EMPLOYMENT TRIBUNALS

Claimant: Mr P Christian

Respondent: Unilever UK Limited

Heard at: Liverpool **On:** 24 April 2019

Before: Employment Judge T Vincent Ryan

REPRESENTATION:

Claimant: Miss P Thompson, Trade Union Representative
Respondent: Mr J Boyd, Counsel

JUDGMENT

The judgment of the Tribunal is:

1. The claimant was fairly dismissed by the respondent for a reason related to his conduct, gross misconduct, upon his receipt of a letter dated 7 September 2018. The claimant's claim of unfair dismissal fails and is dismissed.

2. The respondent dismissed the claimant in accordance with his contract of employment in that he was summarily dismissed for gross misconduct. The claimant's claim that the respondent dismissed him in breach of contract fails and is dismissed.

REASONS

1. The Issues

In circumstances where the claimant was reported by a colleague for alleged aggressive and confrontational behaviour and was summarily dismissed for gross misconduct, the following issues were agreed as arising for adjudication by the Tribunal, the claimant accepting that the reason for dismissal was a reason related to conduct:

1.1 Principally whether the respondent acted fairly and reasonably in treating the claimant's conduct towards a colleague, SJ, on 18 August 2018 as

sufficient reason to dismiss the claimant for gross misconduct and thereby summarily;

1.2 The parties considered that the Tribunal must decide whether Mr Cartledge (the disciplining officer) (SC), and Ms Ransford (the appeals officer) (RR) had a reasonable and genuine belief in the misconduct alleged against the claimant, namely that he acted in an aggressive and confrontational manner towards SJ;

1.3 The parties agreed that the Tribunal must consider whether when Mr Cartledge and Ms Ransford made their decisions they did so following and based upon a reasonable investigation; and

1.4 Whether dismissal, and indeed all steps taken by the respondent, fell within the band of reasonable responses of a reasonable employer.

1.5 Of particular concern to the claimant which he says should lead to a finding of unfairness were the following matters or allegations:

1.5.1 The initial witness statements taken following the events of 18 August 2018 were not disclosed to the claimant at the disciplinary hearing;

1.5.2 Reference was made at the disciplinary hearing to historical matters that were not relevant, specifically informal counselling received by the claimant in January 2018 regarding text messages that he sent at around that time to colleagues;

1.5.3 That the investigating officer, John Whiteside, did not act impartially in the investigation;

1.5.4 That no due account was taken of the claimant's mitigation;

1.5.5 That there was inconsistency in treatment of the claimant and SJ whom the claimant alleges had sworn at him and had acted in an aggressive manner but that he was not disciplined.

1.6 Insofar as the Tribunal may decide that the dismissal was unfair then it would have to consider the nature and extent of any contributory conduct on the part of the claimant and how that would reflect on a remedy award, and similarly whether the claimant was at such risk of being fairly dismissed that any compensatory award ought to be reduced.

1.7 Furthermore, as the claimant was summarily dismissed, that is without notice or pay in lieu of notice, the Tribunal had to decide whether the respondent, beyond having a reasonable and genuine belief in the claimant's responsibility for the conduct in question, was entitled to dismiss the claimant summarily under the terms of the contract of employment or conversely, whether in fact the claimant had acted in breach of contract by his conduct.

2. **The Facts**

2.1 The Parties –

The Respondent

2.1.1 The respondent is a large employer with a professional HR department operating under written policies and procedures and with a Code of Business setting out the ethical stance taken by the respondent regarding interpersonal relations at work. The Code is at pages 41-44 of the trial bundle to which all further page references refer unless otherwise stated. The document entitled "Code of Business Principles and Code Polices – The Code and Our Standard of Conduct" is a significant document setting out the ethos within the respondent company and one that it jealously guards. The respondent relies upon what it says is its reputation for doing business "with integrity and respect for others" which it considers to be an asset "as valuable as its people and its brands". It was evident from the witness evidence of the claimant, Mr Cartledge and the HR Business Partner, Ms K Roberts, that the Code was inculcated into all staff and management practices and that to maintain the respondent's reputation it required the highest standards of behaviour as identified and emphasised in the Code. There was more than mere lip service to a token policy, but rather employees were required to refresh their memory of the Code and sign off on it annually; they were required to understand and know the requirements of the Code and policies, to undertake training, to follow the Code, to ensure that their behaviour met the standards required, and they were required to report actual or potential breaches of the Code whether relating to them, colleagues or people acting on the respondent's behalf.

