him and was provided with the written evidence relied on in reaching the decision to dismiss. He was not denied the

opportunity to respond to the allegations and was given opportunity to raise issues which Ms Wilkinson followed up with further investigation where necessary. The claimant was given a detailed and reasoned decision for his dismissal by Ms Wilkinson and there was no procedural unfairness at the appeal stage, any flaws at the disciplinary stage having been rectified.

54. The next element of the **Burchell** test is whether there were reasonable grounds for the conclusion that the claimant was guilty of disciplinary misconduct. The Tribunal approached this by considering the allegations separately. The first allegation is that the claimant engaged in verbally abusive and aggressive language and threw punches at Mr Holt.

55. The claimant does not deny that he engaged in abusive and aggressive language with Mr Holt but denies that he threw punches. The decision to dismiss the claimant was based on the statements of essentially three people, the claimant, Mr Holt and Mr Williams. Although Ms Wilkinson did interview other witnesses to the incident no one gave any different version than that given by Mr Holt and Mr Williams. At the time of the incident Mr Holt was on a two year serious warning and knew that any further misconduct would be likely to result in his dismissal. It was reasonable of Ms Wilkinson to conclude that he was not being dishonest in the account of the incident that he gave especially as he knew what the potential outcome would be. Based on the evidence before the respondent there were reasonable grounds to conclude that claimant had carried out the alleged misconduct.

56. The second allegation is that the claimant altered his account of what happened on 19 December 2017 and in so doing sought to deceive the respondent. This is an allegation that was strenuously denied by the claimant and in oral evidence he continued to maintain that he had not spoken to Mr Robotham when he was in hospital. On the basis of the evidence before Ms Wilkinson during the appeal hearing there were text messages between the claimant and Mr Robotham which referred to the claimant having made a statement and also reference to which version of events the claimant was wanting to put forward. His statement at this particular time mirrored that of both Mr Williams and Mr Holt. It was only later that he sought to change his version to exclude references to punches being thrown. In the circumstances there were reasonable grounds for Ms Wilkinson to conclude that the claimant had changed his version of events and the only reasonable conclusion for Ms Wilkinson to reach having made that finding was that in doing so he sought to deceive the respondent.

57. Overall, the Tribunal is satisfied there were reasonable grounds for the conclusion reached by Ms Wilkinson at the end of the appeal that the claimant was guilty of disciplinary misconduct. All elements of the **Burchell** test were satisfied.

58. The last question was whether the decision to dismiss the claimant rather than impose a lesser disciplinary sanction was within the band of reasonable responses. The Conduct Policy at page 934 identified abusive behaviour to colleagues as gross misconduct. The claimant maintains that although he accepts that verbally abusive and aggressive conduct to another employee could warrant dismissal, if the respondent had referred him to occupational health earlier and if Mr Robotham had spoken to those who were bullying him he would not have reacted in the way in

which he did on 19 December 2017. It is clear that Ms Wilkinson did consider the mitigating factors raised by the claimant but did not accept that even if occupational health had determined that the claimant was a disabled person this would justify or excuse his behaviour. She also considered his complaint that he was being bullied and made enquiries about the same. She was satisfied from the evidence of the staff in the department that there was a significant level of banter that took place in the department and that the claimant was one of the main protagonists. She considered that if the claimant had felt unduly targeted he could have raised a grievance but he did not. She considered that given that the claimant is required to have contact with the public in the course of his duties behaviour such as he was found to have demonstrated on 19 December 2017 would not be acceptable in any circumstances. The judgment of the Tribunal is that it was reasonable to conclude that the claimant was guilty of gross misconduct both in the manner in which he behaved on 19 December 2017 and in attempting to deceive the respondent by changing his version of what happened that day.

59. It does not follow that in every case of gross misconduct dismissal must automatically ensue. Although Mr Kelly did not consider other options Ms Wilkinson specifically considered whether a suspended dismissal would be appropriate given the claimant's length of service and previous good disciplinary record. She discounted this option as she did not believe it was a risk she was able to take for the reasons she gave. The Tribunal find that the claimant's conduct and his continued refusal to accept responsibility for his actions could reasonable be viewed as a conduct of such severity that any mitigating factors would not remove the need to dismiss the claimant.

Therefore it follows that the dismissal was fair and the complaint of unfair dismissal is dismissed

Employment Judge Sharkett

Date: 26 April 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 April 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.