2.1.2 Central to the Code is a requirement that employees treat others with "dignity, honesty and fairness" to foster working environments "that are fair and safe where rights are respected and everyone can achieve their full potential" (page 42). At page 43 under the heading "Respect, Dignity and Fair Treatment" the Code requires that employees must respect the dignity and human rights of colleagues and all others they come into contact with as part of their jobs, treating everyone fairly and equally without discrimination in respect of any protected characteristic. At page 44 under the heading "Must Nots" it is confirmed that employees must not "engage in any direct behaviour that is offensive, intimidating, malicious or insulting" or engage in any indirect behaviour which could be construed as, amongst other things, "harassment or bullying" such as amongst other things, "creating a hostile or intimidating environment, isolating or not cooperating with a colleague".

The Claimant

2.1.3 The claimant was employed by the respondent at its Port Sunlight site as a Process Operative from 5 January 1998 until his dismissal on 6 September 2018 for a reason related to conduct, specifically his conduct towards SJ on 18 August 2018 in No. 3 Factory on Line 23 at approximately 8.00pm-8.15pm when there was an altercation between the claimant and SJ.

2.1.4 The claimant had read, was knowledgeable about and signed up to (literally and metaphorically) the Code. He appreciated the seriousness and significance attached to the Code by the respondent. He was aware of the “Dos and Don’ts” set out therein.

2.1.5

2.1.5.1 In January 2018 the respondent was concerned about the claimant's conduct in and around his sending of text messages to a certain colleague. At around that time the claimant had sadly suffered a close family bereavement and it was accepted by the respondent that this had affected his judgment such that he acted in a way that he accepted was unprofessional and inappropriate. The claimant acknowledged his fault and was apologetic to his colleague and management. This matter was discussed by Mr Cartledge and the claimant on 26 January 2018 and Mr Cartledge made a note of it (or rather his HR support, LE, made a note of it) which appears at page 78. The claimant had been concerned that he could be dismissed over this matter but Mr Cartledge reassured him that the purpose of this informal discussion was to ensure that he corrected his behaviour, and as he was seeking counselling and had apologised the respondent would be supportive of him. This was not a formal disciplinary consideration but was rather informal counselling regarding the claimant's untoward behaviour towards a colleague in the particular circumstances described above.

2.1.5.2 On 24 August 2018 the claimant was issued with a formal oral warning (pages 103-104). The warning was issued for “misrepresenting your working hours and not following lateness reporting procedures”. This warning was not taken

into account in the decision making of SC at the disciplinary hearing or RR at the appeal.

2.2 Saturday 18 August 2018 –

2.2.1 SJ was engaged by the respondent as an agency worker employed by Manpower Limited and the claimant had issues with him, his attitude and work-rate. The claimant believed that SJ had repeatedly been found asleep on the line and indeed that he had been suspended for that and received an oral disciplinary warning. The claimant was also concerned that SJ was not up to the job and there were several parts of the role that he was not able to fulfil. In a series of text messages that are set out at page 89 the claimant drew to the attention of his trade union representative, at the time, his concerns about SJ which he said was "getting me down". He went on to say that he was considering asking for a move to a different factory and that he was not happy working with SJ. The claimant went so far as to say that he felt the respondent's expectation of its employees "to carry Manpower" was "ridiculous"; he indicated that he was going to work on his CV and look for other employment as he felt unsupported.

2.2.2 Later the same day the claimant was working on the line with SJ at approximately 8.00pm.

2.2.3 At approximately 8.00pm the claimant and a colleague, SS, were in conversation whilst SJ was working on the production line.

2.2.4 After some time SJ shouted across to the claimant for assistance, commenting on the length of time he believed that the claimant and SS had been involved in social conversation rather than working.

2.2.5 The claimant believed that SJ was being both critical and demanding in circumstances where he was requesting assistance that he ought not to have required in that he ought to have been able to fulfil the job he was then doing. With this attitude of mind (a build-up of the attitude exhibited in the text messages of earlier the same day - see 2.2.1 above) the claimant walked purposefully towards SJ.

2.2.6 When the claimant reached SJ he stood very close to him in a challenging manner, challenging him with the words (by his own admission) "what's your problem?". This was not intended as an open question as to how the claimant could assist SJ but it was said as a challenge to the way SJ had called him over. The claimant queried SJ as to why he had called him over and there was an altercation with raised voices in which the claimant stood so close to SJ that SJ reported he felt uncomfortable. Both the claimant and SJ swore at each other.

2.2.7 SS witnessed this and in fact had followed the claimant over towards where SJ had been working, and he heard most of what was said and saw from their demeanour a situation which he later described as the claimant standing uncomfortably close to SJ. SS felt uncomfortable and walked away.

2.2.8 SJ felt moved to report this incident to the Night Leader, TH. This action of reporting the incident was generally considered by all concerned, including the claimant, to be unusual in an industrial setting, even within the respondent's premises. Mr Cartledge and Ms Roberts (and Ms Roberts speaking on behalf of RR) considered the fact of this report by SJ to corroborate that he felt harassed; it was all out of the ordinary.

2.2.9 TH (the Night Leader) asked the claimant, SJ and SS to prepare brief statements of what occurred. They each gave very brief accounts without being asked any questions or for specific detail, and their brief accounts were written, up appearing at pages 79 (the claimant), page 80 (SS) and page 81 (SJ).

2.2.10 The claimant's initial explanation was that SJ had called him over asking why he (the claimant) was not helping him (SJ); the claimant says that he gave an explanation to SJ as to what he should do and that they then each carried on doing their own work.

2.2.11 SS's initial explanation was that SJ called the claimant over to assist him and he was not sure whether SJ had used bad language; that the claimant went over to SJ and asked him "what's up?"; voices were raised and they were "close together at the time"; he (SS) "left the area and went back to the control room".

2.2.12 SJ's initial account was to the effect that the claimant "stormed over" to him and swore at him, challenging him "getting close to [me]"; he said he felt threatened and asked the claimant to back off following which the claimant "stormed off swearing"; SJ said he felt threatened and unsafe.

2.2.13 In all the circumstances TH sent both SJ and the claimant home until further notice, although he did not immediately confirm formal suspension.

2.2.14 The claimant was due to work the next day, Sunday 19 August 2018, which was to be his last day before being off shift from 20-24 August 2018. On Monday 20 August 2018 the respondent wrote to the claimant inviting him to an investigatory meeting on 22 August 2018 (page 82). The investigating officer was Mr Whiteside (JW) (Operational Leader). In fact, JW was assisted throughout the investigation by PV.

2.3 On 22 August 2018 JW and PV interviewed the claimant in the presence of his union representative and the notes of that interview, which the claimant accepts are a true and accurate account, appear at pages 84-92. The claimant accused SJ of swearing at him, but he denied swearing at all. The claimant stated that he stood a metre or so away from SJ and acted in a calm manner throughout.

2.4 Also on 22 August 2018 JW and PV interviewed SS and the notes of that interview appear at pages 93-96. SS stated that he saw the commencement of the incident but walked away feeling uncomfortable, having heard SJ asking the claimant "do you mind giving me a hand?", to which the claimant's demeanour "showed frustration". He corroborated what the claimant said in cross examination during the hearing that the claimant said to SJ "what's your problem?" and he offered the view that the claimant "could come across intimidating". SS reported that the claimant was standing some eight inches from SJ in such a way as he (SS) would have felt intimidated, but, in any event, he then felt uncomfortable and he turned away. He recounted that he heard the claimant swearing at SJ and stated the opinion that SJ felt intimidated because he looked upset. He heard SJ say "back out of my face" and when asked the leading question whether he thought that was "because of fear" SS confirmed that that is what he thought. SS confirmed that there was no physical altercation but "just the presence".

2.5 SJ was interviewed by RY on 22 August and notes of that interview are at pages 97-100. At page 98 SJ gives a detailed account of abusive language and name calling by the claimant during this altercation when he says that the claimant was "standing over" him, getting "closer, closer into my face". This made him feel anxious and he says that he asked the claimant to move away in a neutral tone.

2.6 RY also interviewed an employee, AG, on 22 August, although AG was not an eyewitness to the altercation. SJ had mentioned in interview that AG had told him that the claimant could be a "bully boy". AG confirmed to RY that he had received text messages from the claimant that were inappropriate and unprofessional and he gave examples that he said showed something of the claimant's allegedly intimidatory conduct to colleagues.

2.7 On 5 September 2018 SC wrote to the claimant inviting him to a disciplinary hearing and that letter appears at pages 106-107. The claimant was sent copies of relevant correspondence, investigation minutes and documents and the witness statements of SS and SJ together with the investigation report, a copy of the Code and policies. He was told that the disciplinary hearing was to consider an investigation into an allegation that he had acted aggressively and with confrontational behaviour towards another employee on work premises on Saturday 18 August 2018. He was told that if upheld this allegation would amount to gross misconduct in breach of the Code and that dismissal was a potential sanction. He was reminded of his statutory right to be accompanied. The claimant was not sent a copy of the informal counselling note of 26 January 2018 nor the investigatory interview with AG. The claimant was

not sent the initial statements that were taken by TH on the night of 18 August from him, SS and SJ (pages 79, 80 and 81).

2.8 The formal disciplinary hearing took place on 6 September 2018. It was conducted by SC with HR support from LE. The claimant attended with his trade union representative, TC. The notes appear at pages 108-117. The claimant was given an opportunity to give his version of events of 18 August and to challenge the accounts given by SJ and SS. He was specifically asked to comment on quoted content from their respective statements and investigatory interviews.

2.9 Throughout the disciplinary hearing the claimant says that he maintained a calm manner throughout the events in question, he denied being aggressive or confrontational. He confirmed that he asked SJ what his problem was and said he was standing maybe half a metre from the claimant and he did not think his stance or comments were intimidating. He said he did not come across as being aggressive but was relaxed (then qualified to not being totally relaxed) and not shouting or swearing. The claimant conceded there was frustration but he did not accept that he was aggressive in any way but rather “firm and fair but he didn’t like it”.

2.10 During the disciplinary hearing, and in the light of the claimant's refusal to accept that he had acted improperly at any stage of the altercation, SC made reference to both the January counselling and the statement of AG. During the hearing he gave the claimant a copy of AG’s statement in which AG had talked about the claimant's conduct towards him and other colleagues, including C. The claimant was given an opportunity to address that. I accept the evidence of SC that the reason he raised the January counselling and AG’s statement was because the claimant was not accepting of any fault in circumstances where there was other peripheral evidence to show that he could on occasions act in a manner, whether intentionally or not, that gave others the impression that he was acting unprofessionally and even confrontationally. SC wanted the claimant to understand and to show some personal insight with a view to the claimant perhaps conceding some fault or error on his part. SC’s hope was that if the claimant displayed such insight and perhaps contrition where appropriate there would be “something to work on” with a view to managing inappropriate behaviour in the future; this in turn could have led to a fuller consideration of sanctions short of dismissal with counselling or training and monitoring. SC was giving the claimant every opportunity to consider his situation and his behaviour generally with a view to humble and insightful self-appreciation. The claimant appeared resistant and maintained denial of any fault on his part; he refused to accept responsibility for any part of the incident of 18 August 2018 and would not accept that his conduct in any way displayed aggressive and confrontational behaviour such as described by SJ and alluded to by SS or stated by SS to be his opinion from his perspective (albeit he was not the object of the behaviour).

2.11 SC considered the mitigation put forward by the claimant regarding the events of 18 August and in answer to the matters put to him regarding his behaviour generally, including by reference to the counselling issue in

January 2018 and the comments made by AG. He considered the claimant's length of service which as at the date of the disciplinary hearing was 20 years. SC did not consider it accurate to say that the claimant had a “clean” disciplinary record. He considered whether any sanction short of dismissal would be appropriate but considered it would not be because he was not satisfied that the claimant accepted fault to a degree where he could correct his behaviour and take into account any admonition with regard to the way he spoke to and acted towards colleagues. Ultimately SC considered that a warning would be insufficient as without evidence of insight and any appreciation of the distress caused to SJ there was no prospect of the claimant improving his behaviour to such an extent that he could be trusted and relied upon to maintain the ethical standards set out in the Code.

2.12 SC adjourned the disciplinary hearing and wrote to the claimant with the outcome which appears at pages 118-119. SC weighed up the evidence, in particular that received from the claimant and that received from SJ and SS. There was in effect the claimant's word against that of SJ, the object of his behaviour, and an eyewitness. SC preferred the evidence of SJ and SS to the account given by the claimant in all the circumstances, circumstances that were put to the claimant and which he was given every opportunity to comment upon and explain. SC considered that the claimant's conduct was in breach of the Code and that he had engaged in direct behaviour that was “offensive, intimidating, malicious or insulting”. The claimant was sent a copy of the minutes of the disciplinary hearing and reminded of his right to appeal, which was explained to him.

2.13 On 17 September 2018 the claimant wrote a letter of appeal which appears at page 125. It sets out five grounds of appeal, namely that there was no full and fair disciplinary process, the decision was unfair because only he was dismissed and not SJ, that the outcome was disproportionate to the alleged offence, that it was not made clear to him on 18 August whether he was suspended or just told to leave site, and finally that he had not received all of the statements taken by TH at the time of the incident on 18 August (namely his own statement and that of SJ and SS at pages 79-81).

2.14 The appeal hearing took place on 20 September 2018 and was chaired by RR who is no longer employed by the respondent and did not attend to give evidence. She was supported in her preparation during the hearing and with her decision by KR, a Human Resources Business Partner. KR gave evidence to the Tribunal, which I accept as being conscientious, honest and truthful. RR decided, following the appeal hearing, to dismiss the appeal. The notes of the appeal hearing are at pages 130-132 when the matter was adjourned. It was reconvened on 24 September, and notes of the reconvened hearing are at pages 133-136. In the interim RR, with the support of KR, interviewed the disciplining officer, SC, and notes of that interview are at pages 138-140. RR (supported by KR) also interviewed the investigating officer, JW, and notes of that interview are at pages 141-141C. At the reconvened appeal hearing on 24 September RR put to the claimant the matters contained in the statements of SC and JW and gave him an opportunity to answer them. The claimant was

represented by his trade union throughout the appeal process, including at both appeal hearings.

2.15 RR dismissed the claimant's appeal and her outcome letter is at pages 142-145, written with the assistance of KR (but the decision remained that of RR). In that letter RR has set out her reasoning in respect of the grounds of appeal and rejected each of the principal matters raised by the claimant during his hearing in further clarification of the appeal letter of 17 September, namely his concern that the process lacked clarity over suspension, that statements were not shared with him, that the investigating officer had not acted independently and had not sought to establish facts independently, that there was "ambiguity" over what happened during the altercation. RR considered the written grounds of appeal and the clarified grounds in accordance with the submissions made at the appeal hearing, and considered all matters put by the claimant to the respondent in appealing against the decision to dismiss.

2.16 SJ –

2.16.1 SJ was an agency worker engaged by the respondent but employed by Manpower Limited.

2.16.2 SJ was sent home by the respondent following the incident on 18 August 2018.

2.16.3 The investigating officer, JW, recommended that both the claimant and SJ should undergo disciplinary procedures. That recommendation with regard to SJ was passed onto Manpower Limited.

2.16.4 Manpower Limited dismissed SJ who did not return to work for the respondent after 18 August 2018.

3. **The Law**

3.1 Section 94 Employment Rights Act 1996 (ERA) states that an employee has the right not to be unfairly dismissed, while s.98 ERA sets out what is meant by fairness in this context in general. Section 98(2) ERA lists the potentially fair reasons for an employee's dismissal, and these reasons include reasons related to the conduct of the employee (s.98(2)(b) ERA). Section 98(4) provides that once an employer has fulfilled the requirement to show that the dismissal was for a potentially fair reason the Tribunal must determine whether in all the circumstances the employer acted fairly and reasonably in treating that reason as sufficient reason for dismissal (determined in accordance with equity and the substantial merits of the case).

3.2 Case law has established that the essential terms of enquiry for the Employment Tribunal are whether, in all the circumstances, the employer carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of the dismissal in those respects, the Employment Tribunal then has to decide whether the

dismissal of the employee was a reasonable response to the misconduct. The Tribunal must determine whether, in all of the circumstances, the decision to dismiss fell within the band of reasonable responses of a reasonable employer; if it falls within the band the dismissal is fair but if it does not then the dismissal is unfair.

3.3 Questions of procedural fairness and reasonableness of the sanction (dismissal) are to be determined by reference to the range of reasonable responses test also (**Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17**).

3.4 The Tribunal must not substitute its judgment for that of the employer, finding in effect what it would have done, what its preferred sanction would have been if it, the Tribunal, had been the employer; that is not a consideration. The test is one of objectively assessed reasonableness. **In *Secretary of State for Justice v Lown* [2016] IRLR 22** , amongst many others, it was emphasised how a tribunal can err in law by adopting a "substitution mindset"; the point was made in **Lown** that the band of reasonable responses is not limited to that which a reasonable employer might have done. The question was whether what this employer did fell within the range of reasonable responses. Tribunals must asses the band of reasonable responses open to an employer, and decide whether a respondent's actions fell inside or outside that band, but they must not attempt to lay down what they consider to be the only permissible standard of a reasonable employer.

3.5 Under the **Polkey** principle it may be appropriate to reduce an award by applying a percentage reduction to the Compensatory Award to reflect the risk facing a claimant of being fairly dismissed or to limit the period of any award of losses to reflect this risk, estimating how long a claimant would have been employed had he not been unfairly dismissed, in circumstances where the respondent would or might have dismissed the claimant. I must consider all relevant evidence, and in assessing compensation I appreciate that there is bound to be a degree of uncertainty and speculation and should not be put off the exercise because of its speculative nature.

3.6 Where a Tribunal finds that a complainant's conduct before dismissal was such that it would be just and equitable to reduce a Basic Award it may do so (s.122 ERA). Where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce any compensatory award by such amount as it considers just and equitable having regard to that finding (s.123 ERA). In doing so a Tribunal must address four questions (**Steen v ASP Packaging Ltd [2014] ICR 56 EAT**):

3.6.1 What was the conduct giving rise to the possible reduction?

3.6.2 Was that conduct blameworthy?

3.6.3 Did the blameworthy conduct cause or contribute to the dismissal?

3.6.4 To what extent should the award be reduced?

3.7 When a claimant argues that a respondent's disciplinary decisions were inconsistent and that this gives rise to unfairness, it is important that the dismissing and/or appeals officers who are accused of being inconsistent are actually aware of the comparator cases. It is also essential that the comparators relied upon are in comparable situations to the claimant. Because of the need for respective facts to be truly comparable, arguments of inconsistency are difficult to maintain. That said, inconsistency of treatment in truly comparable situations may give rise to a finding of unreasonableness and unfairness on the part of the respondent, such as to render the decision to dismiss unfair.

3.8 Regarding the breach of contract claim the question is not one of fairness and reasonableness but whether the contract was breached or abided by. Was the respondent entitled by the terms of the contract to dismiss the claimant in the circumstances in question? Had the claimant's conduct been such as to amount to a breach of a term of the contract entitling the respondent to dismiss summarily. If the claimant's conduct was gross misconduct then the respondent could dismiss without notice; if the claimant's conduct was compliant with his contractual responsibilities and not in breach of them then summary dismissal would be in breach of contract and would be a wrongful dismissal.

4. Application of Law to Facts

4.1 On the night of 18 August 2018, perhaps significantly following the claimant's expression of frustration with SJ earlier that morning, the claimant acted in a manner that displayed his frustration with SJ during the evening shift at some time after 8.00pm. He was irritated at being called over for assistance by SJ and that SJ commented adversely on the fact that the claimant and SS were talking when he needed help. In response the claimant walked directly and purposefully towards SJ and stood so close to him that SJ felt uncomfortable and SS believed that to be the case; SS confirmed that he would have felt uncomfortable. In common parlance the claimant was "in the face of" SJ. In that stance the claimant challenged SJ using swearing and abusive language. Unusually and perhaps uniquely in this industrial setting SJ was moved to report an incident of intimidation to the Night Leader.

4.2 By his conduct the claimant had engaged directly in behaviour that was considered by SJ, the investigating officer, SC and RR in turn, as amounting to offensive, intimidating, malicious and insulting behaviour that was harassing and bullying. SJ reported feeling those effects as a result of the unwanted conduct of the claimant. To that extent SJ's stated feeling that he was harassed was corroborated both by his report and a relatively supportive statement from SS. On the contrary the claimant denied the details recounted by both SS and SJ, and furthermore refused to accept any culpability whatsoever. SC at the disciplinary hearing and

thereafter RR on appeal had to consider three versions of events, two of which were very similar and were opposed to that presented by the claimant. For reasons they have explained and as are set out above they preferred the evidence obtained by JW and PV, the investigating officers, from SJ and SS. They disbelieved the claimant and furthermore felt that his lack of insight, contrition and willingness to amend meant that a warning would have little effect upon him. They had no confidence that the claimant would mend his ways which were seen to be in breach of the Code.

4.3 The claimant had breached the Code by virtue of his conduct so described. That amounted to a breach of contract.

4.4 The investigation discovered all of the above and was sufficiently thorough and well documented to provide the disciplining and appeals officers with the respective accounts of events.

4.5 The claimant, albeit during the course of the disciplinary hearing, was given the opportunity to consider the additional background information in the mind of SC regarding the January counselling and AG's statement. Neither the counselling nor the statement were taken into account in making the decision to dismiss other than that they were used to illustrate to the claimant that his behaviour was not always perceived to be calm and could be perceived to be unprofessional and intimidatory; these were matters that the disciplining officer considered the claimant ought to take into account and which were put to him with the hope of being able to arrive at a conclusion and sanction short of dismissal. The claimant did not take the opportunity afforded.

4.6 The initial statements at pages 79-81 taken from the claimant, SJ and SS on 18 August 2018 were eventually shown to the claimant. They were vague, of a general nature, given briefly and without questioning. They are not inconsistent with the later detailed statements. SC relied on the later detailed statements and would not have been swayed by the vaguer, shorter, initial statements in arriving at a different conclusion. Those brief initial statements would always have required further and better particulars and more enquiry and investigation. Had they been relied upon the investigation would have been incomplete. It was not unfair to the claimant that further investigation was made by JW and PV to get behind those bland initial accounts of what occurred and to drill down into what was said, by whom and what stance they had adopted. It was appropriate, therefore, for SC to place emphasis on the detailed investigation. It was not unfair to the claimant for SC to pay scant regard to the initial accounts. Had the initial contemporaneous accounts been more detailed, and in particular had they been contradictory of the later statements, then there may well have been an unfairness to the claimant, but this is not the case.

4.7 There is no evidence to suggest that JW and PV in investigating the matter acted unfairly or partially or were in any way biased against the claimant. There is evidence that questions were asked of SJ and SS, as they were of the claimant, but that their answers differed from his. The

decision was then left to SC who was impartial and acted conscientiously and diligently throughout. On the basis of KR's evidence there is nothing to suggest that RR did not act in the same way in considering the appeal. KR's approach as HR Business Partner would appear to have been conscientious, diligent and fair.

4.8 It is clear that SC considered mitigation and that in particular was why he wished to enlighten the claimant as to how his behaviour could be perceived and was perceived both with regard to the counselling in January 2018 and AG's comments. The claimant's lengthy employment was taken into account, but what counted against it was what was seen as his lack of insight, acceptance of responsibility and any degree of contrition and commitment to amend.

4.9 It is evident that the respondent took a consistent view in dealing with the claimant and SJ. Both were sent home on the evening of 18 August 2018 and disciplinary action was recommended in respect of both. Whilst the claimant was dismissed the respondent was not able to dismiss SJ as his employer was Manpower Limited. Nevertheless, on the basis of JW and PV's investigation Manpower Limited dismissed SJ, who did not return to work at the respondent's factory after 18 August 2018. Whilst the respondent was only able to put most of the responsibility on the claimant, as he is their employee, they at least viewed SJ's conduct to be a potential breach of its Code. In any event Manpower Limited must have considered that SJ's conduct amounted to conduct sufficient to lead to dismissal.

4.10 It is not a matter for me to decide what I would have done had I been the claimant's employer, and that is not something I have even addressed. Regarding the claim of unfair dismissal, I have to decide what was the reason for the dismissal and whether the respondent acted fairly and reasonably in all the circumstances as treating the claimant's conduct on 18 August 2018 as sufficient reason to dismiss in all the circumstances and taking into account the respondent's size and resources.

4.11 I consider that dismissal fell within the band of reasonable responses of a reasonable employer. The respondent has, honours, and applies an ethical Code. It has set a particular standard that it is entitled to uphold. The claimant's conduct was in breach of the Code. A colleague reported feeling harassed and intimidated. It cannot be said that no reasonable employer would dismiss an employee who was considered to have engaged in intimidatory and bullying behaviour. Some employers would dismiss in these circumstances and others would not, but dismissal clearly falls within the range of reasonable responses, and in particular in the circumstances described by SC where the claimant did not show any understanding, insight or acceptance of responsibility with commitment to amend.

4.12 There is an implied duty of trust and confidence underlying every contract of employment. In this case the respondent supports that duty by way of, amongst other things, its Code of Business Principles and Code Policies, with an Integrity Pledge Acknowledgement (pages 45-46). There is an

expectation that is mutual between the respondent and its employees that they will each abide by the Code, and that failure to do so seriously damages or destroys the relationship of trust and confidence. The Code is specific as to behaviour that is tolerated and that is intolerable. The claimant's conduct on 18 August 2018 crossed the line of acceptable conduct towards a colleague. The claimant breached his contract of employment. The respondent was entitled to consider that the claimant's conduct amounted to gross misconduct in breach of contract. It did so. In those circumstances the respondent was entitled to rely upon the contract which permits for summary dismissal, that is dismissal without notice or pay in lieu; it did so.

4.13 It follows from the above that the claimant was fairly dismissed for a reason related to his conduct and was dismissed in accordance with his contract of employment and not in breach of it.

Employment Judge T Vincent Ryan

Date: 15.05.19

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 May 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.